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COURT OF APPEALS
DIVISION II

NO. 383616

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STATE OF WASHINGTON
BY: *JW*

DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

PIERCE COUNTY and NEIGHBORS UNITED FOR THE LOOP,
Appellants,

v.

ALLAN DEUTSCHER and MARIJKE DEUTSCHER, Respondents.

APPELLANTS' BRIEF

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ORIGINAL

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I. INTRODUCTION

Pierce County ("County") and Neighbors United for the Loop ("Neighbors") appeal from a Superior Court order reversing the Hearing Examiner's modification and approval of a proposal for a commercial child care center. The Superior Court approved the project at the level proposed by the landowner/developer. In this appeal Appellants Pierce County and Neighbors seek reinstatement of the Examiner's decision.

II. ASSIGNMENT OF ERROR

Where the Hearing Examiner's decision modifying and approving a conditional use permit was supported by substantial evidence the Superior Court erred in reversing the Examiner's decision.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Where substantial evidence supports the fact-finder's decision to modify a conditional use permit application for a commercial child care center to make it compatible with the established residential neighborhood, did the Superior Court err by substituting its judgment for that of the fact-finder?

2. Did the applicants for a conditional use permit meet their burden of proving to the Hearing Examiner that their proposal was compatible with the existing residential neighborhood?

3. Did the applicants for a conditional use permit meet their burden of proving to Superior Court that one or more of the standards set forth in *RCW 36.70C.130(1)* had been met?

IV. STATEMENT OF THE CASE

A. The Examiner's Initial Decision and 2006 LUPA Appeal.

In 2002 Petitioners Allan and Marijke Deutscher ("the Deutschers") submitted an application for a conditional use permit ("CUP") with the Pierce County Planning and Land Services Department ("Planning Department").¹ The proposal included a commercial child care facility for up to 100 children in a 9,990 square foot building to be constructed at the northeast corner of Old Military Road and Spanaway Loop Road in unincorporated Pierce County.² Access to the facility would be by way of a driveway on Spanaway Loop Road and a second access onto Old Military Road.³

The proposed project was first heard by the Parkland Midland Spanaway Advisory Commission.⁴ The Commission recommended denial

¹ AR 53. "AR" refers to the Administrative Record made before the Hearing Examiner, which was filed with the Pierce County Clerk and transmitted to the Court of Appeals on or about August 25, 2008, under separate cover. "AR 53" refers to the applicable page number of the Administrative Record.

² AR 53.

³ AR 53.

⁴ AR 150.

of the project based on concerns regarding traffic, compatibility with the surrounding residential area, and water pollution issues.⁵

A public hearing was then held before the Pierce County Hearing Examiner on the Deutschers' application for a conditional use permit.⁶ In addition to testimony regarding traffic, several neighbors testified that a commercial child care facility would be disruptive and would not be compatible with the residential character of the neighborhood.⁷

After reviewing all of the evidence presented, the Examiner issued a decision denying a CUP for the project.⁸ Specifically, the Examiner found that the proposal was not compatible with the residential neighborhood and, because of traffic concerns, the project would pose a risk to the public health and safety and general welfare.⁹

The Deutschers appealed the Examiner's decision to Superior Court pursuant to the Land Use Petition Act, *Ch. 36.70C RCW*.¹⁰ The Superior Court found that the Examiner erred by relying in part on traffic

⁵ AR 150.

⁶ AR 53.

⁷ AR 146–147; summary of testimony of Curtis Mayer, Dr. Williams, Ellen Rhodes, Sherry Haviland, Dale Coons, and Charlotte Chalker.

⁸ AR 138–156.

⁹ AR 152–153.

¹⁰ AR 159.

concerns to disapprove the project in light of undisputed expert evidence that the traffic generated by the project could be mitigated.¹¹

With respect to the project's compatibility with the neighborhood, the Superior Court found that while the Examiner's findings and conclusions were supported by testimony, such findings and conclusions were not sufficiently clear as to allow the parties to understand what aspect of the project failed to meet the CUP criteria.¹² The Superior Court remanded the matter back to the Examiner to determine whether the project met the CUP criteria as to matters other than traffic.¹³

B. The Examiner's Second Decision and 2008 LUPA Appeal.

Thereafter, the Deuschers submitted a revised proposal which relocated the building elsewhere on the property.¹⁴ The revised proposal continued to serve up to 100 children in a 9,990 square foot facility.¹⁵ The Parkland Midland Spanaway Advisory Commission again recommended denial of the project based on, among other reasons, density and intensity of the proposed commercial use and incompatibility with the existing residential neighborhood.¹⁶

¹¹ AR 159–162.

¹² AR 160–161.

¹³ AR 161.

¹⁴ AR 191. A copy of the revised site plan is included in App. A.

¹⁵ AR 24 and 191.

¹⁶ AR 64–65.

A public hearing was subsequently held before the Pierce County Hearing Examiner. At the hearing the Deutscher's agent presented the revised proposal, as well as two additional proposed layouts; one with two smaller buildings and another with three smaller buildings.¹⁷ The agent admitted that although smaller buildings would be more in keeping with the size of the neighborhood residences,¹⁸ smaller buildings would be "less efficient" in terms of how child care is provided, and the single larger building would provide a "more significant shield for the noise."¹⁹ The agent described the single-building concept as their "first preference."²⁰

Neighbors again testified about the residential character of the neighborhood. Peter Wold testified about the neighborhood that he has lived in for more than 40 years:

I've been a residence [sic] there in the community since 1964. I've seen the area develop in homes. We selected our home there many years ago in 1964 when I got out of the Air Force and we selected it because of the residential and the rural nature of the community.²¹

¹⁷ AR 26 and AR 205–206.

¹⁸ The staff report states that the project as proposed with a 9,990 square foot building would be 2–3 times the size of nearby single-family homes. See AR 67, para 1.

¹⁹ TR p. 22, line 3–p. 23, line 24. "TR" refers to the transcript of the January 10, 2008, hearing before the Examiner, filed in Superior Court on May 21, 2008, and transmitted to the Court of Appeals under separate cover on or about February 3, 2009.

²⁰ TR p. 22, lines 23–25.

²¹ TR p. 53, lines 11–16.

Joe Mayer, a developer and builder, described the neighborhood in which he grew up:

The other thing about this neighborhood that is different is that it's a very nice residential neighborhood [T]his neighborhood has really maintained a very high standard for a long, long time. We have larger lot sizes, larger homes, green belts, streams, Douglas fir, large Douglas fir trees and I guess my concern is that if this building is permitted under the basis that anybody driving along Spanaway Loop Road can use this facility for a daycare center then it would be logical to assume that another property owner could sell to a similar type of developer user and this whole area could just be transformed into other types of similar uses . . . and I'm, you know, I think that our area of Spanaway and Parkland is really one of the things that has made it remain at a high quality is the fact that it has been consistently residential²²

Area resident Rick Selden testified regarding the effort the neighbors have made to preserve the residential character of the neighborhood:

We have fought a long time to keep Spanaway Loop Road a greenway through ever-encroaching growth and maintain the established character of this neighborhood. This is not a commercial area.²³

Sheri Haviland, a long-time resident and member of the community planning board, testified that the area has been residential for the 25 years that she has lived there:

²² TR p. 49, line 17–p. 50, line 10.

²³ TR p. 37, lines 3–7.

This is a residential neighborhood and it is not a commercial center. It has been a residential neighborhood as long as I've lived out here and I've lived out here for 25 years.²⁴

The Examiner subsequently issued a decision denying approval of a 100-child center based upon evidence that such a center would not be compatible with the existing neighborhood:

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.²⁵

Rather than deny the proposal, the Examiner approved a modified version of the center, serving less children in a smaller building.²⁶ Specifically, the Examiner determined that, if modified, the project would not adversely affect the established character of the surrounding vicinity.²⁷

A day care facility would be compatible if it were of a size, density and intensity use similar to the surrounding residences.²⁸

The Deuschers then filed a new land use petition in Superior Court, arguing that the Examiner arbitrarily limited the project to 33 children in a single building not to exceed 3,500 square feet.²⁹ The

²⁴ TR p. 48, lines 14–17.

²⁵ AR 21–40, included in App. B.

²⁶ AR 21–40 and AR 1–12. AR 1–12 is included in App. C.

²⁷ AR 36–37.

²⁸ AR 35.

²⁹ CP 58.

Superior Court found that the Examiner's modification was not supported by substantial evidence and approved the center as proposed by the Deuschers.³⁰ Thereafter, Pierce County and the Neighbors filed this appeal.³¹

V. LEGAL ARGUMENT

A. The Standard of Review in LUPA Cases.

The standards of review under the Land Use Petition Act ("LUPA"), *ch. 36.70C RCW*, are set forth in *RCW 36.70.130(1)*. The Court of Appeals sits in the same position as Superior Court and applies the LUPA standards directly to the administrative record that was before the fact-finder. *Citizens for Responsible & Organized Planning v. Chelan County*, 105 Wn.App. 753, 758, 21 P.3d 304 (2001).

Appellate courts review the findings of the fact-finder without deference to Superior Court's findings. *Griffin v. Thurston County Bd. of Health*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008). A reviewing court may grant relief only if the party seeking relief from the fact-finder's decision has met the burden of establishing that one or more of the standards set forth in (a) through (f) has been met:

³⁰ CP 281–284.

³¹ CP 279–289.

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) 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;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (d) The land use decision is a clearly erroneous application of the law to the facts;
- (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
- (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

The meaning of county code language is an issue of law that courts review *de novo* under subsection (b), the "error of law" standard. *See Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002). Courts review factual findings for substantial evidence under subsection (c). Substantial evidence is evidence sufficient to convince a rational, unprejudiced person. *Id.* at 751-52. *Griffin v. Thurston County Bd. of Health*, 165 Wn.2d at 55.

Under LUPA, an appellate court is not to substitute its own judgment for that of the fact-finder. Appellate review "necessarily entails

acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences." *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217, review denied, 120 Wn.2d 1008, 841 P.2d 47 (1992). See also *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 34, 891 P.2d 29 (1995).

RCW 36.70C.130 reflects a "clear legislative intention" that reviewing courts give substantial deference to both legal and factual determinations of local jurisdictions with expertise in land use regulation." *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 180, 61 P.3d 332 (2002). Reviewing courts must also consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. *Cingular Wireless v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006).

In the present case the Hearing Examiner was the fact-finder. This Court should therefore give deference to the factual and legal determinations made by the Hearing Examiner. The burden remains on the Deuschers to prove that one or more of the standards set forth in *RCW 36.70C.130(1)* have been met.

B. The Pierce County Code.

PCC 18A.75.030 recognizes the unique nature of conditional uses and the need to place limitations on such uses in order to make them compatible with other allowed uses.³² *PCC 18A.75.030(A)* refers to the "special degree of control" necessary to ensure compatibility with, among other things, the character of the area, and specifically allows the Examiner to condition or modify the proposal:

A. Purpose. The purpose of this Section is to establish decision criteria and procedures for special uses called Conditional Uses which possess unique characteristics. Conditional Uses are deemed unique due to factors such as size, technological processes, equipment, or location with respect to surroundings, streets, existing improvements, or demands upon public facilities. These uses require a special degree of control to assure compatibility with the Comprehensive Plan, adjacent uses, and the character of the vicinity. Conditional Uses will be subject to review by the Examiner and the issuance of a Conditional Use Permit. This process allows the Examiner to:

1. determine that the location of these uses will not be incompatible with uses permitted in the surrounding areas; and
2. make further stipulations and conditions that may reasonably assure that the basic intent of this Title will be served.

[Emphasis added.]

³² A copy of PCC 18A.75.030 is included in App. D.

PCC 18A.75.030(B)(2) places the burden on the property owner to prove that the proposed use meets all of the criteria set forth in the Code. *PCC 18A.75.030(B)(1)* sets forth the criteria which must be met in order to approve a conditional use permit:

a. That the granting of the proposed 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.

b. That the granting of the proposed Conditional Use Permit is consistent and compatible with the intent of the goals, objectives and policies of the County's Comprehensive Plan, appropriate Community Plan (provided that, in the event of conflict with the Comprehensive Plan, the Comprehensive Plan prevails), and any implementing regulation.

c. That all conditions necessary to lessen any impacts of the proposed use are conditions that can be monitored and enforced.

d. That the proposed use will not introduce hazardous conditions at the site that cannot be mitigated to protect adjacent properties, the vicinity, and the public health, safety, and welfare of the community from such hazard.

e. That the conditional use will be supported by, and not adversely affect, adequate public facilities and services; or

that conditions can be imposed to lessen any adverse impacts on such facilities and services.

f. That the Level of Service standards for public facilities and services are met in accordance with concurrency management requirements.

[Emphasis added.]

PCC 18A.75.030(B)(3) gives the Examiner broad discretion to modify the proposal:

The Examiner may approve an application for a Conditional Use Permit, approve with additional requirements above those specified in this Title or require modification of the proposal to comply with specified requirements or local conditions.

At issue in the present case is whether the project is compatible; that is, will the proposed use "adversely affect the established character and planned character of the surrounding vicinity". *PCC 18A.75.030(B)(1)(a)(2)*. Compatibility with the area surrounding a proposed use is a factual determination. *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d at 34.

In the present case, the Examiner viewed the site and found that if the proposal was modified, the Deutchers' met their burden of proof on the issue of compatibility with the existing residential neighborhood. While the Deutchers may disagree with the Examiner's determination that the proposal, as modified, is compatible with the existing residential

neighborhood, substantial evidence was presented to support the Examiner's findings on this issue.

C. Substantial Evidence Supports the Examiner's Modification of the Project.

Based on the evidence presented, the Examiner made the following key findings regarding the established character of the neighborhood and the incompatibility of the proposed project.

- The neighborhood is residential for at least a mile in all directions (FOF 9);³³
- A 10,000 sq. ft. facility is not compatible with the size of the residences in the area and is out of proportion with surrounding residences (FOF 36);³⁴
- The project as proposed is not compatible with the existing residential neighborhood (FOF 32, 37),³⁵
- The neighborhood where the facility is proposed is an old established residential neighborhood (FOF 32);³⁶

³³ See, for example, letter from Rick Selden, AR 140; letter from Peter and Linda Wold, AR 41; testimony from Dale Coons, AR 147.

³⁴ Staff report: the facility would be 2-3 times the size of nearby single-family homes (AR 67).

³⁵ See letters and testimony of, among others, Rick Selden and Peter Wold.

³⁶ Testimony of Charles Ferber, neighborhood resident for 61 years (AR 26); testimony of Dan Fox, a neighborhood resident since 1973 (AR 27); testimony of Joe Mayer, who has lived in this neighborhood most of his life (AR 28); testimony of Herb Gelman, a neighborhood resident for 40 years (AR 28); testimony of Peter Wold, a resident since 1964 (AR 29).

1. The Established Residential Character of the Neighborhood.

As the testimony of the long-time residents shows, the neighborhood where this project is proposed has developed over the years with mid-size single family homes on relatively large lots with considerable landscaping and green space.³⁷ Many residents have lived there for decades and have continuously resisted the intrusion of commercial uses into the neighborhood.³⁸ It is undisputed that the neighborhood is residential for at least a mile in all directions.³⁹ This evidence clearly supports the Examiner's finding that the neighborhood is an "old established residential neighborhood."⁴⁰

2. The Proposed Project Is Not Compatible With the Established Residential Neighborhood.

Whether the proposed project is compatible with the established residential character of the surrounding neighborhood is a question of fact to be determined by the fact-finder. *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d at 34. Here, the Examiner found that regardless

³⁷ TR p. 49–50 (Testimony of Joe Mayer).

³⁸ See footnotes 20–23.

³⁹ AR 31, FOF 9. This finding was not challenged in the Deutchers' land use petition and is therefore a verity on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

⁴⁰ AR 34, FOF 32.

of the height, landscaping, or design of the proposed project, a 100 student/10,000 square foot facility consisting of one or more buildings is not compatible with the uses in the surrounding residential neighborhood.⁴¹

The Examiner's findings regarding compatibility are supported by substantial evidence. In addition to the testimony of neighborhood residents discussed above, the Examiner's finding is supported by the testimony of long-time resident Herb Gelman:

[T]his is the last vestige of a residential semi-rural area that exists from 116th to 176th. There will be no more and to allow the commercial intrusion into that residential area would be not only a gross disservice to the residents but to the County as a whole.⁴²

The Court of Appeals, Division I, addressed the issue of compatibility with the surrounding area in *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 187 - 188, 61 P.3d 332 (2002), *review denied sub nom, Citizens for Responsible Rural Area Dev. v. King County*, 149 Wn.2d 1013 (2003). In *Timberlake* the property owner sought a conditional use permit for a large church in a rural residential area adjacent to several commercial uses including an Albertson's grocery store. Although the project was initially denied, upon

⁴¹ AR 33-35, FOF 22, 32, 36.

remand the Hearing Examiner approved a scaled-down (building size) proposal and the parties appealed. *Timberlake Christian Fellowship v. King County*, 114 Wn. App. at 178–179. In addressing the issue of compatibility the Court found that the Hearing Examiner "struck an appropriate balance between the needs of the church and the concerns of the neighbors in the rural area." *Timberlake Christian Fellowship v. King County*, 114 Wn. App. at 185.

Similarly, in the present case the Hearing Examiner appropriately balanced the needs of the landowners/developers with the residents' concerns regarding the intrusion of a commercial use into an established residential neighborhood. The Examiner's modification of the proposed project was not an abuse of the Examiner's discretion and was justified under evidence presented and the Pierce County Code provisions for conditional use permits.

VI. CONCLUSION

The Deutchers had the burden of proving to the Hearing Examiner that their project met the criteria for a conditional use permit. The Examiner found that they did so, but only if modified

⁴² TR 52, lines 2–7.

in order to be compatible with the established residential neighborhood.

The Deuschers also had the burden of proving to the Superior Court that the Hearing Examiner's decision should be reversed based upon the standards set forth in *RCW 36.70C.130(1)*. Contrary to the Superior Court's ruling, the Deuschers failed to meet their burden of proving that the Examiner's decision met the standards for reversal set forth in *RCW 36.70C.130(1)*.

The determination of whether a proposed use is compatible with the surrounding vicinity is a factual judgment belonging to the fact-finder. In the present case the Superior Court substituted its judgment for that of the fact-finder when the Court determined that modification of the proposal was unnecessary to achieve compatibility with the neighborhood. Contrary to the Superior Court's determination, substantial evidence clearly supports the Examiner's decision that the project, if and only if modified, is compatible with the established residential neighborhood.

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Pierce County respectfully requests that this Court reverse the decision of the Superior Court and affirm the decision of the Hearing Examiner.

DATED: February 2, 2009

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellants' Brief was delivered this 2nd day of February, 2009, to ABC-Legal Messengers, Inc., with appropriate instruction to forward the same to the following parties:

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CHRISTINA M. SMITH

FILED
COURT OF APPEALS
DIVISION II
09 FEB -2 PM 3:27
STATE OF WASHINGTON
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DEPUTY

SITE INFORMATION

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 2100 CARROLL RD. BLDG H
 OLYMPIA, WA 98527
 (360) 352-1462
 CONTACT: JAM CAR

TAX PARCEL NUMBER(S): D3182000, D318200009

SITE ADDRESS: 1450 10th Avenue Ct S

PARCEL SIZE: 1.56 ACRES

PROPOSED USE: MODS KAMPUS DAY CARE CENTER

ZONING: MODERATE DENSITY RESIDENTIAL

PARKING: 37

ADA VAN ACCESSIBLE ADA STANDARD: 34

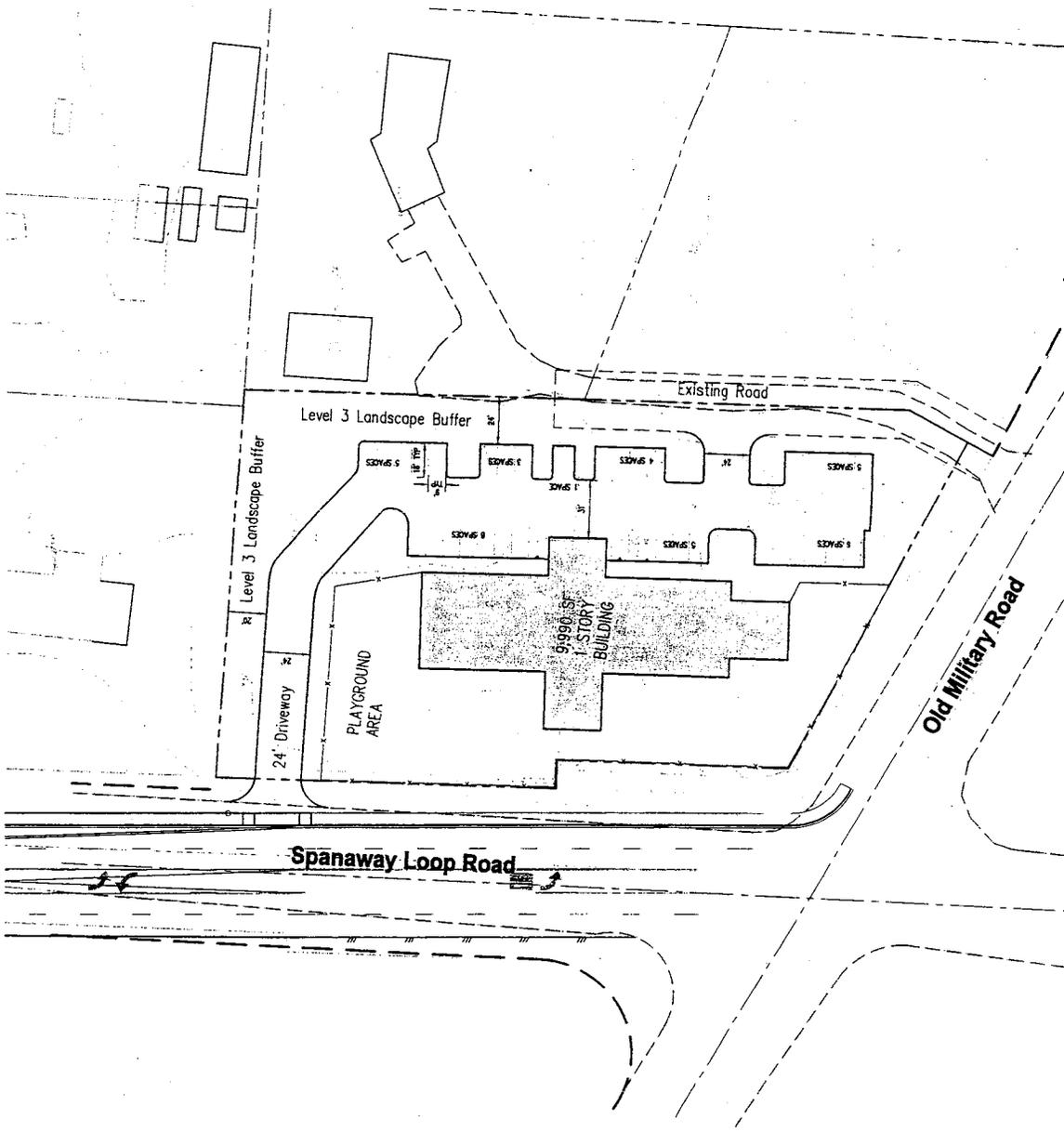
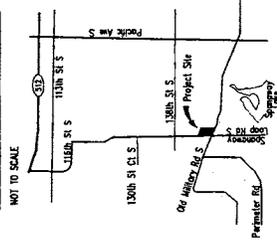
TOTAL PARKING: 37

WATER: PARKING LIGHT & WATER

SEWER: ON-SITE SYSTEM

POWER: ELUMBER POWER COMPANY

VICINITY MAP



CONCEPTUAL SITE PLAN

SPANAWAY KID'S KAMPUS

JOB No.: 280-01
 DRAWING FILE No.: 280-01-SP-2.dwg

HORIZONTAL SCALE: 1"=60'
 DATE: AUGUST 6, 2007

2007 CLEARANCE ENGINE
 M. J. CARR, P.E.
 1700 10th Avenue, Suite 100
 Lacey, WA 98516
 (360) 352-1462
 www.sheacarrjewell.com



EXHIBIT No: 1
 SHEET No: 2



January 24, 2008

Allan and Marijke Deutscher
1401 Marvin Road NE, Ste. 307-254
Lacey, WA 98516

**RE: CONDITIONAL USE PERMIT: CASE NO. CP14-02, SPANAWAY KIDS
KAMPUS DAYCARE, APPLICATION NUMBERS: 349567, 349568 & 385974**

Dear Applicants:

Transmitted herewith is the Report and Decision of the Hearing Examiner regarding your request for the above-entitled matter.

Very truly yours,

KEITH D. McGOFFIN
Deputy Hearing Examiner

KDM(ca)

- cc: Parties of Record
- PIERCE COUNTY PLANNING AND LAND SERVICES
- PIERCE COUNTY CODE ENFORCEMENT
- PIERCE COUNTY DEVELOPMENT ENGINEERING DEPARTMENT
- PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT
- TACOMA-PIERCE COUNTY HEALTH DEPARTMENT
- FIRE PREVENTION BUREAU
- PIERCE COUNTY PARKS AND RECREATION
- PIERCE COUNTY COUNCIL
- PIERCE COUNTY RESOURCE MANAGEMENT



OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

FINDINGS, CONCLUSIONS AND DECISION

**REMAND HEARING AND DECISION ON
CONDITIONAL USE PERMIT**

SUBJECT: CONDITIONAL USE PERMIT: Case No. CP14-02
Spanaway Kids Kampus Daycare
Application Number 349567,349568 & 385974

OWNER/ Applicant: Allan and Marijke Deutscher
1401 Marvin Road N.E., Suite 307-254
Lacey, WA 98516

ATTORNEY: WILLIAM T. LYNN
P.O. BOX 1157
TACOMA, WA 98401-1157

AGENT: Jean Carr
Parametrix
8830 Tallon Lane, Suite B
Lacey, WA 98516

PROPOSAL: Applicant requests a Conditional Use Permit to develop a 100-child day care center within a one-story, 25-foot high 9,990 sq. ft building, with exterior playground and ball field areas to the north and east ~~west and south~~ of the building, and a 37-space parking lot ~~along Old Military Road and Spanaway Loop Road S~~ on the east side of the building. The proposed access is onto both 16th Avenue Court South/Old Military Road and Spanaway Loop Road South. The project will be served by a public road, public water, and an on-site septic system. The project is located

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in a Moderate Density Single-Family (MSF) zone classification, at 14510 16th Avenue Court South, in the NW 1/4 of Sec. 20, T19N, R3E, W.M., in Council District No. 5.

On January 10, 2006, the Pierce County Deputy Hearing Examiner issued a decision denying the applicants' request for a 100 child day care facility at this location. The applicants appealed the Examiner's decision to Pierce County Superior Court. A hearing was held on July 14, 2006. In a June 14, 2007, order, the Court reversed the Examiner in regards to denial of the Conditional Use Permit on issues of "...traffic volumes, existing or proposed, traffic impacts, traffic safety or other traffic concerns". The Court remanded the matter back to the Hearing Examiner to determine whether the project can satisfy findings for Conditional Use Permit approval based on matters other than traffic and for the Examiner to make additional findings in this regard, including "...alternatives, design modifications, and/or mitigation that might allow the required Conditional Use Permit findings...." for approval to be made.

On August 24, 2007, the applicants submitted a revised layout to address non-traffic related concerns of staff, neighbors, and the Parkland-Spanaway-Midland Advisory Commission. These concerns included noise generated in the outdoor playground, adequate stacking space for vehicles exiting onto both Spanaway Loop Road South and 16th Avenue Court/Old Military Road South. The Examiner has directed that the revised proposal be routed for additional review and scheduled for re-hearing before both the Parkland-Spanaway-Midland Advisory Commission and the Hearing Examiner to address non-traffic related compatibility issues.

PUBLIC HEARINGS:

The Examiner conducted a public hearing on the request at 9:00 A.M. on Thursday, January 10th, 2008. Due notice of the hearing was given pursuant to County regulations. All parties wishing to testify on the request were sworn in by the Examiner.

The following Exhibits were submitted at the hearing and all were made part of the record as hereinafter set forth.

- EXHIBIT R1 - Staff Report and Attachments
- EXHIBIT R2 - Letter from Charlotte Chalker

- EXHIBIT R3 - Letter from Rick Selden, January 8th, 2008
- EXHIBIT R4 - Truman's Map
- EXHIBIT R5 - Letter from Dale Coons January 8th, 2008
- EXHIBIT R6 - Letter from Sherry Haviland
- EXHIBIT R7 - Aerial Photograph of existing site
- EXHIBIT R8 - Two Building Alternative Design
- EXHIBIT R9 - Three Building Alternative Design
- EXHIBIT R10 - 13 Photographs of Applicant's Other Facilities
- EXHIBIT R11 - Daniel Fox's Letter of November 13, 2007
- EXHIBIT R12 - Parkland, Spanaway Midland Community Plan
- EXHIBIT R13 - Daniel Fox's Written Comments
- EXHIBIT R14 - Joe Mayer Letter of January 9th, 2008
- EXHIBIT R15 - Joe Mayer Letter of December 11, 2007
- EXHIBIT R16 - Rick Selden's Letter of December 8th, 2007
- EXHIBIT R17 - Andrew Bacon's E-Mail 12/12/07

PUBLIC HEARING:

Robert Jenkins, County planner, presented the Staff Report and attachments and discussed the application and the remand from Superior Court to the Examiner. He said the planning staff has reviewed the proposed Conditional Use Permit for conformance with Title 19A - Comprehensive Plan, Title 18A Development Regulations - Zoning for Pierce County, and Title 18D - Environmental Regulations. Since the Traffic Division of Public Works and Utilities has determined that the project will not adversely impact the busy Spanaway Loop Road/Old Military Road South traffic corridor and Pierce County Superior Court has concurred, staff finds that the proposal has adequately analyzed the impacts of such a facility and complies with the findings for granting of a Conditional Use Permit, subject to conditions dealing with solid board fences on the north and east, L3 landscape buffers on the north and northeast, retention of mature trees north and east of the parking lot and along the frontage of Spanaway Loop and Old Military Roads South, minimized parking lot lighting impacts, and the residential character of the building itself. With regard to the issue of the proposed septic system potentially contaminating the community wells in the vicinity, staff would recommend that the applicant provide the on-site sewage justification prior to any site disturbance and that a dry sewer line be installed. He submitted letters filed with the Staff and they were admitted as Exhibits R1 through R6. He outlined the proposal of 100 children Day Care Center with an estimated 10,000 square foot building. He described the

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location of the site at the NE corner of Spanaway Loop Road and Military Road, which generally leads from Pacific Avenue to McChord Air Force Base. He said the applicants had filed a revised plan to move the building further to the West and move the entrance and enlarge the driveway on Spanaway Loop Road and move the play area to the West of the building and further away from the residences to the East. He outlined the parking and 8 stalls for drop off and pick up of the children. He outlined the landscaping to Level 3 and 25 foot wide buffer to the NE and increase the Level 3 landscaping along the access road of 16th Ave. Court South and increase the overall landscaping to the site. He used an overlay to show the trees on the site to be retained. He discussed the MDNS with a left turn lane on Spanaway Loop Road. He presented the December 12, 2007 review of the proposal by the Parkland Spanaway Midland Advisory Committee and the extensive testimony there against the application and the final decision to deny the application as density and intensity are not compatible with the neighborhood and incompatibility with surrounding residential area due to the size. He further testified as to the possible gating of the site both on 16th Ave Court South and Spanaway Loop Road. He wanted building lighting as set forth in proposed Condition 21. He outlined the zoning of the area at the time of application to be Moderate Density Single Family (MSF) which allowed Day Care Centers as a Conditional Use. He said he did not know of the impact on the surrounding wells. The proposal would have a dry sewer line to Spanaway Loop Road and he referred to proposed Condition 33 in regard Aquifer Recharge. He then outlined the criteria for a Conditional Use Permit on page 23 of Exhibit 1, Staff Report. He indicated impacts from the loss of the trees on the site. He stated the project would meet the criteria for a Conditional Use Permit.

Wm Lynn, attorney for the applicant, stated this is not a rezone but an application for an allowable use by way of a Conditional Use Permit. He outlined the criteria for a Conditional Use Permit. He said there will be no injury to the neighborhood and the use is compatible with the surrounding neighborhood. He stated that any potential impacts are met by the mitigating conditions proposed by the County. He stated the Day Care is comparable with the allowed uses in the zone. This facility will operate during the day and close between 6:00 and 6:30 in the evening. He said the facility will be three times the size of surrounding homes, but the site would be allowed 7 homes. He said the playground would not be for all day but small groups of children will come out at different times. He indicated the moving of the play area further away from residences to the East. He said the lights would be limited and focused to parking lot and off at night. He described the

moving of the building and the design change to more resemble a home. He said the Health Department had its own regulations in regard septic systems which they would have to meet. The size of the septic system, setbacks and drainfields are all controlled by the Regulations of the Health Department. He said the size of the project would equal 7 homes.

Jean Carr, representative for the applicant, testified and presented the aerial view of the project on the site, Exhibit 7 and said the location of the building and the play area would not impact the neighbors. She said her children attend another facility of the applicant in Dupont and the facility there is located in a neighborhood and works well there. This site is ½ acre larger than in Dupont. She discussed the original plan and the revised plan to move the building to the West with enhanced buffering to the North East. She said they plan on moving the play area to be along Spanaway Loop Road and away from the residences on 16th Ave. Ct South. She said each class goes out to the play area at different times and each are supervised. There would be a fence around the area and noise would be limited by the building. She presented Exhibit 8 and 9 showing different design proposal: two buildings and three buildings. She did say that one building would be better to minimize the noise. The building or buildings would be designed as a large home. There would be no change in property values by the location of the day care. She said the facility would serve both the immediate and large area. She said there are 11000 children in the ZIP code zone and they would serve them. She agreed to the retention of trees except for the footprint of the building/buildings, parking lot and play area and septic system. She outlined the hours from 6:30 A.M. to 6:00 P.M. with peak from 7:00 A.M. to 7:30 A.M. and all afternoon. She agreed to the dry sewer line. She said the 7 home septic system would accommodate 114 people, the same as the day care. She said one/half of the children would be in diapers thus reducing the water usage. She requested granting the permit.

Wm Lynn again testified that the proposal meets the Conditional Use Permit criteria and is the same as 8 homes. He said the facility uses smaller toilets for the children. He presented Exhibit 10 photographs of facilities in Dupont, Lacey and Brown's Point.

Mr. Charles Ferber testified against the proposal saying the Military Facilities of Fr. Lewis and McChord provide for day care facilities and many of the families in the area are military and there is no need for a day care facility. He wanted to know where the children will be coming from.

Jean Carr said the children would not be from military families.

Ferber said he has lived at his house for 61 years (on Military Road near the entrance to McChord Field) and the road and Spanaway Loop Road are used

as commercial with trucks going to I-5. He said the children must be from new homes and there are not that many new homes in area. There is no need for the facility.

Mr. Lynn said the facility will serve a large area of the ZIP zone.

Mr. Rick Selden, a nearby neighbor, requested the application be denied. He submitted his letter in opposition and stated he investigated the existing Day Care Centers in the larger area and they were all along Highway 7 (Pacific Avenue) and 176th Street. He said they were not filled to capacity. One he said had 54 children but was licensed to have 80 children. These facilities are all in commercial zones and not in single family neighborhood. He discussed the traffic and said the facility would increase the traffic and impact the neighborhood. He said a convenient location for this type of facility would be 116th and Steele street and there is space available. He is an owner of a business and knows the impact on neighborhoods of uses. He said there is no commercial use between 116th and 176 and from Pacific Avenue and McChord Field. It is all residential and this proposal would not be compatible with the single family neighborhood.

Paul Steiner, a neighbor, testified that the septic system would impact the wells in the area and the use was not compatible and the only supporters were the applicants.

Carl Truman, President of the Martens Water system outlined the wells and their service area adjacent to the proposed site and he said it would be dangerous to their systems to have such a large septic use in the vicinity. If it did cause damage to the wells, it would cost over \$125,000. to connect to the Parkland Water Company and he wanted to know who was going to pay for that connection. He said all 98 residents of Marten addition are opposed to this project and he requested denial of same.

Mr. Lynn said that all of the Marten residents were on septic systems and were all more than 100 foot from well.

Dale Coons, 2nd home north of site, said the service is not needed in the area. He said this would be a significant intrusion of commercial use between 116th and 176th. There are all residences in the surrounding area and there are no commercial uses. He said the Conditional Use criteria requires the use to adhere to the Comprehensive Plan and to be compatible with the neighborhood. This use is not compatible. It would be the first commercial use in the area. He said the Advisory Committee was correct in deny the application.

Dan Fox a resident of the area since 1973 submitted Exhibit R11,R12 and R13 in regard his comments against this day care use. He said the Comprehensive Plan allows for day care, but not on this 1.2 acre site. It

would be detrimental to the surrounding properties and the inhabitants. He said the commercial use will be a significant impact on the area and contrary to the community plan. He cited the goal for residential character and development in the Parkland, Spanaway, Midland Community Plan. He directed attention to pages 26 and 27 in said Plan, Exhibit R 12 and quoted: "The key health, safety, a strong sense of community, and a high quality of life in the...region is to preserve, maintain, and enhance existing residential neighborhoods, and develop and maintain new residential neighborhoods which provide a variety of well and sensitively designed and sited housing types, densities and complementary land uses;" and, on Page 27: "The character of historically low density residential areas should be preserved, restored and maintained." He said the community plan was against this day care use in this neighborhood. He discussed water and sewer flows and what the Health Department would allow. He discussed several sewer problems in the area and the phosphate in a neighbor's swimming pool from contamination by a septic system. He said the increase of traffic for this 100 child day care would impact the neighborhood. And said the need of one out ways the need of many and that is wrong.

Sherry Haviland said she is on the Community Plan Board and the Advisory Committee and this site is not designated as commercial in the Community Plan. She said the traffic is an issue and the traffic will impact the neighbors. She felt the project would effect the wells in the area. She had filed Exhibit R6. She said this is a residential neighborhood and not a place for this commercial use and requested denial of the project.

Joe Mayer, builder and neighbor, said he was not accustomed to speak against a use, but he has lived in this neighborhood most of his life and from Steele Street and 116th all the way to 176th Street there are no commercial uses. It is all residential. All the way from Pacific Avenue to McChord it is residential. This is a nice neighborhood with no crime and high standards of larger homes and large trees. If this use is permitted it is logical that someone near by will sell to another commercial use. A mixed use as contemplated here will start a decline in the area. This area is consistently residential and this use will change the residential neighborhood. There are better commercial sites for this day care in commercial zoned areas and not in residential neighborhoods. This large an enterprise should be located elsewhere and he requested the denial of the Permit.

Herb Gelman said he has lived in the area for 40 years and 27 in his present location. The projected use of this site as a day care would be incompatible to the area. He said look at the aerial photograph and you can see it is all residential and you will also see the congestion of Meridian. He said this is

the last vested residential area between 116th and 176th. This would be an commercial intrusion into a residential neighborhood. He requested Denial of the Permit.

Helen Rhodes testified that the neighborhood did not need a commercial use in the area and they didn't want or need a day care. She said if it is approved she would sell her land for a "truck stop". She was against the proposal.

Peter Wold said he was a resident since 1964 and the area has been developed over the years into a residential neighborhood. He said the facility just doesn't meet the criteria for a Conditional Use Permit. There are other areas more compatible with this commercial use. He discussed the phosphate in the swimming pool and said the water will go to the wells and contaminate them. He said the septic system was too large with the existing wells in the area.

David Wilson said he lives north of the site and he received notification from the Postal Service that he had to move his mail box further onto his property because the mail truck had been rear ended on Spanaway Loop Road. He said the re-stripping hadn't helped with the traffic and any additional traffic generated by this day care would impact the neighborhood.

Lyle Webster said he was only a three year residents but that traffic is a problem and it will impact his living in the area and requested denial of the application.

Art Wilson, who lives adjacent to the site, said the community doesn't want the facility and the community opposes it. He said there is 100 % opposition from the community. He said he has used Spanaway Loop Road for 30 years and now he uses C street over by Pacific Avenue because of the heavy volume of traffic on Spanaway Loop Road. This facility will impact the neighborhood and the traffic and access to the site will definitely change the neighborhood.

Ishmael Correa said she lives to the East of the side and there are no sewers in this area. She said the traffic would be relieved if the cross-base highway were built, but that is seemingly not in the future. The Community wants the traffic problems solved and the water problems solved. She wanted to know how they could build 7 houses on this site when new zoning only allowed one house per 1/2 acre. The access to the site from the East on Military Road will be onto 16th Ave Court South and then access from there to the site. She said she lives on 16th Ave and the traffic from the day care will impact her use and access to Military Road. She said the traffic on Spanaway Loop Road backs all the way to Tule Lake Road during peak hours and is back up on Military Road. She said this proposal will impact her residential neighborhood.

Mr. Wm Lynn replied to the witnesses that the other locations of this Day Care business were very successful and did not impact the neighborhoods there. He outlined the changes in the plan. He said "need" is not an issue. He said that this use will not create a precedent as the zoning has changed and no use similar is allowed. He said that the use will be larger than the homes in the area, but the design will not look commercial but residential. With the landscaping and retention of trees, it will not impact the neighborhood. The hours and use will not be an impact, The lighting will be minimal and the noise reduced with revised plan. He said the applicant would have to meet the Health Department Standards. He said there is a need for the 100 child care facility and it provides for service and convenience to the community. He said there is no basis for reducing the amount of children in this facility. Robert Jenkins said the area was zoned to only allow educational or civic uses if the day care would close. He said the present zone only allows 5 homes on this site now.

NOTE: A complete record of this hearing is available in the office of the Pierce County Planning and Land Services.

FINDINGS OF FACT:

1. The Hearing Examiner has admitted documentary evidence into the record, viewed the property, heard the testimony, reviewed the reports and exhibits, and the record.
2. Proper notices of the hearings were published and given pursuant to the Code.
3. The applicants request a Conditional Use Permit to develop a 100 child day care center within a one story, 25 foot high, 9,990 square foot building, with exterior playground and ball field areas to the north and east of the building, and a 35 space parking lot along Old Military Road and Spanaway Loop Road South. The proposed access is onto both 16th Avenue Court South/Old Military Road and Spanaway Loop Road South. The project will be served by a public road, public water, and an on site septic system. The project is located in a Moderate Density Single-Family (MSF) zone classification at 14510-16th Avenue Court South in the Spanaway area.
4. The current day care center is a use permitted by Conditional Use Permit in the MSF zoning classification.
5. The purpose of this Section (Conditional Use Permit) is to establish decision criteria and procedures for special uses called Conditional Uses which possess unique characteristics. Conditional Uses are deemed unique due to factors

such as size, technological processes, equipment or location with respect to surrounding streets, existing improvements or demands upon public facilities. These uses require a special degree of control to assure compatibility with the Comprehensive Plan, adjacent uses, and the character of the vicinity.

Conditional Uses will be subject to review by the Examiner and the issuance of a Conditional Use Permit. This process allows the Examiner to:

1. determine that the location of these uses will not be incompatible with uses permitted in the surrounding areas; and
2. make further stipulations and conditions that may reasonably assure that the basic Intent of this Title will be served.

5A.

A Conditional Use Permit may be approved only if all of the following findings can be made by the Examiner regarding the proposal and are supported by the record:

A.) The granting of the proposed 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.

6. Under the law of zoning, a Conditional Use Permit is not a variance from the zoning regulations, nor a rezone, but a use which the regulations expressly permit under the specific conditions as outlined above.

7. This proposal is in general conformance with the County Comprehensive Plan and generally meets the policies and Criteria of the Plan.

8. To approve this proposal, the application must be reviewed specifically and must meet the required findings.

9. The specific location of the day care center is on the North East corner of the intersection of Old Military Road and Spanaway Loop Road. The neighborhood is residential for at least a mile in all directions and is East of one of the main accesses to the military base of McChord Field.

10. Large commercial establishments are located East of the site including Sprinker Field, a small mall, Spanaway Park and Spanaway Golf Course and strip commercials along Pacific Avenue (Highway 7).

11. The subject property is part of a short plat with access off 16th Avenue Court South. The applicant propose to have two accesses to the site: one off Spanaway Loop Road and the other off 16th Avenue Court South onto Old Military Road.

12. The proposal is for a 100 child day care facility with a one story structure and a play area with parking. The applicants have similar operations in Yelm,

Olympia and Dupont and the facilities are attractive buildings with landscaping to blend into the surrounding residential properties. The revised plan moves the building to the West and relocates the play area along side Spanaway Loop Road. The applicant also has projected other designs for two or three buildings.

13. The proposal meets the County parking but the County Staff desires additional buffering along the North and East boundaries.

14. The proposal aesthetically meets all 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 and traffic raises serious questions in regard compatibility with the surrounding residential area and the effect on the traffic.

15. The applicant provided a traffic analysis performed by a professional traffic engineer and has revised same and projected the traffic based on several possible alternatives (such as the Cross-Base highway that would connect to 176th street which would reduce the traffic off McChord Airforce base).

16. The County engineering/traffic division generally accepted the survey and analysis subject to making further revisions and limitations on accesses to both Old Military Road and Spanaway Loop Road as the project progresses.

17. The traffic analysis shows 126 trips per day at the peak times of 7:00 A.M. to 8:00 A.M. and 4:00 P. M to 6 P.M. reduced by an allowable formula to 94 trips. The traffic issue was determined by the Superior Court not to be an impact on the County road system.

18. The proposal was presented to the Parkland-Spanaway-Midland Advisory Commission which after a thorough presentation by the applicant, the County Staff and the public, voted to deny approval of the project with a 6-0 vote. The Commission's reasons for denial were: 1) incompatibility with surrounding residential area due to the size of the project; 2) questions of impacts from septic system on surrounding wells; 3) traffic concerns, including the qualified acceptance by Public Works and the need to address the proposed realignment of Spanaway Loop Road; 4) Traffic safety, congestion and further backup of traffic on both Old Military Road and Spanaway Loop Road.

19. The Examiner issued a Decision denying the application for a Day Care facility at this location. Said Decision was appealed to the Pierce County Superior Court and said Court reversed the denial and remanded the matter back to the Examiner. The Court held the traffic generated at this site would not impact the County Road System and the matter was remanded to make additional Findings on matter other than traffic and make alternatives, design modification and/or mitigation that might allow the Conditional Use Permit.

20. On remand, the matter was referred to the Parkland-Spanaway-Midland Advisory Committee for review and decision. At said meeting, citizens from the

area presented testimony against the application and the applicant presented an alternative design for the site. The Commission denied the project on the grounds the "density and intensity of the facility is not compatible with the neighborhood", and on grounds of air quality, " incompatibility with surrounding residential area, due to size", and bad precedent and economic impact on neighbors and on potential well contamination and noise impacts.

21. 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 from 116th to 176th Street. The specific area is surrounded by large well designed homes and the access road to the Day Care(16th Ave Court South) is the service road for several residences.

22. Mr. Selden, a business owner, Mr. Mayer, a contractor, Mr. Fox, Mr. Gelman, Mrs. Chalker, Mr. Truman, Ms. Haviland, Mr. Coons, the Parkland-Spanaway-Midland Advisory Committee (twice), 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. (See Page 7 of Staff Report and testimony set out above)

23. If the project is allowed the applicants would have to comply not only with the requirements and conditions set forth by the County but also the Rules, Regulations of the Tacoma Pierce County Health Department in regards the septic system to assure protection of the aquifer and the surroundings wells.

24. The projected design of the facility, as presented by the applicants, is compatible with the home designs in the surrounding area.

25. The location of the play area and the increased Landscaping plan and buffers lessens the noise impact on the residences to the East of the site.

26. The project appears to be in conformance with the Comprehensive Plan, Development Regulations, Zoning and Environmental Regulations and the traffic will not impact the County Road System.

27. The Examiner must determine that the location of this day care will not be incompatible with the uses in the area. The area is strictly residential and the Day Care would be an allowable supportive use in the Zone if the size density and intensity is compatible with the neighborhood.

28. 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.

29. 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.

30. The ultimate question is: "is the location of this use not incompatible with the uses permitted in the surrounding 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?"

31. In Hilltop Terrace Ass'n vs. Island County, 126 Wn 2d 22, the Supreme Court set the guide for determining compatibility as follows:

"...application rendered to propose use compatible with the surrounding Area is a factual judgment that belongs to the BOCC (Bd or Co Comm). Nevertheless, we must be satisfied that substantial evidence supports the BOCC's factual determination pertaining to the ...second application. RCW7.16.020(5) "Substantial evidence exists where there is a sufficient Quantity of evidence in the record to persuade a fair minded, rational Person of the truth of the finding." (citations omitted)... "necessarily Entails acceptance of the factfinders views regard the credibility of Witnesses and the weight to be given reasonable but compelling Influences."

32. 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.

33. 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. The Advisory Committee determined the size density and intensity of the day care was not compatible with the neighborhood.

34. The County rezoned the whole area to limit the size of day care facilities.

35. Need may not be controlling as to the issuance of a Permit, but evidence was presented that available day care facilities had available space and did not need to increase their license to 80 children. Said facilities were in commercial zoned areas.

36. The size of the proposal for a 100 child day care and a nearly 10,000 square foot building is not compatible with the residences in the area and is out of proportion with surrounding residences.

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

38. Most of the surrounding homes are of the approximate size of 3500 square feet or one-third the size of the proposed nearly 10,000 square foot building. A smaller building would be more compatible with the small 1 and ½ acre site with more retention of trees and natural vegetation, with larger buffers and more landscaping.

39. The Examiner must review the evidence to determine the appropriate size of the day care facility that would be compatible with the surrounding neighborhood. Present zoning limits the size to 24 children in an outright use. The Advisory committee supports the size of 24 children facilities. Citizens reviewed the proposed use and testified or presented evidence the facility, if allowed, should be reduced to 24 or 50.

40. The applicant testified on two occasions in their own testimony that the size of the facility would be three (3) times the size of surrounding homes.

41. The substantial weight of evidence, including the applicants own words, is to the reduction of the size density and intensity of the day care facility.

42. The Condition Use Permit for the Spanaway Kids Kampus Day Care should be granted as not detrimental to the public health, safety and general welfare, and not adversely affect the established character and planned character of the surrounding vicinity and not be injurious to the uses, planned uses, property, or improvements adjacent to, and in the vicinity of, the site proposed for the day care, subject to limiting the size density and intensity to not more than one third the size of the surrounding residences, or 33 children.

CONCLUSIONS:

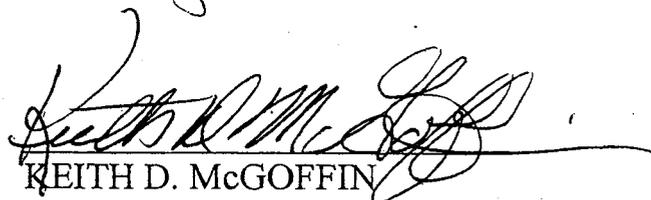
1. The Hearing Examiner has the jurisdiction to hear, consider and decide the issues presented by the request
2. The current day care center is a use permitted by Conditional Use Permit in the MSF zoning classification.
3. A Conditional Use Permit may be approved only if all of the following findings can be made by the Examiner regarding the proposal and are supported by the record:
 - A.) The granting of the proposed 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.
4. Under the law of zoning, a Conditional Use Permit is not a variance from the zoning regulations, nor a rezone, but a use which the regulations expressly permit with specific conditions.
 5. This proposal is in general conformance with the County Comprehensive Plan and generally meets the policies and Criteria of the Plan.
 6. The size of the proposal for a 100 child day care and a nearly 10,000 square foot building is not compatible with the residences in the area and is out of proportion with surrounding residences.
 7. A day care facility would be compatible if it were of a size, density and intensity use similar to the surrounding residences. The traffic of a smaller facility would have less impact on the neighborhood.
 8. Most of the surrounding homes are of the approximate size of 3500 square feet or one-third the size of the proposed nearly 10,000 square foot building. A smaller building would be more compatible with the small 1 and ½ acre site with more retention of trees and natural vegetation, with larger buffers and more landscaping.
 9. The Examiner must review the evidence to determine the appropriate size of the day care facility that would be compatible with the surrounding neighborhood. Present zoning limits the size to 24 children in an outright use. The Advisory committee supports the size of 24 children facilities. Citizens reviewed the proposed use and testified or presented evidence the facility, if allowed, should be reduced to 24 or 50.
 10. The applicant testified on two occasions in their own testimony that the size of the facility would be three (3) times the size of surrounding homes.
 11. The substantial weight of evidence, including the applicants own words, is to the reduction of the size density and intensity of the day care facility.
 42. The Condition Use Permit for the Spanaway Kids Kampus Day Care should be granted as not detrimental to the public health, safety and general welfare, and not adversely affect the established character and planned character of the surrounding vicinity and not be injurious to the uses, planned uses, property, or improvements adjacent to, and in the vicinity of, the site proposed for the day care, subject to limiting the size density and intensity to not more than one third the size of the surrounding residences, or 33 children.

DECISION:

The application for a Conditional Use Permit for establishment of Spanaway Kids Kampus Daycare facility, at the North East corner of the intersection of Spanaway Loop Road and Old Military Road, 14510 16th Avenue Court South be and the same is hereby APPROVED subject to the reduction in the size density and intensity of the use to 33 children and staff and of the buildings, the septic systems, the parking and the increase of landscaping, buffers and setbacks relative to a 33 child day care center. The Examiner remands the application to the Department of Planning and Land Services to prepare appropriate conditions commensurate with the size density and intensity of a 33 child day care facility at this location and to present same to the Examiner for review, approval to be made a part of and attached to this Decision.

DATED this 24th day of January, 2008.


REITH D. McGOFFIN
Deputy Hearing Examiner

TRANSMITTED this 24th day of January, 2008, to the following:

OWNER/APPLICAN Allan and Marijke Deutscher
I: 1401 Marvin Road NE, Suite 307-254
Lacey, WA 98516

ATTORNEY: William T. Lynn
P.O. Box 1157
Tacoma, WA 98401

AGENT: Jean Carr
2102 Carriage Drive SW, Bldg. H
Olympia, WA 98502

OTHERS:

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PIERCE COUNTY PLANNING AND LAND SERVICES
PIERCE COUNTY BUILDING DIVISION
PIERCE COUNTY DEVELOPMENT ENGINEERING DEPARTMENT
PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT
TACOMA-PIERCE COUNTY HEALTH DEPARTMENT
FIRE PREVENTION BUREAU
PIERCE COUNTY PARKS AND RECREATION
PIERCE COUNTY COUNCIL
PIERCE COUNTY RESOURCE MANAGEMENT

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January 30, 2008

Allan and Marijke Deutscher
1401 Marvin Road NE, Suite 307-254
Lacey, WA 98516

**RE: CONDITIONAL USE PERMIT: CASE NO. CP14-02, SPANAWAY KIDS
KAMPUS DAYCARE, APPLICATION NOS. 349567, 349568 & 385974**

Dear Applicants:

Transmitted herewith is the Report and Decision of the Hearing Examiner regarding your request for the above-entitled matter.

Very truly yours,

KEITH D. McGOFFIN
Deputy Hearing Examiner

KDM/ca

- cc: Parties of Record
- PIERCE COUNTY PLANNING AND LAND SERVICES
- PIERCE COUNTY CODE ENFORCEMENT
- PIERCE COUNTY DEVELOPMENT ENGINEERING DEPARTMENT
- PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT
- TACOMA-PIERCE COUNTY HEALTH DEPARTMENT
- FIRE PREVENTION BUREAU
- PIERCE COUNTY PARKS AND RECREATION
- PIERCE COUNTY COUNCIL
- PIERCE COUNTY RESOURCE MANAGEMENT



OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

DECISION ON CONDITIONAL USE PERMIT

WITH CONDITIONS

SUBJECT: CONDITIONAL USE PERMIT: Case No. CP14-02
Spanaway Kids Kampus Daycare
Application Number 349567,349568 & 385974

OWNER/ Applicant: Allan and Marijke Deutscher
1401 Marvin Road N.E., Suite 307-254
Lacey, WA 98516

ATTORNEY: WILLIAM T. LYNN
P.O. BOX 1157
TACOMA, WA 98401-1157

AGENT: Jean Carr
Parametrix
8830 Tallon Lane, Suite B
Lacey, WA 98516

PROPOSAL: Applicant requested a Conditional Use Permit to develop a 100-child day care center within a one-story, 25-foot high 9,990 sq. ft building, with exterior playground and ball field areas to the north, west, and south of the building, and a 37-space parking lot on the east side of the

~~building~~. The proposed access is onto both 16th Avenue Court South/Old Military Road and Spanaway Loop Road South.

On remand from Superior Court, the Examiner conducted a public hearing on the request at 9:00 A.M. on Thursday, January 10th, 2008. Witnesses were sworn in and testimony was taken for and against the proposal and Exhibits were introduced into evidence.

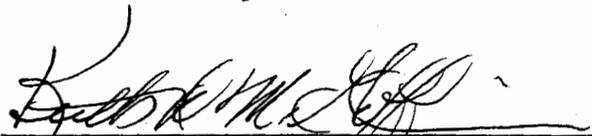
At the conclusion of the Hearing, the Examiner took the matter under advisement and on January 24th, 2008 the Examiner made the following

Decision:

“The application for a Conditional Use Permit for establishment of Spanaway Kids Kampus Daycare facility, at the North East corner of the intersection of Spanaway Loop Road and Old Military Road, 14510 16th Avenue Court South be and the same is hereby APPROVED subject to the reduction in the size density and intensity of the use to 33 children and staff and of the buildings, the septic systems, the parking and the increase of landscaping, buffers and setbacks relative to a 33 child day care center. The Examiner remands the application to the Department of Planning and Land Services to prepare appropriate conditions commensurate with the size density and intensity of a 33 child day care facility at this location and to present same to the Examiner for review, approval to be made a part of and attached to this Decision.”

The Examiner received from the Department of Planning and Land Services modified conditions dated January 25th, 2008 and after review, the Examiner does hereby approve the modified Conditions and attaches said Conditions to the January 24th, 2008 Remand Decision and adopts same as hereinafter set forth:

DATED THIS 30th DAY OF January, 2008.



KEITH D. McGOFFIN
Deputy Hearing Examiner

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**CONDITIONS ATTACHED TO THE JANUARY 24TH, 2008 REMAND
DECISION ON THE SPANAWAY KAMPUS DAY CARE CENTER**

SEPA:

1. The SEPA mitigating measures set forth in the Mitigated Determination of Nonsignificance issued by the Pierce County Environmental Official on September 14, 2005, are hereby made conditions of approval as set forth hereinafter. Provided, however, that said mitigating conditions are not subject to change by the major amendment process, but must be changed by the Environmental Official through the SEPA process.

Planning:

2. Airborne sound transmission shall not exceed the noise levels prescribed by the Tacoma-Pierce County Health Department and Chapter 8.76 of the Pierce County Code, "Noise Pollution Control."
3. All requirements of the Pierce County Building Department must be met prior to the issuance of building permits for this proposal.

Development Engineering:

4. A storm drainage plan must be submitted to the Development Engineering Section as part of the site development plans. The drainage plans shall be in accordance with Ordinance 99-24S, Title 17A, Construction and Infrastructure Regulations – Site Development and Stormwater Drainage.
5. Based on a review of the project proposal by the Traffic Engineering Division of Pierce County Public Works and Utilities, the County agrees to allow two full-time accesses: one each onto Spanaway Loop Road and Old Military Road South. These accesses will be allowed with the following provision: "Public Works reserves the right to restrict any access if deemed necessary in the future (if a problem arises)."

6. The driveway access locations onto this project are subject to Short Plat No. 78-676. The Public Works notes on the short plat indicate that access to Lot Nos. 1, 2, 3, and 4 shall be by way of the private road easement only. As such, the applicants shall be required to complete a Short Plat Amendment to allow the second proposed access directly onto Spanaway Loop Road South.

Tacoma Pierce County Health Department (TPCHD):

7. Prior to approval of the water supply for this development, a Certificate of Water Availability is required as per WAC 246-290 and Pierce County Ordinance 86-116S4.
8. Should this project not be served by sanitary sewer, the TPCHD will require a review of potential adverse environmental impacts and justification for utilization of on-site sewage treatment and disposal prior to application for site development permit or building permit approval.
9. The project falls within an Aquifer Recharge Area as defined and regulated by Chapter 18E – Aquifer Recharge Areas, Pierce County Development Regulations – Critical Areas. Based upon review of the SEPA Environmental Checklist, it appears that the proposal does not meet the criteria for requiring a Hydrogeologic Assessment contained in Section 18E.50.020.D.3.a. In accordance with Section 18E.50.020.D.2.a, the project is exempt from the Hydrogeologic Assessment requirements of Chapter 18E.50, and is subject to the applicable mitigation measures contained under Section 18E.50.020.D.2.b

Planning:

10. Final development plans shall be submitted to the Planning and Land Services Department for review and approval within two (2) years of the effective date of the approval of this request. Failure to submit said plans shall automatically render all approvals granted herein null and void. Final development plans shall include, but not be limited to, site plan, professional landscape and screening plan, parking area, signage and building elevations.

11. Completion or substantial progress toward completion of the approved project shall occur within one year of the approval of final development plans, or all approvals granted herein shall automatically become null and void.

12. A Memorandum of Agreement shall be completed and recorded by the applicants with the Pierce County Auditor in conjunction with the **final development plan approval** by the Director of Pierce County Planning and Land Services.

13. The size of the day care center building shall be limited to a maximum of 3,500
Square feet.

14. The maximum number of children to be housed in the day care center shall be 33.

15. Prior to final occupancy approval, the applicants shall install a 6-foot high solid board fence along the north and the east lot lines with single-family homes.

16. An L3 landscape buffer shall be installed north and east of the parking lots and adjacent to the single-family lots. All existing trees, with 6" diameter at breast height or greater, and located north and east of the parking lot shall be retained. Trees determined to be diseased or dangerous may be removed and replaced only as set forth in Section 18A.35.035.N. Existing trees shall count toward the required L3 requirement. No storm drainage infiltration trench, septic drainfield or associated piping shall be permitted to be located north and east of the parking lot. The entire areas north and east of the parking lot shall be planted with native trees, shrubs and groundcover.

17. All existing trees located within 25 feet of the rights-of-way for Spanaway Loop and Old Military Roads South shall be retained. Existing trees shall count toward the required L1 requirement. Trees determined to be diseased or dangerous may be removed and replaced only as set forth in Section 18A.35.035.N. No storm drainage

biofiltration swale shall be located within the dripline of any existing trees, with 6" diameter at breast height or greater, located along Military Road or Spanaway Loop Road South.

18. Native plant material shall be used in the required L1 and L3 buffers. In choosing appropriate plant material, the applicant shall utilize the Pierce County Northwest Native Plant List, dated October 1, 2003, or the WSU Cooperative Extension Native Plant Identification Database and plant association lists, found at <http://gardening.wsu.edu/nwnative>, as resources.
19. The perimeter parking lot trees standard shall be increased from 1/40 lineal feet of frontage to 1/25 feet, along 16th Avenue Court South.
20. Prior to approval of site development plans for this project, the applicant shall submit a tree inventory to identify the location of all trees of 6" diameter or greater.
21. Prior to final development plan approval, the applicant shall provide elevations illustrating a design with residential architectural elements, including but not limited to: a) a hip, composite shingle roof with a moderate pitch and 2-foot wide minimum overhangs; b) siding with muted, not primary colors; c) brick or masonry accents; and d) a multi-pane window design. If the applicant and Planning Department cannot agree that the design is residential in scale and character, the matter shall be directed to the Hearing Examiner for resolution.
22. A minimum of 9 parking spaces shall be provided, with one of the spaces designated for loading and unloading of children only, between the hours of 6-9 a.m. and 4-7 p.m.
23. To minimize impacts on residential neighbors, the parking lot lighting shall be placed on a timer to operate no earlier than 6:00 a.m. nor later than 7:00 p.m. In addition, building lighting shall be shielded downward and placed on a motion sensor between 7:00 p.m. and 6:00 a.m.
24. The applicant shall submit written documentation from the TPCHD approving on-site treatment and disposal for this site prior to application for site development or building permits.

25. The applicant shall construct a dry sewerline connection from the building to Spanaway Loop Road South prior to building permit approval. The day care center shall connect to sanitary sewers once they become available on Spanaway Loop Road.
26. The proposed driveway onto 16th Avenue Court South shall comply with the 125-foot separation requirement from the Military Road South right-of-way intersection unless a deviation to the Pierce County Road Standards is applied for and accepted.
27. The day care center building shall comply with all applicable setback requirements of Title 18A.
28. The final parking lot layout shall be modified to preserve the mature trees located along the eastern edge of the site.
29. The parking lot shall be gated at both access points, and provided with appropriate turn arounds as approved by Development Engineering. The gates shall be closed between the hours of 7:00 p.m. and 6:00 a.m.

Washington State Department of Ecology:

30. Any discharge of sediment-laden runoff or other pollutants to waters of the state is in violation of Chapter 90.48, Water Pollution Control, and WAC 173-201A, Water Quality Standards for Surface Waters of the State of Washington, and is subject to enforcement action.

Washington State Department of Natural Resources:

31. (Was omitted in PALS modified conditions).
32. A forest practices permit may be required for the harvest of timber associated with this project.

Washington State Department of Revenue:

33. This timber will be cleared from the site and there will be a Forest Excise Tax liability. The landowner/timber owner should contact the

Department of Revenue, Forest Tax Section, prior to harvest, to register with the Department. This will ensure that the landowner receives the proper tax reporting forms and that Pierce County receives its' revenues that are due.

Tacoma Pierce County Health Department (TPCHD):

34. This project is proposing to utilize onsite sewage systems as the method of sewage disposal. Density, lot size and soil conditions must be shown to meet WAC 246-272 (The State Board of Health Onsite Sewage System Regulations). As of December 5, 2007, the TPCHD has not received an application. No review will be made until the required application, with fees, is received.
35. Prior to approval of the water supply for this land use application, a valid Certificate of Water Availability is requires as per WAC 246-290, Pierce County Ordinance 86-116S4, and TPCHD Board of Health Resolution 2002-3411.
36. This proposal is subject to the Aquifer Recharge Area requirements of the Pierce County Code, 18E.50.040.D.6. This paragraph requires the applicant to show that, as the result of this development, the nitrate level in groundwater does not exceed 2.5 mg/L at the property boundary.

END OF CONDITIONS

TRANSMITTED this 30th day of January, 2008, to the following:

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12

18A.75.030 Conditional Use Permit.

- A. **Purpose.** The purpose of this Section is to establish decision criteria and procedures for special uses called Conditional Uses which possess unique characteristics. Conditional Uses are deemed unique due to factors such as size, technological processes, equipment, or location with respect to surroundings, streets, existing improvements, or demands upon public facilities. These uses require a special degree of control to assure compatibility with the Comprehensive Plan, adjacent uses, and the character of the vicinity. Conditional Uses will be subject to review by the Examiner and the issuance of a Conditional Use Permit. This process allows the Examiner to:
1. determine that the location of these uses will not be incompatible with uses permitted in the surrounding areas; and
 2. make further stipulations and conditions that may reasonably assure that the basic intent of this Title will be served.
- B. **Decision Criteria.** The Examiner shall review Conditional Use Permits in accordance with the provisions of this Section and may approve, approve with conditions, modify, modify with conditions, or deny the Conditional Use Permit. The Examiner may reduce or modify bulk requirements, off-street parking requirements, and use design standards to lessen impacts as a condition of the granting of the Conditional Use Permit.
1. **Required Findings.** The Examiner may use Design Standards and other elements in this code to modify the proposal. A Conditional Use Permit may be approved only if all of the following findings can be made regarding the proposal and are supported by the record:

- a. That the granting of the proposed 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.
 - b. That the granting of the proposed Conditional Use Permit is consistent and compatible with the intent of the goals, objectives and policies of the County's Comprehensive Plan, appropriate Community Plan (provided that, in the event of conflict with the Comprehensive Plan, the Comprehensive Plan prevails), and any implementing regulation.
 - c. That all conditions necessary to lessen any impacts of the proposed use are conditions that can be monitored and enforced.
 - d. That the proposed use will not introduce hazardous conditions at the site that cannot be mitigated to protect adjacent properties, the vicinity, and the public health, safety, and welfare of the community from such hazard.
 - e. That the conditional use will be supported by, and not adversely affect, adequate public facilities and services; or that conditions can be imposed to lessen any adverse impacts on such facilities and services.
 - f. That the Level of Service standards for public facilities and services are met in accordance with concurrency management requirements.
2. **Burden of Proof.** The applicant has the burden of proving that the proposed conditional use meets all of the criteria in Section 18A.75.030 B.1., Required Findings.
 3. **Approval.** The Examiner may approve an application for a Conditional Use Permit, approve with additional requirements above those specified in this Title or require modification of the proposal to comply with specified requirements or local conditions.
 4. **Denial.** The Examiner shall deny a Conditional Use Permit if the proposal does not meet or cannot be conditioned or modified to meet Section 18A.75.030 B.1., Required Findings.
- C. **Procedures.** Procedures for application modification, review and amendment as well as permit extensions and relinquishment are outlined in Chapter 18A.85. For additional information about application requirements, see Chapter 18.40; for public hearing and appeal procedures, see Chapter 1.22; for the review process, see Chapter 18.60; for public notice, see Chapter 18.80; for fees, see Chapter 2.05; and for compliance, see Chapter 18.140.
- (Ord. 97-84 § 2 (part), 1997; Ord. 95-79S § 2 (part), 1995)

FILED
COURT OF APPEALS
DIVISION II

38361-6-II

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY _____
DEPUTY

PIERCE COUNTY, a Washington municipal corporation, and
NEIGHBORS UNITED FOR THE LOOP (Intervenors)

Appellants,

v.

ALLAN and MARIJKE DEUTSCHER,

Respondents.

Joinder of Appellant Neighbors United for the Loop

1102 Broadway Plaza, #403
Tacoma, Washington 98402
Tacoma: (253) 627-0123
Seattle: (425) 251-5938

SMITH ALLING LANE
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Attorneys for Intervenors
Neighbors United for the Loop
(NUFTL)

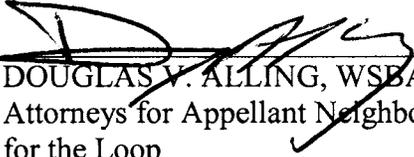
ORIGINAL

Appellant Neighbors United for the Loop joins in and adopts the
brief of Appellant filed by Pierce County submitted herein.

DATED this 2nd day of February, 2009.

SMITH ALLING LANE, P.S.

By


DOUGLAS V. ALLING, WSBA #1896
Attorneys for Appellant Neighbors United
for the Loop