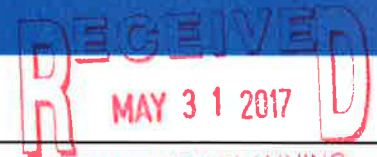




APPEAL OF ADMINISTRATIVE DECISION TO HEARING EXAMINER

**OFFICIAL USE ONLY**

Case #: _____

Master File #: 17-2250

Date: _____

Received By: [Signature]

Project Planner: _____

Related Cases: _____

APPELLANT:Name: Hope Community ChurchMailing Address: 2425 Black Lake Blvd. SWCity, State, Zip: Olympia, WA 98512Telephone Number(s): (360) 701-7093 (Jennifer Rossnagle)E-Mail Address: Jennifer@hopecc.us**REPRESENTATIVE OR ATTORNEY:**Name: Loren D. Combs of VSI Law Group, PLLCMailing Address: 225 Tacoma Avenue SouthCity, State, Zip: Tacoma, WA 98402Telephone Number(s): (253) 922-5464E-Mail Address: ldc@vsilawgroup.com

I hereby appeal the administrative (staff) decision described below for those reasons stated herein and as attached hereto, and seek the relief and remedies as stated. I understand that this appeal is not complete without payment of the required filing fee. I understand that this appeal will be considered pursuant to the authority and provisions of Olympia Municipal Code 18.75.020 and 18.75.040.

Filing Fee: \$1,000.00 (plus Hearing Examiner Deposit of \$500.00 when appealing an impact fee)

I understand that an impact fee appellant **is required to pay actual Hearing Examiner costs,**

Initials

which may be higher or lower than any deposit amount. I hereby agree to pay any such costs.

DECISION APPEALED: May 17, 2017 Administrative Decision by Tim Smith, AICP, Principal Planner

Case Name: Hope Community Church CUP Decision Maker: Tim Smith, AICP, Principal Planner

Case Address: 2425 Black Lake Blvd. SW Date of Decision: May 17, 2017

Case No.: #05-1429

COPY OF DECISION APPEALED IS ATTACHED: ☒ YES ☐ NO

See Attachment A

Basis of Appeal.

1. Please describe how you are or are likely to be harmed by the decision you are appealing.

Hope Community Church (the "Church") is appealing the administrative determination of Tim Smith, AICP, and Principal Planner that its Conditional Use Permit #05-1429 has expired. CUP#05-1429 approved the construction of a 20,563 square foot multi-purpose building for church purposes with associated parking and other improvements. The Church constructed the first phase of the improvements in 2010-11, consisting of constructing a 12,142 square foot building, parking and landscaping improvements, and wetland and buffer enhancement. The Church is now prepared to construct the 8,278 square foot addition to complete the multi-purpose building as approved under CUP #05-1429, but was informed by the Planning Department that the CUP has expired. This decision will harm the Church because it will require the Church to submit a new CUP application and go through a new CUP approval process, which will require considerable time, money and effort to complete, and which could result in new or more onerous conditions of approval. The 8,278 square foot addition is intended to be used for the Church's Children's Ministry programs, which will now be delayed by the time it takes to obtain new CUP approval and raise the additional funds required for the appeal.

2. Please describe below, or in attachments, how and why you believe the city staff erred.

Loren D. Combs was involved in this project since its inception, and met on multiple occasions with city staff, and represented the Church at the CUP application hearing before Hearing Examiner Bjorgen. Although the Church would have liked to have had the money to complete all of the work at once, as is often the case with non-profit organization, the money wasn't immediately available for full buildout. Many times churches rely on volunteers and donations, and the timing isn't always as predictable as it might otherwise be. The issue of phasing was thus discussed with the staff, and the issue was presented to the hearing examiner.

Included as **Attachment B** is a copy of the Staff Report prepared by the City of Olympia staff for the Hearing. On the page 2 of the Staff Report under the heading Project Description, it states: "The applicant is asking that the construction of the new facility be phased over several years."

Pages 20 through 22 of the City's Staff Report provides the City's recommendations to the Hearing Examiner. Recommendation 11 on Staff Report page 21 reads: "Should applicant seek phasing of the development, all landscaping and frontage improvements must be installed as part of Phase 1." These above two sections of the City Staff Report make it very clear that the applicant had requested phasing, that prior to the hearing, the phasing issues had been vetted by the City staff, and that they were very aware, prior to the hearing that phasing was a possibility, and that the staff, when considering the application, was okay with phasing, so long as certain improvements were completed in phase 1.

At the public hearing the Staff Report was introduced into evidence, and the Hearing Examiner admitted the Staff Report as Exhibit 1 to the hearing record. The Hearing Examiner decision, absent the exhibits, is attached hereto as **Attachment C**. Pages 45 and 46 of the Hearing Examiner's decision, states, in part:

"The proposed conditions in the Staff Report, Ex.1, pp. 20-22, are incorporated, modified or deleted as follows:

...

7. Conditions 7-13 are incorporated as proposed.

As mentioned above, condition 11 is the portion of the City Staff Report recommended phasing should be allowed, on certain conditions. The record is clear that: 1) the Church asked for phasing to be allowed as part of the CUP application; 2) the City staff was aware that the Church may need to phase the project over several years; 3) the City staff had no objection to phasing so long as certain improvements were made as part of "Phase 1"; and 4) the Hearings Examiner approved the phasing over several years subject to applicant requesting phasing, and the landscaping and frontage improvements be completed in the first phase.

All of the requirements upon phasing that were imposed by the Hearing Examiner have been met, and thus the request of the Church to now start the next Phase, now that funding is available, is appropriate and should be allowed.

The Religious Land Use and Institutionalized Persons Act ("RLUIPA") provides an independent basis for granting the Church relief the Planning Department's administrative determination. RLUIPA prohibits any government from implementing a land use regulation in a way that imposes a substantial burden on religious exercise unless the burden satisfies strict scrutiny, and provides in part:

No government shall impose or implement land use regulations in a manner that imposes a substantial burden on the religious exercise of a person, including the religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution –

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §2000cc (A)(1).

The term "religious exercise" includes "the use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. 2000cc-5(7); *see also San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004) (conversion of hospital to a place for religious education is a "religious exercise"); *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2nd Circuit 2007) (Expansion project for the operator of private religious day school was "religious exercise"). The determination that CUP#05-1429 did not allow phasing, and that it has expired, will impose a substantial burden on the Church's religious exercise as it will cause the Church to incur the cost and expense of obtaining a new CUP, delay the relocation and expansion of its Children's Ministry programs, and expose the Church to the risks and uncertainties of the permitting process.

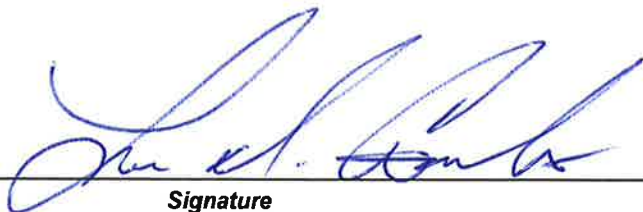
3. **Remedy or Relief Sought:** If you are successful on appeal, please describe the action you wish the Hearing Examiner to take. Explain how this action would eliminate or reduce harm to you.

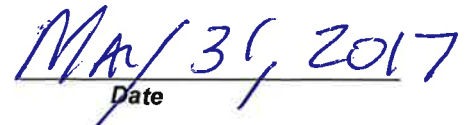
Reverse the Planning Department's administrative determination, and rule that CUP #05-1429 allows phasing and has not expired, and if necessary, provide a deadline for submission of a building permit for the remaining improvement covered under the CUP.

Have you served notice of this appeal on any other parties? ☐ YES ☐ NO

If yes, please list:

Signed:


Signature


Date



ATTACHMENT A

City of Olympia | Capital of Washington State

P.O. Box 1967, Olympia, WA 98507-1967

olympiawa.gov

May 17, 2017

Accrete Construction LLC dba BPCI
Bonnie Fagin, Project Manager
801 Valley Ave NW #A
Puyallup, WA 98371

Dear Ms. Fagin:

RE: Conditional Use Permit #05-1429; Hope Community Church – Administrative Determination

The City of Olympia Community Planning & Development Department (CP&D) has made an administrative determination that Conditional Use Permit (CUP) #05-1429 has expired. New Land Use and Conditional Use Permit approvals are required before the City can proceed with the review and issuance of engineering and building permits for the remainder of the project.

This is an administrative determination that may be appealed to the Hearing Examiner pursuant to the authority and requirements of Chapters 18.75 and 18.82 of the Olympia Municipal Code. An appeal must be filed within fourteen (14) days from the date of this letter. The letter must be accompanied by a \$1,000 appeal fee.

The Olympia Hearing Examiner approved CUP #05-1429 on July 22, 2008 for an expansion of the church on an approximately 5-acre site. The CUP included the construction of a 20,563 square foot multi-purpose building with associated parking and other improvements. In 2010, the church applied for and received approvals for building and engineering permits to construct 12,142 square feet of the project. It is our understanding that the church is now interested in completing the expansion and applying for building and engineering permits to construct the remaining 8,278 square feet.

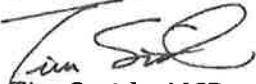
Pursuant to Olympia Municipal Code 18.72.140(B), unless exercised or otherwise specified, a conditional use permit shall be void one (1) year from the date a notice of final decision was issued. If exercised, a conditional use permit shall be valid for the amount of time specified by the Hearing Examiner.

A phasing plan and timeline were not included in the original CUP application or in the decision of the Hearing Examiner. The City does have an email record of an October 17, 2008 conversation between staff and the applicant in which an administrative revision to the CUP was offered as a process to approve a phasing plan for the project for up to ten years. The City does not have any records indicating that the applicant applied for a CUP revision or that the required processing fee was paid. It is therefore the position of CP&D that the 2008 CUP approval has expired.

MAYOR: Cheryl Selby, **MAYOR PRO TEM:** Nathaniel Jones, **CITY MANAGER:** Steven R. Hall
COUNCILMEMBERS: Jessica Bateman, Clark Gilman, Julie Hankins, Jeannine Roe, Jim Cooper

Please contact me if you have questions or would like to discuss this issue further. If you decide to move forward with new land use and CUP applications, staff recommends a presubmission conference so that we can discuss the review process and applicable requirements. The application for a presubmission conference is available on the City's website at <http://olympiawa.gov/city-services/building-permits-and-inspections/land-use-review.aspx>. The fee is \$240.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Smith", written over the printed name.

Tim Smith, AICP
Principal Planner

City of Olympia
OLYMPIA HEARING EXAMINER
Monday, April 14, 2008

Case: 05-1429; Hope Community Church

Applicant: Hope Community Church
2425 Black Lake Boulevard SW
Olympia, WA 98512

Representative: Foster & Williams Architects
PO Box 102
Shelton, WA 98584

Project Description: Applicant seeks approval to expand on-site parking facilities, and construction of new 20,563 square foot multi-purpose church facility.

Location: Section 20, Township 18 N., Range 2 W.;
2425 Boulevard Lake SW, AP#12820440500

Legal Description: On file with Community Planning & Development (CPD)

Site Area: 5 acres

Comprehensive Plan Designation: Two-Family Residential (RM-18)

Zoning Designation: Two-Family Residential (RM-18)

SEPA: A Determination of Non-Significance was issued on January 31, 2008. The comment deadline ended on February 14, 2008, and the Appeal deadline ended at 5:00 p.m. on February 21, 2008. (Attachment F)

Notice: Notice of public hearing was mailed to: parties of record, property owners within 300 feet of the subject site, Recognized Neighborhood Associations, and posted on the site on or before April 4, 2008.

Staff Recommendation: Approve with Conditions

Project Description

The applicant is seeking a Conditional Use Permit to construct a new 20,563 square foot, two-story (daylight basement) multi-purpose facility to be built central to the site near the existing building and will be connected via covered walkways. The new building will be utilized for worship, fellowship, and recreation. The applicant is asking that the construction of the new facility be phased over several years. The existing facility will be used for administrative offices and education. The applicant has also noted that child care services may be provided onsite though no existing service is provided at this time.

The applicant is also asking for additional parking in excess of what is allowed by City code of one stall.

As proposed, the applicant is seeking to encroach into Category II and a Type 5 stream critical area buffer by as much 40%.

Site Context

The site is approximately 5.38 acres. In addition, the Church owns two other adjacent parcels totaling approximately 5 acres and is encumbered by wetlands and their associated buffers. The property is zoned residential Multi-family (RM-18). The properties to the north are zoned single-family residential and developed with single-family homes in the Westbrook Park subdivision. The properties to the east across Black Lake Boulevard are zoned Professional Office/Residential Multi-family (Professional Office/Multi-family), to the south is the city of Tumwater and is zoned Light Industrial, and to the west is Single-family (R-4) which is currently under application for a 293-lot subdivision, which if approved, should improve 25th Avenue along the Church's southern property line accessing Black Lake Boulevard.

The site is characterized by rocky soils, slopes, and wetlands on the northern and western boundaries.

Background Information

The City of Olympia's Site Plan Review Committee met with representatives of the Church on July 20, 2005. Subsequent to that meeting, an application for Conditional Use Permit was received on July 11, 2006. To date, City staff conducted Concept Design Review before the Design Review Board on March 8, 2007.

APPLICABLE POLICIES AND STANDARDS

The Hearing Examiner may approve certain uses because their unusual size, infrequent occurrence, special requirements, possible safety hazards of detrimental effects on surrounding properties, and other similar reasons are classified as conditional uses. These uses may be allowed in certain districts by a Conditional Use Permit granted by the Hearing Examiner. Prior to granting such a permit, the Hearing Examiner shall hold a public hearing, unless otherwise provided for in this code, and determine that all applicable conditions will be satisfied, (OMC 18.48.020).

1. Olympia Municipal Code Title 12 - Chapter 12.02 Olympia Development Standards, Section 12.02.020 **Engineering Design and Development Standards (EDDS), November 2004 Edition** (Standards) was adopted by Ordinance No. 6321.
2. Olympia Municipal Code Title 13 - Chapter 13.16 Storm and Surface Water Utility, Section 13.16.017 **City Of Olympia Stormwater Manual, 2005** (Manual) was adopted by Ordinance No. 6345.
3. Olympia Municipal Code Title 14.
4. Olympia Municipal Code Title 16 - Chapter 16.60 Tree Protection and Replacement Olympia Engineering Design and Development Standards 4.G.100 (street trees).
5. Olympia Municipal Code Title 18.
6. City Of Olympia Comprehensive Plan.

ENGINEERING REVIEW

The Engineering Division's review of this Land Use Application is complete. The plans date-stamped November 7, 2007, (Attachment T), and Drainage Report date-stamped July 12, 2006, (Attachment AA), with a comment letter and soils report attached, dated October 12, 2007, (Attachment AA). These were used for the review.

1. **Requirements 2.040, Frontage Improvements in General 2.040.A (Standards)** - Unless deferred or exempt as provided for in the Standards, any development permit authorizing a development will require that the developer construct or install frontage improvements.

Streets and Alleys 2.040.B, General 2.040.B.1 (Standards) - Streets and alleys will be designed and constructed in conformance with the provisions of Engineering Design and Development Standards, Chapter 4. The minimum requirements established by the current editions of the American Association of State Highway and Transportation Officials (AASHTO) and the Institute of Transportation Engineers (ITE) standards, and as identified by Table 11, Chapter 4. **Access to Developments 2.040.B.2 (Standards)** - A development will abut a public right-of-way and have public right-of-way frontage with site access to one or more streets improved to comply with the standards as set forth in Chapter 4 of the Engineering Design & Development Standards.

Recommended Finding: This development currently has right-of-way frontage on one street, BlackLake Boulevard which is designated a three lane Arterial Street section.

Streets and Alleys, Alignment and Location 2.040.B.3 - Proposed streets and other primary accesses will be aligned with existing streets or accesses as identified in the

Transportation Element of the Olympia Comprehensive Plan. Street alignments will relate, where practical, to natural topography, and will be selected so as to minimize grading and avoid excessive runoff. Alignment and connections of newly constructed public streets will be provided in accordance with the following conditions and Table II, Chapter 4, unless otherwise prohibited: c. Streets will be located for the development of adjoining land.

Street intersections – 2,040 6c. Right-of-way and curb radii will be provided at all intersections in accordance with chapter 4 of the Engineering Design & Development Standards.

New Streets, Half Streets, and Limited Access to Streets. - 2.040 8, 9, & 10. Under Section 8, New Streets, it requires that streets designated by the City's officially adopted Comprehensive Plan and shown to be within the boundaries of a development, after completion of a TIA (Traffic Impact Analysis) by the Applicant, the developer may be required to dedicate the entire right-of-way and construct improvements as described in Chapter 4 of the Engineering Design & Development Standards. Where said street is adjacent to a boundary of a development, the developer may be required to dedicate the necessary right-of-way and construct improvements as described for half of the street.

Under section 9, Half Streets, it states that the construction of half streets will be permitted only along the boundaries of a development. Pavement at least 20 feet in width or as required for that street classification (measured from gutter to gutter line), will be provided and an adequate right-of-way width will be dedicated. As required by the Olympia Fire Department, "No Parking" signs will be installed as required to ensure fire access, with the needed spacing.

Under Section 10, Limited Access to Streets, it states vehicular access rights to an arterial or major collector will be restricted.

Recommended Finding: *As per the City's Comprehensive Plan, a Major Collector Street has been called out approximately along the south property line of the subject property, therefore provide right-of-way dedication and construction of half of Major Collector Street along the south property line of the subject property including intersection improvements to Black Lake Boulevard.*

The proposed construction of frontage improvements of ½ of a 2- to 3-lane Arterial Street along the full Black Lake Boulevard frontage is conceptually approved.

2. **Water 2.050.B (Standards)** - The developer shall install water facilities in accordance with the provisions of Chapter 6 of the Engineering Design & Development Standards.

Recommended Finding: The City has capacity for this development's domestic water and fire suppression system requirements. A City water main exists on the Black Lake Boulevard frontage to the proposed project. The proposed off site and on site water main improvements and connections on Black Lake Boulevard are conceptually approved.

- A. Install water main extensions within the required Comprehensive Plan Major Collector street along the south property line of the development.
- B. Provide details on the engineering submittal as per the City's Engineering Land Use Completeness Checklist Review, water portion.

3. **Sewer 2.050.A (Standards)** - The developer shall install sewer facilities in accordance with the provisions of Chapter 7 of the Engineering Design and Development Standards.

Recommended Findings: The City has capacity for this development's anticipated sanitary sewer discharge. This project will be required to extend a sewer main on site from Black Lake Boulevard from the existing sewer mains to all on site sewers. The proposed sanitary sewer main extensions and connections are conceptually approved with the following conditions;

- A. Install sewer main extensions within the required Comprehensive Plan Major Collector street along the south property line of the development.
- B. Provide details on the engineering submittal as per the City's Engineering Land Use Completeness Checklist Review, sewer portion.

4. **Storm Drainage 2.050.C (Standards)** - The developer will provide for the treatment storage and disposal of surface drainage through a storm drainage system designed to the current City of Olympia, Stormwater Manual, January 2005 (Manual) and Chapter 5 of the Engineering Design and Development Standards. **General 5.010 (Standards)** - The standards established by this chapter are intended to represent the minimum standards for the design and construction of storm drainage facilities. The referenced document "Stormwater Manual" (Manual) is considered a part of this chapter of the Engineering Design & Development Standards. The Manual sets forth the minimum drainage and erosion control requirements as supplemented herein.

Recommended Findings: The City has agreed to a fee in lieu of detention as a last resort if no other options are available; however this development appears to have other detention options which must first be explored and implemented. The amount of detention that is left after these other options have been maximized on the site will be considered for fee-in-lieu of detention. Therefore the applicant needs to fully explore the use of the following detention options for this site. Provide the maximum amount of detention for each option type, (the final site detention will be a combination of several types of storage).

- A. Expanding and utilizing the existing detention facilities on the site.
- B. Creating new detention facilities on the site. Note that stormwater ponds are an allowable use of the outer 50% of a wetland buffers. Note that ponds can be built above the existing bedrock on the sides of existing slope.
- C. Utilize underground detention in-fill portions of the site. Given the bedrock, deep excavation is not practical on this site but the site grading plan shows that portions of the site will be filled 5 to 10 feet deep. These sections could be used to provide detention, i.e., SW corner of site.
- D. Using permeable pavements such as sidewalks and parking areas. The upper parking area is flat and provides a good candidate for permeable pavement.
- E. The ideal location of the stormwater mitigation on this site is the NE corner of the lot. The owner may consider purchasing additional land upon which to build their stormwater facility. The additional land would be wetland buffer which has little building value but can be used for stormwater ponds.

It is evident that the detention volume for the site will not be met in one location by one type of detention storage. The point of the analysis is to determine the maximum amount of each type of detention on the site. The analysis should include the storage volume required for the site and then determine the maximum amount of each type of storage volume which can be placed on the site.

The expansion or new above ground detention facility does not have to be connected to the existing above ground detention; small detention ponds can be placed in steps going up the hill. Each pond can be progressively higher with each providing a small amount of detention. Contech has filters which require less than 2.3 feet of head to operate.

The underground detention in the fill areas is a viable option. Hydrostatic pressure in retaining walls is something to be designed for. Loading on retaining walls does not make this approach impractical.

The permeable pavements can be used for flow control. Infiltration is not needed for permeable pavement to be utilized as flow control. If setback to the building footings are a concern, the permeable pavement section can be lined to prevent infiltration.

The applicant can also utilize off site detention. The most viable location for detention is the NE corner of the lot. The purchase of additional land may be the most cost effective way to provide detention for the site.

In support of the analysis, provide a site plan which shows where each type of storage is possible, show which areas are not available due to bedrock, setbacks, buffers etc. Provide a summary table of how much detention volume is available for each type of storage.

Erosion Control Comments

- 1) Provide an erosion control plan which is in accordance to the City Of Olympia Stormwater Manual Volume II.
- 2) There are clearing and grading time limits in effect in Olympia. They should be in the stormwater site report and written on the plan sheets. The limits are in Volume I Section 2.5.2 Element 12 and Volume II Chapter 3.

Drainage Report Format/Information

- 1) The Olympia manual describes in Volume 1 Section 3.1.7 what is needed in a stormwater site plan. Format the stormwater site plan to the manual guidelines.
- 2) Provide electronic copies of the WWHM runs used to size the facilities as per Volume 1 Section 3.1.7.

5. **Solid Waste 8.0 (Standards)** - The developer will provide for the waste management/recycling for collecting of all solid waste generated from all occupied residential premises within the City a minimum of once every two weeks. System to be designed to the current Chapter 8 of the Engineering Design and Development Standards.

Recommended Finding: The City has capacity for this development's anticipated solid waste. At the time of engineering permits, the solid waste locations will be determined.

6. **Traffic Impact Analysis –**

Recommended Findings: The City has reviewed the Transportation Impact Analysis and finds that the project impact does justify street improvements across both BlackLake Boulevard and the Comp. Plan Major Collector shown along the south property line of the Church project. Transportation impact fees will be required at time of building permits.

URBAN FORESTRY

The Urban Forestry review of this Land Use Application is complete, and was based on the Level V - Tree Protection plan – prepared by Washington Forestry Consultants – date

stamped January 09, 2007, and the Site plan set, Prepared by Foster and Williams –date-
stamped January 09, 2007

1. **16.60.070 Tree Plan Review Standards** - For all development projects, the following Urban Forestry design standards and provisions shall apply.

A. Preservation and conservation of wooded areas and trees shall have priority over development when there are feasible and prudent location alternatives onsite for proposed building structures or other site improvements, as identified by the Site Plan Review Committee, as applicable. This may require site redesign including, but not limited to: redesign of streets, sidewalks, stormwater facilities, utilities; changing the shape and size of the parking lot; reducing or limiting proposed site grading; and changing the locations of buildings or building lots.

B. Tree preservation priority. In designing a development project and in meeting the required minimum tree density, the applicant shall preserve the following trees in the following order of priority. (Trees to be preserved must be healthy, windfirm, and appropriate to the site at their mature size, as identified by a qualified professional forester).

- 1) Landmark Trees.
- 2) Specimen Trees.
- 3) Critical Area Buffer. Trees located within or adjacent to critical area buffers. (Those trees within the buffer may count up to 50 percent of the required tree density.)
- 4) Significant Wildlife Habitat. Trees located within or buffering Significant Wildlife Habitat.
- 5) Other individual trees or groves of trees.

C. On sites where there are currently inadequate numbers of existing trees, or where the trees are inappropriate for preservation, as determined by the Urban Forester, then replacement tree planting shall be required. In designing a development project and in meeting the required minimum tree density, the following trees shall be planted in the following order of priority:

- 1) Critical Area Buffers, Significant Wildlife Habitat. Trees planted within or adjacent to Critical Areas and Significant Wildlife habitat areas.
- 2) Stormwater retention/detention ponds. Trees planted adjacent to Stormwater retention/detention ponds.
- 3) Landscaping. For residential subdivisions this may include entrance landscaping, traffic islands, separate deeded tree tracts, and other common areas.
- 4) Individual residential building lots. Trees planted on individual lots.

2. 16.60.080 – Tree density requirement

- A. Minimum Tree Density Requirement Established. A minimum tree density of 30 tree units per acre is required on the buildable area of each site. The tree density may consist of existing trees, replacement trees or a combination of existing and replacement trees, pursuant to the priority established in Section 16.60.070. For the purpose of calculating required minimum tree density, critical areas, critical area buffers, City rights-of-way and areas to be dedicated as City rights-of-way shall be excluded from the buildable area of the site.

Recommended Findings: The applicant has provided a tree protection and replacement plan, prepared by a qualified professional forester pursuant to the requirements established in OMC 16.60.

Staff has reviewed the Tree Protection and replacement plan prepared by Washington Forestry Consultants, dated January 9, 2007. The site is currently developed as Church facility with associated parking lots, etc. There are existing landscaping trees as well as natural forests onsite associated with wetlands and wetland buffers.

The total site area is 5.37 acres. The buildable area of the site is 5.37 acres. (gross site area minus rights-of-way and critical areas) which requires a minimum tree density of 161 tree units. The applicant has proposed the preservation of 142 tree units. This is 19 tree units short of the required minimum. They are, however, preserving an additional 257 tree units within the wetland areas that are not countable due to the way the credit is provided for these trees. They are also proposing the addition of 44 new trees on the submitted landscape plan prepared by Jeff Glander and Associates, dated January 9, 2007.

PLANNING

1. **OMC 18.04.060(U), PLACES OF WORSHIP.** The following requirements apply to all places of worship subject to conditional use approval.
- A. Location. Before a place of worship may be located in an R-4, R 4-8, R 6-12, MR 7-13 or MR 10-18 district, at least one (1) of the following locational criteria shall be met:

- 1) The proposed place of worship shall be located within three hundred (300) feet of an arterial street, major collector street, or an access point on a highway; or
- 2) The site is within three hundred (300) feet of a school and/or park; or
- 3) The place of worship was the legal owner of the property prior to June 20, 1961.

Recommended Finding: This project meets these criteria. The project abuts Black Lake Boulevard and is an arterial Street.

- B. Plan Review. Plans showing the site layout and design of proposed buildings shall be submitted for approval to the Hearing Examiner and the Site Plan Review Committee.

Recommended Finding: The applicant has submitted plans for review. The application has been reviewed and substantive comments submitted from reviewing agents, and the proposal has been reviewed by the Design Review Board.

- C. Size. The minimum lot size shall be twenty thousand (20,000) square feet.

Recommended Finding: The lot size is approximately 5 acres.

- D. Dwelling Units. Any dwelling in conjunction with a place of worship shall comply with the provisions governing residential uses in the district where it is located.

Recommended Finding: No dwelling units are proposed.

- E. Conversion. No existing building or structure shall be converted to a place of worship unless such building or structure complies or is brought into compliance with the provisions of this code and any other applicable City regulations.

Recommended Finding: No conversions are proposed, all new structures will be constructed in accordance with the standards in place at time of building permit application.

- F. Screening. There shall be sight-obscuring screening along the perimeter of parking lots adjacent to a place of worship which are located across the street from or abutting a residential use. (See Chapter 18.36, Landscaping and Screening.)

Recommended Finding: The applicant has submitted a landscape plan which will meet the requirement to screen the new parking areas.

- G. Associated Uses. Uses sponsored by a place of worship such as day-schools, auditoriums used for social and sports activities, health centers, convents, preschool facilities, convalescent homes and others of similar nature shall be considered

separate uses subject to the provisions of the district in which they are located. (See Section 18.04.060(D) which provides for child care centers as accessory uses.)

Recommended Finding: The Church is proposing to offer before and after school childcare services at a later date. However, child care is a permitted use in the district subject to the provisions of OMC 18.04.060.D.

2. OMC 18.04.080 - TABLES: Residential Development Standards

Recommended Finding: The application as proposed meets the standards set forth in this matrix.

3. **18.32.410 - Streams and Important Riparian Areas - Typing System** - Streams are grouped into categories according to the Washington Department of Natural Resources - Water Typing System. The criteria, definitions and methods for determining the water type of a stream are found in WAC 222-16-030 and 031 and the Stream Type Conversion Table below.

STREAM TYPE CONVERSION TABLE	
Stream Typing (per WAC 222-16-031)	Stream Typing (per WAC 222-16-030)
Type 1 stream	Type "S"
Type 2 stream	Type "F"
Type 3 stream	Type "F"
Type 4 stream	Type "Np"
Type 5 stream	Type "Ns"

- A. **"Type 5 streams"** are those surface waters which meet the criteria of the Washington Department of Natural Resources, WAC 222-16-030 and 031, as a Type 5 Water. These streams are areas of perennial or intermittent seepage, and ponds and drainage ways having short periods of spring or storm runoff. Type 5 streams do not contain salmonid fish habitat.

Recommended Finding: The site plan (Attachment T) shows an "Ns" stream. The stream is further discussed in the November 7, 2007 'Wetland and Stream Buffer Enhancement Plan', (Attachment R, p. 1) prepared by Ecological Land Services, Inc.

4. **OMC 18.32.435 - Streams and Important Riparian Areas – Buffers** - A. For streams maintain the existing vegetation along both sides of a stream channel to whichever distance is greater:

- A. Where there is no ravine or where a ravine is less than ten (10) feet in depth, the existing vegetation on both sides of the stream for the distance set forth below for the applicable stream type, using the stream rating system in OMC 18.32.410 (refer to Figure 2):
- c. Type 4 and 5 streams: 150 feet.

***Recommended Finding:** The identified "Ns" or Type-5 stream requires a 150' buffer measured from the ordinary high water mark (OHWM). The applicant has illustrated a 100' buffer on the proposed site plan which encroaches within 80' in some locations. Any reduction of greater than 25% must be granted by Variance request and granted by the Hearing Examiner per subsection 'H' of this section, and accompanied by a "Biological Assessment." The applicant was informed of this in a substantive review letter (Attachment K, p.11). To date neither a Variance request or Biological Assessment has been submitted.*

However, OMC 18.37.70.A, B, and C state that existing structures and appurtenant uses within critical areas and their buffers shall be exempted from further review. Staff believes it would be reasonable for the applicant to argue that the area proposed for development existed as highly disturbed, as shown in the aerial photos (Attachment BB and CC) labeled as 1992 and 2006, prior to 2005 when the Critical Area Ordinance was enacted, and due to the impermeable, rocky nature of the soil as demonstrated by the Subsurface Investigations (Attachment O, and P) that further development would not increase the nonconformity. Should the Examiner find this to be true. The disturbed area to be developed would be delineated and marked in the field prior to any construction.

5. **OMC 18.32.535 - Wetlands and Small Lakes - Wetland Buffers** - Wetlands buffer areas shall be maintained between all regulated activities and wetlands to retain the wetlands' natural functions and values. The required width of the wetland buffer shall be determined as provided in the tables below. Wetland buffers are based upon the rating of the wetland pursuant to OMC 18.32.585.

Table X: Wetland Buffer Widths	
Wetland Characteristics	Wetland Buffer Width
Natural Heritage Wetlands	Not less than 250 feet
Bogs	Not less than 250 feet
Estuarine – Category I	250 feet
Estuarine – Category II	150 feet
Habitat score: 31 pts and more	300 feet
Habitat score: 30 pts	280 feet
Habitat score: 29 pts	260 feet
Habitat score: 28 pts	240 feet
Habitat score: 27 pts	220 feet

Habitat score: 26 pts	200 feet
Habitat score: 25 pts	180 feet
Habitat score: 24 pts	160 feet
Habitat score: 23 pts	140 feet
Habitat score: 22 pts	120 feet
Habitat score: 21 pts	100 feet
Habitat score: 20 pts	100 feet
Habitat score: 19 pts	100 feet
Water Quality Improvement Score: 24 – 32 pts, and Habitat score: 19 pts or less	100 feet
Category I or II Wetland – Not meeting any of the above criteria	100 feet
Category III Wetland – Not meeting any of the above criteria	80 feet
Category IV Wetland – Score for all three wetland functions is less than 30 pts	50 feet

- A. All wetland buffers shall be measured from the wetland boundary.
- B. The wetland buffer widths contained in OMC 18.32.535(B) presume the existence of a relatively intact native vegetation community in the buffer zone adequate to protect the wetland functions and values at the time of the proposed activity. If the vegetation and other buffer elements are inadequate, then the buffer shall be planted to a density of four hundred (400) tree units per acre pursuant to OMC 16.60 including an understory of native plants commonly found in riparian areas of Thurston County.
- C. The buffer for a wetland created, restored, or enhanced as compensation for approved wetland alterations shall be the same as the buffer required for the category of the created, restored, or enhanced wetland.
- D. The Department may allow modification of the required wetland buffer width by averaging buffer widths when all of the following conditions are met:
 - 1) The wetland has significant differences in characteristics that affect its habitat functions, such as a wetland with a forested component adjacent to a degraded emergent component or a “dual-rated” wetland with a Category I area adjacent to a lower rated area,
 - 2) The buffer is increased adjacent to the higher-functioning area of habitat or more sensitive portion of the wetland and decreased adjacent to the lower functioning or less sensitive portion,
 - 3) The total area of the buffer after averaging is equal to the area required without averaging, and

- 4) The buffer at its narrowest point is never less than seventy five percent (75%) of the required width.
- E. The Department may reduce the required wetland buffer widths by twenty-five percent (25%) under the following conditions:
- 1) For wetlands that score twenty (20) points or more for the habitat functions, if both of the following criteria are met:
 - a. A relatively undisturbed, vegetated corridor at least one hundred (100) feet wide is protected between the wetland and any other priority habitats as defined by the Washington State Department of Fish and Wildlife. The corridor must be protected for the entire distance between the wetland and the priority habitat by legal protection such as a conservation easement.
 - b. Measures to minimize the impacts of different land uses on wetlands, such as those described on Table 8c-11, Appendix 8-C, of *Wetlands in Washington State – Volume 2: Guidance for Protecting and Managing Wetlands* (2005) Ecology publication #05-06-008, as amended or revised, are applied. Examples of these measures include directing lighting away from wetland, locating noise generating activities away from the wetland, and densely planting the buffer to act as barrier to pets and human disturbance.
 - 2) For wetlands that score nineteen (19) points or less for habitat function, apply the provisions of OMC 18.32.535(G)(1)(b).
- F. The Hearing Examiner may allow:
- 1) Reductions to the required wetland buffer width greater than those described in OMC 18.32.535 G on a case-by-case basis when it can be demonstrated that:
 - a. The provisions of OMC 18.32.535(G) have been evaluated by a Wetland Mitigation Report described in OMC 18.32.590, and
 - b. The proposed wetland buffer width will protect the wetlands' functions and values based upon the Wetland Mitigation Report and the best available science.
 - 2) Buffer averaging up to fifty percent (50%) of the required width, except for a Category IV wetland, when it can be demonstrated that:
 - a. It will not reduce wetland functions or values according to a Wetland Mitigation Report described in OMC 18.32.590;
 - b. Measures to minimize the impacts of different land uses on wetlands, such as those described on Table 8c-11, Appendix 8-C, of *Wetlands in Washington State – Volume 2: Guidance for Protecting and Managing Wetlands* (2005) Ecology publication #05-06-008, as amended or revised, are applied;
 - c. The total area contained in the buffer area after averaging is no less than that which would be contained within the standard buffer; and

- d. The wetland buffer has been placed in a critical areas tract or a conservation easement.

Recommended Finding: The wetlands observed in the field appear to be Type II, as stated in Attachment S. A variance request must be sought from the Hearing Examiner for reductions greater than 25%. The applicant has not submitted a variance request, but has submitted a mitigation plan (Attachment R) to this end. However, staff takes the position that it is inadequate for the follows reasons:

- (1). The plan can not be applied to both the stream and wetland without a biological assessment;
- (2). Area proposed for enhancement or otherwise averaging is disturbed. All reduction are based on well-vegetated with native species, this also applies to buffer averaging, and the site has no available area for buffer averaging;
- (3). The applicant has not demonstrated as per OMC 18.35.135 that the impacts have been minimized to mitigate their potentially harmful effects; i.e. - reduced parking area through ridesharing, or use of public transportation, the construction of stormwater vaults to limit the use and area for stormwater, etc.

As stated above, it appears that disturbed areas could be considered as existing nonconformities within required buffers and exempt from further review so long as expansion of development does not encroach into undisturbed buffer areas.

6. OMC 18.32.580 - Wetlands and Small Lakes - Wetland Boundary Delineation

- A. The wetland boundary, wetland buffer, and any critical area tract shall be identified on all grading, landscaping, site, utility or other development plans submitted on the project.

Recommended Finding: The applicant was informed in the substantive review letter (Attachment K) of the requirements.

"The wetland buffer is not shown on all required plan sheets. All delineated wetlands and their associated buffers must be accurately labeled and shown on the project plan sheets. Required buffers may be reduced by the City Of Olympia Hearing Examiner if greater than 25% and requested by the applicant in writing on forms provided by the city." (Excerpt from Attachment K.)

7. OMC 18.32.605 - Landslide Hazard Areas - Applicability and Definition

- A. "Landslide Hazard Area" means those areas which are potentially subject to risk of mass movement due to a combination of geologic, topographic and hydrologic factors; and where the vertical height is ten (10) feet or more. The following areas are considered to be subject to landslide hazards:

- 1) Steep slopes of forty (40) percent or greater (refer to Figure 6);
- 2) Slopes of fifteen (15) percent or greater, with:

- a. Impermeable subsurface material (typically silt and clay), frequently interbedded with granular soils (predominantly sand and gravel), and
 - b. Springs or seeping groundwater during the wet season (November to February) (Refer to Figure 7).
- 3) Any areas located on a landslide feature which has shown movement during the past ten thousand years or which is underlain by mass wastage debris from that period of time.
- B. Not included in the definition of "Landslide Hazard Area" are those man-made steep slopes which were created in conformance with accepted construction standards or which meet the requirement of 18.32.640(C).

Recommended Finding: There are slopes on the western boundary adjacent to the proposed parking areas which appear to be greater than 40% and ten or more feet in height. The tops of all steep slopes and their associated buffers meeting the above criteria must be shown on the project plan sheets. The specific areas meeting the criteria of 18.32.605(B) must be supported by a geotechnical report or engineered plans.

8. **OMC 18.32.630 - Landslide Hazard Areas - Buffers**

- A. In order to minimize damage to personal health and property due to landslides, a buffer of undisturbed vegetation as provided in this section shall be maintained between all regulated activities and landslide hazard areas. Development must maximize the retention of existing vegetation and retains all vegetation outside of the developed building area. Vegetation, in the form of ground cover, shrubs or trees, assists in stabilizing the ground surface. Damage to existing vegetation through removal or disturbance can have significant impacts on slope stability. Any removal of vegetation, therefore, must be minimized in steep slope areas. Where removal of vegetation cannot be avoided in order to accommodate a permitted development or to stabilize a slope, an acceptable plan to fully revegetate and restabilize affected areas must be provided.
- B. The required buffer width is the greater amount of the following distances measured from the edges of the landslide hazard area (except for Subsection B.4 below):
 - 1) From all sides of the landslide hazard area limits: the distance recommended by the engineering geologist or geotechnical engineer;
 - 2) At the top of the landslide hazard area: a distance of one-third (1/3) the height of the slope,
 - 3) At the bottom of the landslide hazard area a distance of one-half (1/2) the height of the slope;
 - 4) Fifty (50) feet in all directions from a seep; or
 - 5) The minimum distance recommended by the engineering geologist or geotechnical engineer (Refer to Figures 6 and 7).

- C All landslide hazard area buffers shall be measured from the landslide hazard area as located in the field.
- D The landslide hazard area, its buffer, and any critical area tract shall be identified on all grading, landscaping, site, utility or other development plans submitted on the project.
- E The Department may reduce the required landslide hazard areas buffer widths except buffers recommended pursuant to OMC 18.32.630 B 5, up to fifty (50) percent on a case-by-case basis when supported by a Geotechnical Report including the following:
 - 1) Buffer width reduction is supported by a Geotechnical Report described in OMC 18.32.640 that evaluates the criteria in OMC 18.32.630(E);
 - 2) The existing buffer area is well-vegetated;
 - 3) The protection of the landslide hazard area buffer using a fence and sign have been evaluated, as described in OMC 18.32.145;
 - 4) Topographic conditions of the site and the buffer have been evaluated;
 - 5) The intensity and type of the land uses adjacent to the buffer have been evaluated with respect to minimizing potential adverse impacts upon the landslide hazard area; [e.g. publicly owned parks, designated open space areas in plats and binding site plans, or lands with a recorded conservation easement];
 - 6) The site has been evaluated with respect to its site design and building layout to minimize potential risks with landslide hazard areas; and
 - 7) A smaller buffer will be adequate to protect property from the landslide hazard based on the best available science.
- F The Hearing Examiner may allow reductions greater than those described in OMC 18.32.630(E) to the required landslide hazard area buffer width on a case-by-case basis when it can be demonstrated that:
 - 1) The provisions of OMC 18.32.630(E) have been evaluated by a Geotechnical Report described in OMC 18.32.640, and
 - 2) Based upon the Geotechnical Report and the best available science it is demonstrated that the proposed landslide hazard area buffer width will be adequate to protect personal health and property from a landslide from this site.

Recommended Findings: Buffer reductions greater than 50% may be granted by the City Of Olympia Hearing Examiner, buffer reductions up to 50% may be granted by staff. In either case a written request must be submitted and supported by a geotechnical report pursuant to this chapter.

- 9. **OMC 18.38.100A. Required Vehicular and Bicycle Parking.** A minimum number of bicycle parking spaces are required as set forth in Table 38-01 below. The specific number of motor vehicle parking spaces set forth in Table 38-01 +/- ten percent (10%) shall be provided, unless varied pursuant to OMC 18.38.080 or other provision of this Code. Any change in use

which requires more parking shall install vehicular and bicycle facilities pursuant to Table 38.01 and consistent with the location standards of OMC 18.38.220.

Recommended Finding: The applicant has requested a variance of 1-parking stall in excess of what is allowed by the code. The applicant has demonstrated in the set of plans (Attachment U, p.A2.0) that 450 seats will be provided. At a ratio of 1-stall per 4-seats, 112.5 stalls would be allowed. Combined with an increase of 11.25 allowed administratively, 124 stall would be allowed. The applicant has requested 125 stalls without submission of a parking variance request, or parking demand study; thus, staff recommends denial of the one excessive stall. The applicant must also show how they will meet the bicycle requirements.

10. **OMC 18.40.060(D) - General standards - Lighting.** All display and flood lighting shall be constructed and used so as not to unduly illuminate the surrounding properties and not to create a traffic hazard.

Recommended Finding: The lighting plan provided (Attachment T or U) appears to meet the requirements of this section.

11. **Comprehensive Plan.** The applicable Comprehensive Plan policies are as follows:

Recommended Finding: Other than the requirement for a neighborhood collector found on the Transportation Map, no applicable Goals/Policies of the Comprehensive Plan were identified.

FURTHER ANALYSIS

It is noted that Development Engineering has required, per the City of Olympia's Comprehensive Transportation Plan, half of major collector. Should this requirement be upheld by the Hearing Examiner, it is anticipated that the entire site plan would require significant redesign in response.

Recommended Finding: A significant modification of the site plan so extensive that it would essentially require a new review should be remanded back to staff for resubmission, review, and a new public hearing. A remand back to staff for resubmittal would preserve the applicant's vesting status; however, all appropriate fees consistent with Title 4 of the Olympia Municipal Code would apply.

RECOMMENDATION

City staff recommends approval of the Conditional Use Permit with the following conditions.

1. The project must conform to all the standards set forth in the Engineering Design & Development Standards.
2. Frontage Improvements and Site Civil Improvements shall be constructed according to the Standards, as conceptually shown on the plan set titled Preliminary Site Utility Plan as

follows: Black Lake Boulevard to ½ an Arterial street section. Design and install ½ a Major Collector Street section along the south property line of the property.

3. The developer will install water facilities in accordance with the provisions of Chapter 6 of the Engineering Design and Development Standards. The City has capacity for this development's domestic water system and fire suppression system requirements.
 - A Design and install water main extension improvements within the required Major Collector Street extension along the south property line of the project,
4. The developer will install sewer facilities in accordance with the provisions of Chapter 7 of the Engineering Design and Development Standards. The City has capacity for this development's anticipated sanitary sewer discharge with the following conditions:
 - A Design and install sewer main extension improvements within the Major Collector Street extension along the south property line of the project.
5. The stormwater system and must be revised as per the attached storm water review comments.
6. A (TIA) is required to verify and demonstrate the impact of the project to existing streets and show the traffic circulation and the nexus and proportionality for the Comprehensive Planned Major Collector Street. Transportation impact fees will be required.
7. The developer will provide for the waste management/recycling for collecting of all solid waste generated from all occupied residential premises within the City a minimum of once every two weeks. The system is to be designed to the current Chapter 8 of the Engineering Design and Development Standards.
8. Before construction begins the applicant shall submit a complete set of detailed construction drawings to the Community Planning and Development Department for review and approval. Construction drawings shall be prepared according to the Engineering Design and Development Standards.
9. General Facility Charges for City utilities (Water, Sanitary Sewer, Stormwater, and Solid Waste) and the LOTT sanitary sewer Capacity Development Charge will be assessed at the time engineering construction permits are issued.
10. The developer shall file an agreement with the City to assure the full and faithful performance of the operation and maintenance of all public improvements and the site stormwater facilities for a period of two years following final construction approval. This guarantee through the appropriate surety shall be in place and approved by the City before final construction approval. The amount of the bonding will be 25 percent of the cost of the improvements, or as determined by the Development Engineer. In addition a bond or other allowable securities will be required by the City to guarantee the performance of work within

existing public rights-of-way or maintenance of required public infrastructure intended to be offered for dedication as a public improvement. Bonds or other allowable securities to guarantee work in an existing public right-of-way is required to be in place and submitted to the City prior to release of any approvals or permits for such work. The type and amount of security will be pursuant to code, or if not specified, be at a minimum of \$4,000 or 125 percent of the value of the work performed, whichever is greater, at the discretion of the City. Types of securities include, but are not limited to, a bond with a surety qualified to do a bonding business in this state, a cash deposit, an assigned savings account, or a set-aside letter as acceptable by the City Attorney.

11. Should applicant seek phasing of the development, all landscaping and frontage improvements must be installed as part of Phase I.
12. Prior to issuance of any permits the applicant shall include tree fencing details and locations on the grading plan submitted for civil review.
13. Prior to any further ground disturbing activity, the applicant and City staff shall agree to the limits of disturbed area within all critical area buffers at the site. This area must be protected with fencing during construction, and noted on all plans.
14. Pursuant to #13 above, all critical areas and there associated buffers will be placed in a conservation easement, and posted at 75' intervals with a sign containing wording consistent that found in OMC 14.32.145.
15. In order to protect the welfare of the adjacent wetland, stream and near by residential properties all areas within the buffer as measured 100' from the OHWM of the Type-5 stream and not currently occupied by structures or utility facilities, should be planted with trees to a density of four hundred (400) tree units per acre pursuant to OMC 16.60 including an understory of native plants commonly found in riparian areas of Thurston County.
16. The top of slope of a landslide hazard area must and its associated buffer must be shown on all plans. Any proposed encroachment into these buffers, i.e. - parking areas must be specifically addressed and supported by a geotechnical report.

Submitted by: Kraig Chalem, Associate Planner
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E-mail: kchalem@ci.olympia.wa.us

Staff Report Issued on Behalf of the Site Plan Review Committee (SPRC)

Exhibits: 1. Staff Report with Attachments

Attachments:

- A. General Land Use Application; Received July 11, 2006 (3-pages)
- B. Conditional Use Permit Application; Received July 11, 2006 (12-pages)
- C. Concept Design Review Application; Received July 11, 2006
- D. Memo to the SPRC from the DRB; Dated March 16, 2007
- E. SEPA Checklist; Received July 11, 2006 (11-pages)
- F. SEPA DNS; Issued January 31, 2008 (2-pages + map)
- G. SEPA Comment from the City of Tumwater, Dated February 14, 2008
- H. SEPA Comment for the Dept. of Ecology Received February 15, 2008
- I. SEPA Comment for Andrew McMillan, Sent February 14, 2008
- J. Notice of Land Use Application; Mailed February 22, 2007 (3-pages)
- K. Substantive Review Letter to Applicant; Dated July 2, 2007 (17-pages)
- L. Title Report from First American; Received November 7, 2007 (19-pages)
- M. Memo from Jennifer Rosnagle; dated October 9, 2007 (4-pages)
- N. Memo from Jeff Schramm, dated September 14, 2005 (18 pages)
- O. Subsurface Investigation Report; Received November 7, 2007 (12-pages)
- P. Subsurface Investigation Report; Received July 12, 2006 (9-pages)
- Q. Forestry Report; Received January 9, 2007 (10-pages)
- R. Wetland and Stream Buffer Enhancement Plan, Received November 7, 2007 (19-pages + 2 maps)
- S. Wetland Delineation; Received July 11, 2006 (14-pages + 1 map)
- T. Lighting Plan Set (11"x17"); Received November 7, 2007 (6-pages)
- U. Lighting Plan Set (Full Size); Received November 7, 2007 (6-pages)
- V. Letter from Foster & Williams Architects; Received November 7, 2007 (3-pages)
- W. Transmittal Letter from Olympia Fire Department, Received June 18, 2007
- X. Letter from Thurston County Department of Public Health and Social Services; received April 4, 2007
- Y. Letter from Department of Ecology; Received March 20, 2007
- Z. Letter from Stephen Masini; Received February 28, 2007
- AA. Preliminary Stormwater Site Plan; Received July 12, 2006
- BB. 1992 Aerial Photo
- CC. 2006 Aerial Photo



**HEARING EXAMINER
DECISION CLARIFICATION**

Community Planning & Development Dept
837 - 7th Ave SE - PO Box 1967
Olympia WA 98507-1967
Phone: 360.753.8314
Fax: 360.753.8087
cpdinfo@ci.olympia.wa.us
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September 29, 2008

Greetings,

**Subject: Hope Community Church - Hearing Examiner Decision Clarification
Case # 05-1429**

The enclosed decision clarification of the Olympia Hearings Examiner hereby issued on the above date may be of interest to you.

If you have any questions or need further information regarding this clarification, please contact the City of Olympia, Community Planning and Development Department, at 837 Seventh Avenue SE, or at PO Box 1967, Olympia, WA 98507-1967, by phone at 360-753-8314, or by e-mail at cpdinfo@ci.olympia.wa.us.

Sincerely,

Kraig Chalem
Associate Planner
Community Planning and Development

KC/re

Enclosure

CLARIFIED DECISION
OF THE HEARING EXAMINER OF THE
CITY OF OLYMPIA

CASE NO: File No. 05-1429 (Hope Community Church Conditional Use Permit – Clarification Decision)

APPLICANT: Hope Community Church

SUMMARY OF REQUEST:

The Applicant requests clarification of the Hearing Examiner decision in this matter, dated July 22, 2008, which approved a conditional use permit to construct a new church building, with associated parking and other improvements.

LOCATION OF PROPOSAL:

Thurston County Assessor's Parcel No. 12820440500 in Sec. 20, T18N, R2W, W.M.

SUMMARY OF DECISION:

The decision approving the conditional use permit is clarified as set out below.

HEARING AND RECORD:

The Hearing Examiner decision in this matter approving the conditional use permit, dated July 22, 2008, identifies the exhibits admitted into the record and the individuals who testified in relation to the application for a conditional use permit. The following two exhibits relating to the request for clarification are also admitted into the record:

Exhibit 12. E-mail sent July 22, 2008 from Thomas Bjorgen to Loren Combs and Kroydan Chalem; e-mail sent July 22, 2008 from Loren Combs to Thomas Bjorgen and Kroydan Chalem; and e-mail sent July 23, 2008 from Thomas Bjorgen to Loren Combs and Kroydan Chalem.

Exhibit 13. Letter dated August 14, 2008 from Loren D. Combs to Thomas Bjorgen.

ORDER

A. Procedural background and standards for requests for clarification.

On July 22, 2008, this Hearing Examiner issued a decision granting a conditional use permit to Hope Community Church, with conditions, for construction of a 20,563 square foot multi-purpose church building, with associated parking and other improvements, on its property of 5.38 acres. The property on which this project would be located is zoned Residential Multifamily (RM-18) and is given the same designation under the Comprehensive Plan.

The Findings of Fact of the July 22, 2008 decision granting the conditional use permit describe the proposal in detail. The Conclusions of Law in that document set out the relevant legal analysis, and the "Decision" section beginning on Page 28 sets out the detailed conditions to which the permit is subject.

On July 22, 2008, the Applicant's attorney, Mr. Combs, sent the Hearing Examiner an e-mail, which pointed out a possible ambiguity in the decision and requested its clarification. See Ex. 12. The Hearing Examiner responded the next day, stating that the request should follow the procedure for requests for clarification in Olympia Municipal Code (OMC) 18.75.070 and asking that all requested clarifications be consolidated in a single request. See Ex. 12. The Applicant did so, submitting the request for clarification found at Ex. 13 and the required filing fee. This request asks for clarification of the July 22, 2008 conditional use permit on the three issues discussed below.

Requests for clarification are authorized by OMC 18.75.070 A, which states that

"[a]ny interested party believing that a decision of the Hearing Examiner is ambiguous, vague, or internally inconsistent may request clarification of the decision by the Examiner. Such a request shall be submitted to the Department with the applicable fee and shall set forth the specific provision requiring additional clarity . . . Upon receipt of such a request, the Hearing Examiner may take action as the Examiner deems appropriate to the circumstances."

OMC 18.75.070 B specifies further that

"[a] request for clarification shall not provide an opportunity for reconsideration of a decision nor for introduction of new evidence. Except as ordered by the Examiner, the filing of a request for clarification shall not toll any appeal period or delay issuance of any permit."

Exhibit 12, above, contains the Applicant's preliminary request for clarification concerning the first issue discussed below and the Hearing Examiner's response concerning procedure. Exhibit 13 is the formal request for clarification. Neither of these

exhibits constitutes evidence prohibited by OMC 18.75.070 B, above. The following requests for clarification are judged under the standard of OMC 18.75.070 A: whether the decision is ambiguous, vague, or internally inconsistent.

B. The three points on which clarification is requested.

1. The dedication of right-of-way along the southern boundary of the site.

As a condition of the conditional use permit, the Department of Planning and Community Development asked that the Applicant be required to dedicate right-of-way for a future major collector along the southern boundary of the project site and construct a one-half street section with frontage improvements and civil improvements on that right-of-way. For the reasons set out in Conclusions of Law 31 through 47 of the July 22, 2008 decision, the requested dedication was held unconstitutional under Nollan v. California Coastal Commission, 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987); Dolan v. City of Tigard, 512 U.S. 374, 129 L.Ed.2d 304, 114 S.Ct. 2309 (1994); Burton v. Clark County, 91 Wn. App. 505, 527, 958 P.2d 343 (1998); and Unlimited v. Kitsap County, 50 Wn. App. 723 (1988).

This holding was reflected in Condition Q 1 of the July 22 decision, which stated that "The project must conform to all the applicable standards set forth in the Engineering Design and Development Standards, except as limited in this Decision."

In its request for clarification, the Applicant points out that the Decision section of the July 22 document does not contain any limitation of the dedication requirement. That holding, instead, was in the Conclusions of Law. Thus, the Applicant points out, Condition Q 1 could be read not to pick up the denial of the dedication which was expressed in the Conclusions.

The Applicant's point is well taken. The Conclusions of Law plainly rejected the requested dedication requirement along the site's southern boundary. Condition Q 1 was intended to embody that holding through the clause "except as limited by this Decision." However, that reference to "Decision" was ambiguous. It could refer either to the decision as a whole or to only the part labeled "Decision". If the latter reading were followed, then the dedication would effectively be required through Condition Q 1, since the Decision section itself did not limit the dedication. This reading would be contrary to the denial of the dedication in the Conclusions.

This ambiguity may be dissolved by modifying Condition Q 1 of the July 22, 2008 decision to read as follows:

"Condition 1 is incorporated as modified to read as follows: The project must conform to all the applicable standards set forth in the Engineering Design and Development Standards, except as limited in the Findings of Fact, Conclusions of

Law, or other conditions. Consistently with the Conclusions of Law, the Applicant is not required to dedicate right-of-way along the southern boundary of the site for the planned major collector."

This modification resolves the ambiguity and is the sort of clarification authorized by OMC 18.75.070. Therefore, Condition Q 1 of the July 22, 2008 decision is modified in this manner.

2. Western red cedar planting.

Finding 15 of the July 22, 2008 decision states that Mr. Haderly, one of the Applicant's consultants, testified that 100 Western red cedars will be planted in Area D, identified in the Enhancement Plan, Ex. 5, Att. E. The Enhancement Plan itself, however, shows only ten such trees to be planted in Area D. See Ex. 5, Att. E. To resolve this conflict, the last sentence of Condition G in the July 22 decision states that "[t]he Department Staff shall confer with Mr. McMillan and Mr. Haderly and determine the correct number of Western red cedars to be planted in Area D."

The request for clarification asks that this last sentence in Condition G be removed and replaced with "The Applicant shall plant 100 Western red cedar trees in area D". This request shows that the Applicant will plant the 100 Western red cedars in Area D, which removes the conflict between the testimony and Ex. 5, Att. E. This, as stated, is the conflict which gave rise to Condition G in the July 22 decision. Even though it does not address an ambiguity in the decision, it seems a proper function of clarification under OMC 18.75.070 to resolve this conflict. Therefore, Condition G of the July 22, 2008 decision is modified to read as follows:

"G. The Applicant shall follow all directions and recommendations and take all measures set out in the Wetland and Stream Buffer Reduction and Enhancement Plan, Ex. 5, Att. E. As part of these measures and requirements the Applicant shall plant at least 75 Douglas Fir and 75 Big leaf maples in Area A and at least 30 Western red cedars, 20 Oregon ash and 30 Sitka willows in Area C. In addition, the Applicant shall plant 100 Western red cedars in Area D, consistently with any applicable directions and recommendations in Ex. 5, Att. E."

3. Location of tree plantings.

Condition I of the July 22 decision granting the conditional use permit stated that:

"The Applicant shall inform Mr. McMillan when on-site decisions about the precise location of tree plantings will be made and shall allow McMillan to be present and express his opinion when such decisions are made."

Mr. McMillan, a nearby resident, is the Wetlands and Science Policy Manager for the state Department of Ecology and is certified as a professional wetland scientist by
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the Society of Wetland Scientists. Finding 18, Dec. of July 22, 2008. Mr. McMillan reviewed this project and pointed out shortcomings in its analysis of affected wetlands. Id. at Finding 19. In response to those criticisms, the Applicant revised its categorization of the wetlands and strengthened its enhancement measures. Id. Mr. McMillan also requested that he be included in the on-site decisions about tree locations, if feasible.

The Applicant objected to Mr. McMillan's request, stating that it would give a private citizen a type of approval authority over aspects of the proposal. The July 22 decision agreed with the Applicant that such authority would be improper, but characterized Mr. McMillan's request simply as asking to be present when decisions on tree locations are made and to be able to express an opinion on them. Finding 20. Because Mr. McMillan's expertise had well served this process, his request, subject to this limitation, was granted through Condition I.

The request for clarification states that the Applicant is willing to work with Mr. McMillan and allow his input, but asks that it be specified that the Enhancement Plan at on Ex. 5, Att. E governs site design and vegetation choices and that the City staff is responsible for interpretations.

Condition I of the July 22 decision only grants Mr. McMillan the right to be present and to express his opinion when on-site decisions about the precise location of tree plantings are made. This does not grant him any authority over the substance of any such decision, a point which is reinforced by Finding 20. Therefore, the requested clarification does not require any change in the wording of the July 22 decision.

C. Summary of Order.

1. Condition Q 1 of the July 22, 2008 decision is modified to read as follows:

"Condition 1 is incorporated as modified to read as follows: The project must conform to all the applicable standards set forth in the Engineering Design and Development Standards, except as limited in the Findings of Fact, Conclusions of Law, or other conditions. Consistently with the Conclusions of Law, the Applicant is not required to dedicate right-of-way along the southern boundary of the site for the planned major collector."

2. Condition G of the July 22, 2008 decision is modified to read as follows:

"The Applicant shall follow all directions and recommendations and take all measures set out in the Wetland and Stream Buffer Reduction and Enhancement Plan, Ex. 5, Att. E. As part of these measures and requirements the Applicant shall plant at least 75 Douglas Fir and 75 Big leaf maples in Area A and at least 30 Western red cedars, 20 Oregon ash and 30 Sitka willows in Area C. In addition, the Applicant shall plant 100


Western red cedars in Area D, consistently with any applicable directions and recommendations in Ex. 5, Att. E."

3. OMC 18.75.070 C authorizes, but does not require the Hearing Examiner to order that a clarified decision be subject to appropriate notice and an opportunity for appeal. The only effects of this clarified decision are (1) to affirm that dedication of right-of-way along the southern boundary of the site is not required, (2) to require the planting of 100 red cedars in Area D, instead of ten, and (3) to affirm that Mr. McMillan is to be consulted, but is given no authority over the substance of the affected decision. The first element does not change the July 22 decision. If the Department or any other person with standing objected to the denial of the dedication, it could have appealed that to Superior Court. The second element does change the substance of the decision, but in a way that increases the burden on the Applicant at its own request and enhances mitigation of the impacts of the proposal. This serves the interests of the parties other than the Applicant. The third element, as with the first, changes nothing in the decision. If any party objected to the scope of Mr. McMillan's role, it could have appealed.

For these reasons, there is no need to impose any additional period for appeal of the July 22 decision or this clarified decision. The Department Staff is directed to give notice of this decision to Mr. Combs on behalf of the Applicant and to any other persons who submitted comments or signed up at the hearing.

Dated this 17th day of September, 2008.

*mailed
09/26/08
Redwards*


Thomas R. Bjorgen
Olympia Hearing Examiner

**FINDINGS AND DECISION
OF THE HEARING EXAMINER OF THE
CITY OF OLYMPIA**

CASE NO: File No. 05-1429 (Hope Community Church Conditional Use Permit)

APPLICANT: Hope Community Church

SUMMARY OF REQUEST:

The Applicant requests a conditional use permit to construct a new church building, with associated parking and other improvements, a variance from Critical Area buffer requirements, and a modification of such requirements under the Critical Area Ordinance.

LOCATION OF PROPOSAL:

Thurston County Assessor's Parcel No. 12820440500 in Sec. 20, T18N, R2W, W.M.

SUMMARY OF DECISION:

The conditional use permit is granted, subject to conditions. With the buffer modifications allowed directly under the Critical Area Ordinance, the variance is superfluous and is not required. Therefore, no decision is made on the variance.

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HEARING AND RECORD:

The hearing on this request was held before the undersigned Hearing Examiner on May 14, 2008. The record was held open until June 11, 2008 for the submission of supplemental evidence according to the schedule at Ex. 6. At the hearing, the following individuals testified under oath:

Kraig Chalem, Associate Planner for the City of Olympia
Community Planning and Development Department
837 7th Avenue SE, P.O. Box 1967
Olympia, WA 98507

Alan Murley, Engineering Division
Community Planning and Development Department
837 7th Avenue SE, P.O. B
Olympia, WA

Jerry Heemstra
3133 Strathmore Circle
Tumwater, WA

Janelle Gibbs
6535 Johnson Point Road
Olympia, WA

Karl Alsen

4345 81st Avenue SW

Olympia, WA

Russ Gibbs

6535 Johnson Point Road

Olympia, WA

Len Williams

Foster and Williams, Architects

P.O. Box 102

Shelton, WA

Jeff Schramm

816 6th Street South

Kirkland, WA 98033

Tim Haderly

Ecological Land Services

1157 3rd Avenue

Longview, WA 98632

David Spiller

Hatton Godat Pantier

1840 Barnes Boulevard

Tumwater, WA

Loren D. Combs of the VSI Law Group appeared and presented argument for the

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Applicant.

The following exhibits are admitted as part of the official record of these proceedings:

Exhibit 1. Staff Report by Olympia Community Planning and Development Department in Case No. 05-1429, prepared by Kraig Chalem and dated May 14, 2008. This Exhibit includes the 23-page Staff Report and Attachments A through FF, identified on Page 23.

Exhibit 2. Eleven e-mails from members of the public on this proposal.

Exhibit 3. E-mail from Andy McMillan to Kroydan Chalem, sent May 8, 2008.

Exhibit 4. Olympia Comprehensive Plan Map Transportation 2025.

Exhibit 5. Binder containing Applicant's Hearing Brief and attachments.

Exhibit 6. E-mail from Thomas Bjorgen to Kroydan Chalem, sent May 15, 2008.

Exhibit 7. E-mail from Alan Murley to Loren Combs and Andrew McMillan, sent May 19, 2008.

Exhibit 8. E-mail from Kroydan Chalem to Thomas Bjorgen, sent May 30, 2008.

Exhibit 9. Declaration by Andrew R. McMillan, dated May 24, 2008; memorandum from Mr. McMillan to Kraig Chalem and Thomas Bjorgen, dated May 24, 2008; and resume for Mr. McMillan.

Exhibit 10. Letter from Loren D. Combs to Thomas Bjorgen, dated June 11, 2008.

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Exhibit 11. E-mail from Andy McMillan to Dawn Ketter, sent June 11, 2008.

After consideration of the testimony and exhibits described above, the Hearing Examiner makes the following findings of fact, conclusions of law, and decision:

I. FINDINGS OF FACT

A. General description of proposal and project site.

1. The Applicant requests a conditional use permit to construct a 20,563 square foot multi-purpose church building, with associated parking and other improvements, on its property of 5.38 acres.

2. The proposed building's main level would contain a large multi-purpose room 5607 square feet in size, which would be used for worship, fellowship and recreation. Seating would be provided by portable chairs, which would reach a capacity of 450 persons for worship. The main level would also contain a lobby, library, living room, kitchen, storage and meeting rooms, a nursery, two rooms for children's activities, and a classroom. The building would also have a daylight basement, containing classrooms and a storage area.

3. On the same property, the Applicant has an existing single-story building with a full basement, totaling 9552 square feet in floor space, built in 1986. This existing building is used for worship, adult and children's classes, administrative offices, and fellowship. If the proposed new building is approved, the Applicant will use this existing

building for administration and education. Also on the same property is a 1738 square foot building which the Applicant uses as a youth center, with space for youth worship, classes and fellowship. If the new building is approved, this existing building would continue to serve the same function. The configuration of the proposed new building and the two existing buildings is shown on the revised Site Plan at Ex. 5, Att. G.

4. The Applicant proposes the new church building, because the existing buildings are insufficient to meet its needs in a number of ways, detailed in the testimony and other evidence. The Applicant believes that its enrollment and ministry will suffer without the expansion. Hope Community Church has been located at this site for the past 26 years and has always planned for expanded facilities for its ministry and activities.

5. The Applicant presently has 44 paved parking spaces on its property. These spaces are regularly full on Sundays, with some overflow parking in other areas of the site. The Applicant stated at Ex. 1, Att. B that there is no available off-site parking. The Applicant requests to add new parking for a total on the site of 128 spaces, according to Ex. 1, Att. B, or 129 spaces, according to the testimony of Mr. Gibbs. The Applicant states at Ex. 1, Att. B that if the City standard of one parking space per four fixed seats were to be used, the resulting total of 113 parking spaces would be inadequate to meet its anticipated needs with the new building.

6. The conditional use permit application at Ex. 1, Att. B suggests that the Applicant wishes to hold open the option of using the new multi-purpose room for non-church activities, such as community sports tournaments, after-school sports and other activities, and children's programs after and during public school hours. At the hearing, the Applicant's attorney, Mr. Combs, represented that all activities carried out in the new building would be church related. This is included as a condition of approval and obviates the need for a special use or other permit for such non-church uses. The Applicant is

free to apply for such permits in the future, if desired.

7. The property at issue is zoned Residential Multifamily (RM-18) and is given the same designation under the Comprehensive Plan. The initial Site Plan at Ex. 1, Att. U and the revised Site Plan at Ex. 5, Att. G show the project site and apparent extent of the Applicant's property by a heavy dashed line. The site plans give this area as 234, 271 square feet, which is the same as the 5.38 acres shown on the Staff Report at Ex. 1, p. 2. This site includes portions of the wetland and buffers discussed below. The Staff Report states that in addition to this 5.38-acre parcel, the Applicant owns two adjacent parcels totaling another five acres, also including wetlands and buffers. The post-hearing submittal by the Department at Ex. 8 revises the total acreage of the three parcels to approximately 9.5 acres. The Wetland Delineation at Ex. 1, Att. S is roughly consistent in stating that the "site" consists of three parcels, the roughly five-acre parcel shown on the site plans and two others. The evidence does not show the precise location of these two other parcels, but the testimony indicated that the Applicant owned property to the east of the project site and west of Black Lake Boulevard. In this decision, references to the "site" or the "property" are to this 5.38-acre site shown on the site plans.

8. The site is shown on the aerial photograph at Ex. 1, Att. CC, with superimposed contour lines. Those lines show a hill on the western portion of the site, sloping off in all directions. The Applicant describes this as a "basalt rock hill" at Ex. 1, Att. B. The aerial photograph at Ex. 1, Att. CC shows a rocky, disturbed area to the west and southwest of the larger existing building. Mr. Murley of the City Staff described the site in his testimony as containing extreme rocky conditions. Mr. Spiller, the Applicant's stormwater consultant, stated that the site is mostly rock at the surface. The subsurface exploration by Bradley Noble Geotechnical Services at Ex. 1, Att. P found bedrock beneath the surface at depths ranging from 0.9 to 3.5 feet. This subsurface exploration also found well interlocked large basalt rocks on the surface of the site.

9. The aerial photograph also shows the more treed and vegetated area to the north and west of the rocky, disturbed area. The type of trees and vegetation in these areas to the north and west are described in Ex. 1, Att. Q.

10. Immediately north of the site are single-family residences in the Westbrook Park subdivision. Immediately south of the site lies the City of Tumwater, with land zoned Light Industrial. To the east across Black Lake Boulevard is land zoned Professional Office/Residential Multifamily. The land immediately to the west is zoned Single-family Residential (R-4) and is subject to a pending application for a 293-lot subdivision, according to the Staff Report. According to Ex. 5, p. 8, a proposed subdivision west of the project site known as Kaiser Heights would construct a portion of the proposed major collector discussed below and connect it to Kaiser Boulevard. The evidence does not show whether the 293-lot subdivision noted is the same as Kaiser Heights.

B. Critical areas.

1. Wetlands.

11. Two Category II wetlands are located on the project site, as shown on Ex. 5, Att. E, Fig. 2. Wetland A, as shown on Fig. 2, extends along much of the northern portion of the site and along approximately the northern half of the western part of the site. Wetland B, which is contiguous to Wetland A, covers the more northeastern portion of the site, including an existing stormpond, as also shown on Ex. 5, Att. E, Fig. 2.¹

¹ Note that both the letter designation and the category of these wetlands changed from the initial wetland

12. According to Ex. 5, Att. E, a 160-foot buffer is required around Wetland A, and a 120-foot buffer is required around Wetland B. Ex. 5, Att. E, Fig. 2 plots a blue dashed line showing a 150-foot buffer around each wetland. As can be seen from Fig. 2, the proposed parking lot and building extend well into this buffer, in places consuming over half of it. Approximately 0.5 acres of buffer area would be destroyed by the parking lot and building.

13. A comparison of Ex. 5, Att. E, Fig. 2 with the aerial photograph at Ex. 1, Att. CC shows that most of the area in which the new parking lot intrudes into the buffer consists of the rocky, disturbed area discussed above. The same comparison shows that the area in which the new building would intrude into the buffer contains both rocky and vegetated or treed land. The soil in these proposed buffer intrusions is composed of gravelly fill, with no snags or woody debris. The evidence conflicts as to the buffer or habitat value of these areas of buffer intrusion. On one hand, the Enhancement Plan at Ex. 5, Att. E, p. 3 states that habitat functions are low, but that the areas of intrusion do contain some trees and canopy and limited habitat corridors. The Enhancement Plan states at p. 2 that Douglas Fir are found in the area of "buffer impact", which must mean areas where the parking lot or building intrudes into the buffer. On the other hand, the principal preparer of the Enhancement Plan testified that the areas of intrusion were basically nonfunctional as buffers.

14. The Applicant proposes to mitigate for this loss of buffer area by enhancing and protecting three areas of the remaining buffer totaling 1.83 acres and 0.7 acre of Wetland B itself. These four areas to be enhanced are shown on Ex. 5, Att. E, Fig. 2 and provide a continuous belt of enhanced area around the wetlands. The one area of constriction in the enhanced area is caused by the presence of the existing accessory

delineation, found at Ex. 1, Att. S.

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building, as shown on Fig. 2.

15. The specific enhancement measures proposed for the four areas are detailed in the Enhancement Plan, Ex. 5, Att. E, pp. 4, et seq. In summary, they include removing invasive plant species in all areas, importing topsoil in Areas A, B and C, planting trees, shrubs and other plants of mature container stock, building an eight-foot high solid wood fence along the edge of the enhanced area in the east portion of the site and a six-foot high solid wood fence along the remaining edge of the enhanced area, shielding and directing all outdoor lighting away from Areas A, B and C, and installing permanent wetland buffer signs every 100 feet along the edge of Area A. Mr. Haderly testified that 75 Douglas Fir and 75 Big leaf maples will be planted in Area A; and 30 Western red cedars, 20 Oregon ash and 30 Sitka willows will be planted in Area C. Because these specific numbers do not appear included in the Enhancement Plan, they are added below as conditions. My hearing notes show that Mr. Haderly also testified that 100 Western red cedars will be planted in Area D, although Ex. 5, Att. E, only shows ten such trees in Area D. To resolve any discrepancy, the Department Staff is directed to confer with Mr. McMillan and Mr. Haderly and determine the correct number to be planted in Area D.

16. The Enhancement Plan also contains a number of monitoring and maintenance requirements and performance standards at Ex. 5, Att. E, pp. 4, et seq. Among these is the requirement that 100% of the planted trees have survived at the end of the first, second third and fifth years after planting. The Enhancement Plan also requires that a number of remedial or contingency measures be taken if any performance standard is not met. Ex. 5, Att. E, pp. 13 and 15. Among these is the requirement of an extended monitoring period to evaluate the success of these measures. However, extended monitoring and evaluation alone does not assure that the performance standards will actually be met. Therefore, this decision is conditioned to require that if any performance standards are not met, the Applicant shall, in addition to those measures listed in the Plan,

take all steps needed to meet the performance standards.

17. The Enhancement Plan concludes at p. 4 that the proposed enhancement and mitigation will improve the functions and values of the affected wetlands and, with the project as a whole, will result in no net loss of those functions and values. Mr. Haderly, the Applicant's wetlands expert, testified that reducing and enhancing the existing buffer, as proposed, will better protect the wetlands than would retaining the full, poorly functioning buffer.

18. Andrew McMillan is the Wetlands and Science Policy Manager for the state Department of Ecology and lives near the proposed project. Mr. McMillan holds a Masters of Environmental Science degree in Wetlands Ecology from the Evergreen State College and is certified as a professional wetland scientist by the Society of Wetland Scientists. His resume, found at Ex. 9, demonstrates that he is well qualified as a wetlands scientist and as an expert witness in these matters.

19. Mr. McMillan has scrutinized this project and has pointed out shortcomings in its analysis of affected wetlands. See Ex. 1, Att. I. In response to those criticisms, the Applicant revised its categorization of the wetlands and strengthened its enhancement measures. With these revisions, Mr. McMillan is of the opinion that the Applicant's proposal is consistent with best available science and protects the functions and values of the wetlands and stream. Without Mr. McMillan's participation, these shortcomings would likely not have been corrected and the wetlands likely would have suffered. His work is precisely the sort of citizen involvement needed to make sure the system functions as intended.

20. At Ex. 9, Mr. McMillan requests that the Applicant take a number of additional measures in carrying out the proposed enhancement. First, Mr. McMillan asks that he be

included in the on-site decisions about tree locations, if feasible, and that Ecological Land Services continue as the wetlands consultant until completion of the enhancement plan. The Applicant objects to the first request, stating that it would improperly give a private citizen a sort of approval authority over the aspects of the project. If that is the intent of the request, the objection would be well taken. The request, though, appears to be more one to allow Mr. McMillan to be present when these on-site decisions are made and to express his opinion on them. As such, the consideration of his opinion would only increase the integrity of the enhancement effort. The Applicant objects to the second request on the basis that the Hearing Examiner lacks authority to prescribe which consultant it must use. In these circumstances, the Applicant is correct.

21. Mr. McMillan asks at Ex. 3 and Ex. 9 that the conditions on lighting be sharpened to require that no light on the Church property shine or intrude into the wetlands, buffers or adjacent properties. As long as this refers to direct light, it properly clarifies the intent of the Applicant's proposal and better protects habitat and wildlife.

22. The Enhancement Plan states at Ex. 5, Att. E, p. 10 and 12 that buffer enhancements will begin in the first late summer to early fall period after permit approval and that the planting will be carried out in the fall or early spring. The Plan states at p. 10 that buffer enhancements "will be completed in advance of or concurrent with the project development." Mr. McMillan asks at Ex. 9 which permit is meant by this passage and points out that if the permit is issued in the winter or spring, enhancement work may not begin until well after construction has commenced.

23. There is some ambiguity in the proposed timing, since, in addition to this conditional use permit, there could be a grading permit required for the enhancement or other site preparation and certainly will be a building permit required for the new building. These uncertainties are resolved, though, by OMC 18.32.565, which states that

"A. Where feasible, compensatory projects shall be completed prior to activities that will permanently disturb wetlands, and immediately after activities that will temporarily disturb wetlands.

B. In all cases compensatory projects shall be completed within one year after use or occupancy of the activity or development which was conditioned upon such compensation.

C. Construction of compensation projects shall be timed to reduce impacts to existing flora, fauna and fisheries.

D. The Department may authorize a one-time delay not to exceed twelve (12) months in the construction or installation of the compensatory mitigation. A written request shall be prepared by a qualified wetland professional and include the rationale for the delay. In granting a delay the Department must determine that it will not be injurious to the health, safety, and general welfare of the public."

24. In the absence of evidence to the contrary, it must be presumed that building the parking lot and the new building in the buffer will disturb the wetlands. Since the compensation project will be completed in advance of or concurrent with the project development, this disturbance is temporary. Thus, OMC 18.32.565 requires the compensation to be fully installed and complete "immediately after" construction of the parking lot and new building. The Applicant's proposal to complete compensation in advance of or concurrent with the project development meets this standard, whatever ambiguity may lie in the reference to permits. The only inadvertent loophole would arise if construction were halted, for example, after site clearing or paving but before project completion. In that case, the disturbance to the wetlands could continue indefinitely

without compensation, which is contrary to OMC 18.32.565. To avoid that pass, this decision is conditioned to require the compensation to be completed by the time the project is completed or within one year of the commencement of any actions that disturb any part of the prescribed 160- or 120-foot buffer, whichever is earlier.

2. Streams.

25. A Type Ns stream flows from west to east along the southern edge of the wetlands in the north portion of the project site. See Ex. 5, Att. G. The stream flows under Black Lake Boulevard after exiting the site and continues into the Black Lake Drainage Ditch.

26. A Biological Assessment of the effect of the proposed project on the stream is found at Ex. 5, Att. F. The Assessment concludes that no salmonids use the stream, because it lacks habitat necessary to support them. The Assessment also concludes that the proposed project will not likely degrade water quality or quantity in the stream or in streams associated with Black Lake.

27. The buffer enhancements described above for the wetlands will also benefit this stream. Mr. McMillan expresses the opinion in Ex. 9 that if the Enhancement Plan is implemented as specified, the project will cause no net loss of stream functions and values.

3. Steep slopes.

28. An approximately 12-foot high bank leading toward the wetland areas lies along part of the east and north portions of the site. See Ex. 1, Att. U and Ex. 5, Att. G. The building and parking lot are at least seven feet back from the top of this bank.

C. Stormwater.

29. Currently, stormwater flows off the project site either to the wetlands to the north or to a ditch along Black Lake Boulevard. An existing stormwater retention pond on the east edge of the project site also discharges into the roadside ditch. Each route flows under Black Lake Boulevard through a culvert and into the Black Lake Drainage Ditch. The Black Lake Drainage Ditch flows into Percival Creek and thence to Puget Sound.

30. Due to the prevalence of shallow and surface bedrock, the proposal is expected to cause only a "low" increase in peak runoff. Ex. 1, Att. AA.

31. Mr. Murley of the Department testified that under the Applicant's proposal, stormwater would be routed to the existing pond near Black Lake Boulevard, which would discharge into the Black Lake Drainage Ditch through a metered release. Thus, the route of the stormwater leaving the site would not change.

32. Enhanced treatment is required for this proposal, as stated in Ex. 1, Att. AA, p. 12. The Stormwater Plan proposes to accomplish this through a series of compost filters. Ex. 1, Att. AA, p. 12. The Department accepts this, with the addition of a condition requiring the use of compost-amended soils consistently with Minimum Requirement #5 from the City's Stormwater Manual. Ex. 1, Att. K.

33. The Applicant argues in Ex. 1, Att. AA that it is exempt from the flow control requirements of Minimum Requirement No. 7 in Volume I of the Stormwater Manual. However, the stormwater discharge would be exempt under this Requirement if it were composed entirely of manmade conveyance elements extending to the ordinary high

water line of the exempt receiving water. Percival Creek is not exempt and is not a manmade conveyance. Therefore, this proposal is subject to flow-control requirements.

34. Appendix I-E of Vol. I of the Stormwater Manual allows the substitution of a cash payment or fee-in-lieu for required onsite stormwater management measures, when, among other situations, "the review authority determines that a fee-in-lieu is preferred over onsite stormwater management."

35. Due to the extensive bedrock and difficulty in excavating new detention spaces, the Applicant asks to pay a fee-in-lieu, instead of constructing otherwise required detention. In its comment letter of July 2, 2007, the Department agreed to this, if no other detention options are available. Ex. 1, Att. K. The absence of realistic options for detention is a reasonable criterion for determining whether a fee-in-lieu is acceptable.

36. In its comment letter of July 2, 2007, the Department stated that other detention options appeared to be available, and that they must be explored and implemented before a fee-in-lieu may be authorized. The Applicant responded by letter dated October 12, 2007, at Ex. 1, Att. O, in which it agreed to some additional measures, such as expanding the existing pond, and described why it believed other measures to be infeasible. The Department Staff Report at Ex. 1 repeated the text from the July 2, 2007 letter, which suggests it found the additional measures and analysis from the Appellant to be insufficient. At the hearing, the Applicant's stormwater consultant testified that it would try to provide additional storage on the site or on adjacent property and to work out the question of detention with the City.

37. The evidence shows that both the Department staff and the Applicant's consultant believe that there may be additional ways of increasing the detention capacity or flow control for this project. To ensure that the purposes of the Manual are served, a fee-

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in-lieu should be authorized only if those options have been explored and found not to be reasonably available. Those purposes also demand that actual detention not be waived for a fee-in-lieu if that would result in damage to downstream properties or fish or wildlife habitat. This decision is conditioned to allow a fee-in-lieu of otherwise required detention facilities if the Department agrees that there are no reasonable options available for additional actual detention and if the Department believes that allowance of a fee-in-lieu will not result in damage to downstream properties or fish or wildlife habitat.

38. At the hearing, Mr. Murley testified that the Black Lake Drainage Ditch may not have the capacity for the additional runoff generated by this proposal. To ensure adequate downstream capacity, this decision is conditioned to require that the Applicant demonstrate to the Department's satisfaction that the Black Lake Drainage Ditch has adequate capacity for this increased runoff.

D. Streets and traffic.

39. The sole access for Hope Community Church after the proposed expansion would remain the existing driveway onto Black Lake Boulevard.

40. The Traffic Impact Analysis (TIA) at Ex. 1, Att. N shows that all traffic movements on Black Lake Boulevard will remain at an acceptable level of service (LOS) A or B after completion of this proposal. The outbound movements on the driveway itself, however, would decline from LOS B to LOS E

41. At presently posted speed limits, there is inadequate sight distance looking to the south on Black Lake Boulevard for those entering from the site driveway. Ex. 1, Att. G and Ex. 1, Att. N, pp. 5-6. The initial TIA states at p. 6 that at the posted speed of 45 mph for northbound traffic on Black Lake Boulevard, 555 feet of sight distance is required

looking south from the site driveway. However, the supplemental traffic study at Ex. 1, Att. M states that 500 feet to the south is needed at the same speeds. The supplemental study states that the TIA had assumed an incorrect speed, but does not explain this discrepancy at the same posted speeds. The Applicant states that 485 feet of sight distance is presently available to the south. Ex. 1, Att. M. Whichever of the two sight distances is required, 485 feet is inadequate.

42. Adequate sight distance is available looking to the north.

43. The Applicant proposes to supply adequate sight distance to the south through two possible options. First, the Applicant states that the City of Tumwater has agreed to move the sign "Reduced Speed 30 mph" for northbound traffic on Black Lake Boulevard to a point approximately 575 further to the south, which would enable posting a "30 mph" speed limit for northbound traffic at the City limits, which is the south boundary of the project site. See Ex. 1, Att. M, and test. of Schramm. Mr. Schramm testified that this would reduce the required sight distance to the south to 445 feet. The existing 485 feet would meet this standard.

44. The Applicant also testified that the removal of a bank along Black Lake Boulevard would increase the available sight distance to the south to 500 feet. This, alone, would not meet the 555 feet which the TIA states is required at existing speeds and would barely meet the 500 feet which the supplemental traffic study at Ex. 1, Att. M states is needed at the same speed.

45. To ensure adequate sight distance, this decision is conditioned to require the Applicant to demonstrate to the Department whether 555 or 500 feet of sight distance is needed to the south under current speeds and conditions. If anything more than 500 feet is required, then the reduction in the speed limit must be implemented, since the

Applicant's own evidence shows the bank removal would only increase available sight distance to 500 feet. If 500 feet is required under current conditions, then the Applicant shall provide adequate sight distance by either reducing the speed limits as proposed and/or achieving at least 500 feet of available sight distance by cutting back the bank.

46. The City's Comprehensive Plan designates a future major collector running from Black Lake Boulevard at the southeastern corner of the site to the west along the its southern boundary. See Comprehensive Plan Transportation 2025 map at Ex. 4. The new collector would turn to the north not far to the west of the site and connect with 7th Avenue and Kaiser Road. Id. According to Ex. 5, p. 8, the proposed Kaiser Heights subdivision west of the project site would construct a portion of the proposed major collector connecting to Kaiser Boulevard. This proposed subdivision has not completed the State Environmental Policy Act (SEPA) process or obtained preliminary subdivision approval. Id.

47. Neither the existing Church facilities nor the proposed expansion is planned to have access onto the future major collector. Their sole planned access is the existing driveway directly onto Black Lake Boulevard.

48. The Department asks that the Applicant be required to dedicate right-of-way for the future major collector along the southern boundary of the project site and construct a one-half street section with frontage improvements and civil improvements. As part of these frontage improvements, the Department asks that the Applicant extend water and sewer lines along its south property line in the right-of-way to be dedicated for the future major collector.

49. The Applicant estimates that installing the requested one-half street section, and the frontage and civil improvements, including water and sewer lines, would cost

\$488,499, not including land value. Ex. 5, Att. B. Mr. Gibbs testified that this would consume most of the \$700,000 raised for the expansion and, in his opinion, would stop the project.

E. Tree retention.

50. The Applicant proposes to retain the 195 trees on the project site described in the Preliminary Tree Protection Plan, Ex. 1, Att. Q. These trees comprise a total of 142 tree units, calculated under the Tree Retention Ordinance, Chap. 16.60 OMC. Ex. 1, Att. Q, p. 5.

51. The Tree Retention Ordinance requires at least 30 tree units per acre on the buildable area of each site. OMC 16.60.080. The Department regards buildable area as the same as "developable area" and concludes that under the dictionary definition of the latter, this term includes the land outside critical areas. Ex. 8. However, OMC 16.60.080 states that

"[f]or the purpose of calculating required minimum tree density, critical areas, critical area buffers, city rights-of-way and areas to be dedicated as city rights-of-way shall be excluded from the buildable area of the site."

This is the controlling definition.

52. In Ex. 9 the Department states that 3.3 acres on the site lie outside critical areas, constituting the buildable area. Excluding only critical areas to reach buildable area ignores the presence of wetland and steep slope buffers, City rights-of-way and areas to be dedicated as City rights-of-way, which also must be excluded under OMC 16.60.080.

53. Because the Applicant only fell 19.1 tree units short when the entire site was considered buildable, it seems highly likely that the exclusion of these categories from the buildable area pursuant to the ordinance will result in no deficit. However, the absence of evidence showing the actual acreage of the excluded categories would make that a guess. Therefore, this decision is conditioned to require the Department to calculate buildable area using the proper definition from OMC 16.60.080, see above, and determine whether the proposed 142 tree units to be saved meets the standard of 30 tree units per buildable acre.

F. Miscellaneous.

54. The City has capacity for the domestic water and fire suppression requirements of this proposal.

55. The City has capacity for the sanitary sewer requirements of this proposal.

II. CONCLUSIONS OF LAW

A. Applicable standards.

1. Places of worship are permitted in the RM-18 zone only if a conditional use permit is issued. OMC 18.04.040, Table 4.01.

2. All conditional use permits are subject to the standards set out in OMC 18.48.020 and .040. In summary, these provisions require that the use be compatible with other existing and potential uses in the neighborhood, that it be equivalent to other permitted uses in the same zone with respect to nuisance generating features, such as

noise, odor, traffic and similar matters, and that it minimize hazards to life and property. Conditional uses must also comply with otherwise applicable provisions of Title 18 of the OMC governing land use.

3. Proposed conditional uses must also comply with other City land use regulations that apply to it and with applicable federal law.

B. Parking.

4. The sanctuary is proposed to afford 450 seats through portable seating. When portable seating is used, OMC 18.38.100, Table 38.01, requires one vehicular parking space per four seats, plus or minus ten percent. This ratio would require 113 parking spaces. This, plus or minus ten percent, results in a range from 102 to 124 spaces. The proposed 128 or 129 spaces exceed that range. No evidence was offered showing that the Applicant had requested an administrative variance from the Site Plan Review Committee to allow additional parking under OMC 18.38.080. Therefore, this conditional use permit cannot authorize more than a total of 124 parking spaces.

5. OMC 18.38.100, Table 38.01 requires long-term and short-term bicycle spaces under the formulas in that Table. The revised Site Plan at Ex. 5, Att. G does not designate any bicycle parking, although it is possible that existing spaces were not shown. To assure compliance, this decision is conditioned to require the provision of bicycle spaces consistently with OMC 18.38.100, Table 38.01.

6. OMC 18.38.120 requires five accessible parking spaces for a lot with total parking between 101 and 150 spaces. This proposal meets this requirement.

C. Critical areas.

1. Applicability of Critical Area Ordinance.

7. The Applicant argues in Ex. 5 that under OMC 18.37.070, the proposed expansion is not subject to the Critical Area Ordinance. OMC 18.37.070 states:

"A. **Existing structures and uses.** Existing structures and uses which are located within a critical area or its buffer prior to the effective date of Chapter 18.32 may continue pursuant to the provisions of this Chapter.

B. **Appurtenant structures and related development.** Existing structures located within a critical area or its buffer as provided in OMC 18.37.070(A), may include appurtenant structures and related development such as but not be limited to: garages, out-buildings, lawns, landscaping, gardens, sports fields, sport courts, picnic areas, play equipment, trails and driveways which also existed prior to the effective date of Chapter 18.32.

C. **Critical area review.** That portion of a parcel which contains existing structure, appurtenant structures, and related development as defined by OMC 18.37.070(A) and 18.37.070(B), shall be exempt from further review of OMC Chapter 18.32, except as provided in OMC 18.32.215. Expansion or additions of structures and uses listed in OMC 18.37.070(A) and 18.37.070(B) into undisturbed parts of the property which are within a critical area or its buffer will require a critical area review per OMC Chapter 18.32."

8. The existing main and accessory buildings are partially in the stream and wetland buffers described in the Findings and were constructed prior to 2005.

9. Chap. 18.32 OMC was adopted in 2005 and replaced a prior Critical Area Ordinance, former Chap. 14.10 OMC, adopted in 1992. It is highly unlikely that the City intended to grant legal nonconforming use status to structures or uses which were illegally placed in a critical area or buffer under the prior ordinance, although that could be the effect of a literal application of the 2005 cut-off date. Fortunately, it is not necessary to reach this issue, since the existing church building was constructed in 1986, before adoption of the 1992 ordinance. The existing building falls under the scope of subsection A of this provision.

10. OMC 18.37.070 A and B plainly mean that the existing buildings and parking areas are legal and may remain, even though they violate existing buffer standards. OMC 18.37.070 C announces two further rules. First, it states that the "portion of a parcel which contains" the existing development as described in subsection A and B is exempt from critical area review. This plainly implies that the portion that does not contain the existing development is subject to critical area review. Second, OMC 18.37.070 C states that "[e]xpansion or additions of structures and uses listed in OMC 18.37.070 A and 18.37.070 B into undisturbed parts of the property which are within a critical area or its buffer will require a critical area review per OMC Chapter 18.32." The Applicant argues that this implies that such existing uses may be expanded into disturbed areas without such review.

11. These two aspects of OMC 18.37.070 C must be read consistently with each other, with the purposes of the ordinance, and with the restrictions on nonconforming uses fixed in the case law. Our state Supreme Court has held that "nonconforming uses are uniformly disfavored . . . ", because they limit the effectiveness of land use controls, imperil the success of community plans and injure property values. Rhod-A-Zalea v. Snohomish County, 136 Wn. 2d 1, 8 (1998). For these reasons, our court "has repeatedly acknowledged the desirability of eliminating such uses." Rhod-A-Zalea, 136 Wn. 2d at 8.

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Further, our court has characterized the right to a nonconforming use as "the right not to have the use immediately terminated in the face of a zoning ordinance which prohibits the use". Id. at 6.

12. The Applicant's view would allow new nonconforming buildings to be constructed in buffers and critical areas themselves as long as they were deemed "disturbed". Under the Applicant's reading, this could be done with no mitigation, no compensation, and no examination of the effect on "undisturbed" parts of the critical areas. This is contrary to both the purpose of the Critical Area Ordinance and the disfavored status of nonconforming uses. The two aspects of OMC 18.37.070 C may be harmonized in a way that is true to the purpose of the ordinance and the disfavored status of nonconforming uses by reading the second aspect to allow nonconforming structures to be expanded into disturbed critical areas or buffers without review. The entirely new building here proposed would not fall into that category. One could argue that the new parking lot is merely the expansion of a use, not a structure, and therefore is exempt from review under OMC 18.37.070 C. However, it makes no sense to require critical area review for a new building, but not for a new parking lot that intrudes even more into the buffer. Under the most rational interpretation of OMC 18.37.070 C, the new building and parking lot are subject to critical area review, even though they are arguably on a "disturbed" buffer.

2. Modification of required wetland and stream buffers.

13. OMC 18.32.535 H authorizes the Hearing Examiner to allow:

"1. Reductions to the required wetland buffer width greater than those described in OMC 18.32.535 G on a case-by-case basis when it can be demonstrated that:

a. The provisions of OMC 18.32.535(G) have been evaluated by a Wetland Mitigation Report described in OMC 18.32.590, and

b. The proposed wetland buffer width will protect the wetlands' functions and values based upon the Wetland Mitigation Report and the best available science."

14. The Findings above show that these requirements are met for the wetland buffer reduction proposed in Ex. 5, Att. E, as long as all conditions below are followed.

15. OMC 18.32.435 H authorizes the Hearing Examiner to allow reductions greater than 50% to a required stream buffer "in unique conditions and on a case-by-case basis when it can be demonstrated that:

"1. The provisions of the required stream or "important riparian area" have been evaluated by a Biological Assessment described in OMC 18.32.445, and

2. Based upon the Biological Assessment and the best available science the proposed stream buffer width will be adequate to protect the functions of the stream or "important riparian area."

16. The Findings above show that these requirements are met for the proposed stream buffer reduction, as long as all conditions below are followed.

17. The Applicant states at Ex. 5, p. 13 that the Staff required it to file a variance application to take advantage of the buffer modification provisions in OMC 18.32.435 and 18.32.535. The Staff did not dispute this. A variance, however, is appropriate only to

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vary or modify the requirements of an ordinance. Here, the Applicant proposes to comply with the requirements of the ordinance by obtaining buffer modifications under its terms. A variance is not needed to comply with an ordinance. Therefore, there was no basis to require it for this purpose. If it were within a Hearing Examiner's authority, I would direct the Department to refund to the Applicant the filing fee for this unneeded variance. In the absence of that authority, I can only recommend it. Because the buffer modifications are granted under the terms of the Critical Area Ordinance, no decision is made on the variance.

18. The Department staff also asks in its proposed Condition 15 in Ex. 1 that the area within 100 feet of the stream be planted with trees at a density of 400 tree units per acre pursuant to OMC 16.60. There is no such requirement in OMC 16.60. Instead, OMC 18.32.435 G, part of the Critical Area Ordinance, authorizes the Department to reduce stream buffers by up to 50% on Type 5 streams which have no fish usage and which discharge directly into Puget Sound when, among other requirements, the remaining buffer has been replanted to a density of 400 tree units per acre pursuant to OMC 16.60.

19. This provision, however, is not applicable for two reasons. First, the stream does not discharge directly into Puget Sound and, second, it is the Hearing Examiner, not the Department, from whom the reduction is requested. Therefore, the reduction is governed by OMC 18.32.435 H, not G. The 400-unit per acre requirement is not found in OMC 18.32.435 H.

3. Steep slope buffer.

20. As found, an approximately 12-foot high bank leading toward the wetland areas lies along part of the east and north portions of the site. If this bank qualifies as a critical area, the proposed placement of the building and parking lot at least seven feet

back from the top of this bank meets any buffer requirements under OMC 18.32.630.

D. Stormwater.

21. The principal issue concerning stormwater is that of detention or flow control. For the reasons in the Findings, above, this proposal is not exempt from the flow control requirements of Minimum Requirement No. 7 in Volume I of the Stormwater Manual.

22. According to the Staff comment letter at Ex. 1, Att. K, a fee-in-lieu of otherwise required detention measures is acceptable if no other detention measures are available. The Department accepts that the extensive bedrock and difficulty in excavating new detention spaces restrict and may preclude required detention. As described more fully in the Findings, though, both the Department staff and the Applicant's consultant believe that there may be additional ways of increasing the detention capacity or flow control for this project. To ensure that the purposes of the Manual are served, a fee-in-lieu should be authorized only if those options have been explored and found not to be reasonably available. Those purposes also demand that actual detention not be waived for a fee-in-lieu if that would result in damage to downstream properties or fish or wildlife habitat. This decision is conditioned to include these requirements.

23. As also described in the Findings, the evidence raised a question as to whether the Black Lake Drainage Ditch has the capacity for the additional runoff generated by this proposal. To ensure adequate downstream capacity, this decision is conditioned to require that the Applicant demonstrate to the Department's satisfaction that the Black Lake Drainage Ditch has adequate capacity for this increased runoff.

24. As conditioned below, this proposal complies with the City Stormwater Manual.

E. Streets and traffic.

1. Dedication and frontage improvements along the southern boundary of the site.

25. As found, the City Comprehensive Plan proposes a new major collector street along the southern boundary of the project site. The Department asks that the Applicant be required to dedicate right-of-way for this future street and construct a one-half street section with frontage improvements and civil improvements, including the extension of water and sewer lines in the right-of-way for the future major collector.

26. Currently, no dedication for this future street has been made along the southern boundary. The boundary between the cities of Olympia and Tumwater runs along the site's southern boundary. Ex. 5, p. 4. Immediately south of the site is a 60-foot strip owned by Manke Lumber Company and used for access. *Id.* The Staff Report does not specify whether it requests dedication of the entire width or one-half the width of the new street from the Applicant's property. However, the termination of the City's jurisdiction at the Applicant's southern property line suggests the entire width would be dedicated from the Applicant's land.

27. Section 2.040 B 8 of the City's Engineering Design and Development Standards (EDDS) states:

"[w]here a street is designated by the City's officially adopted Comprehensive Plan and shown to be within the boundaries of a development, after completion of a TIA (Traffic Impact Analysis) by the applicant, the developer may be required to dedicate the entire right-of-way and construct improvements as described in Chapter 4 of the *Engineering Design and Development Standards*. Where said

street is adjacent to a boundary of a development, the developer may be required to dedicate the necessary right-of-way and construct improvements as described for one-half of the street."

28. EDDS 4B.080 A, in turn, states that

"[a]ll commercial and residential (including multifamily) development, plats, and short plats will install street improvements at the time of construction as required by the Department of Community Planning and Development. Such improvements may include curb and gutter; sidewalk; transit stops, pads, and shelters; street storm drainage; street lighting system; traffic signal modification, relocation, or installation; street trees; utility relocation or installation; undergrounding of franchised utilities; landscaping and irrigation; and street widening, all pursuant to these Standards."

29. These provisions implement the Comprehensive Plan's Policies T 3.13, T 16, T 3.20 and Appendix 6-A, which strongly encourage the connection of streets. A system of well connected streets allows better access for police, fire and emergency vehicles, promotes better linkages between areas of the City, takes traffic off arterial streets, and promotes bicycle and pedestrian connections. Id.

30. These two EDDS provisions authorize the requirements to dedicate right-of-way and install street improvements along the site's southern boundary, as proposed by the Staff. However, as pointed out by the Applicant in the Hearing Brief at Ex. 5, state and federal case law impose additional requirements which must also be met before the dedication and improvements may be ordered. In analysing this case law, the dedication itself will first be considered.

31. The two fundamental federal cases considering when government may require

the dedication of real property as a condition of land use approval are Nollan v. California Coastal Commission, 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987), and Dolan v. City of Tigard, 512 U.S. 374, 129 L.Ed.2d 304, 114 S.Ct. 2309 (1994).

32. Nollan announced the rule that there must be a nexus or connection between the required dedication and the public problem or impact caused by the proposed use or development. That is, the dedication must address some impact of the development. As the Court held in Nollan, 483 U.S. at 836, a

"permit condition that serves the same legitimate police power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."

33. Dolan held that the degree of the exaction or dedication must be roughly proportionate to the projected impact of the proposed development. Dolan, 512 U.S. at 391. The Court stated that

"[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."

Id.

34. The rationale for the Nollan/Dolan test is clear from Justice Scalia's opinion in Nollan. If required outright, a dedication of property is equivalent to condemning property, a classic physical invasion taking demanding compensation under the Constitution.

However, the Court recognized that if a development could be denied without causing a taking, then it could also be allowed subject to a dedication to address that problem. See

Nollan, *id.* at 836-37. This test, in other words, is an analytical method of allowing as a permit condition a requirement which would be a taking if imposed outright.

35. The limited scope of the Nollan/Dolan test was emphasized in Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999). There, the Supreme Court stated that

"we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions-land use decisions conditioning approval of development on the dedication of property to public use. See *Dolan*, *supra*, at 385; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987). The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development."

36. Thus, the Nollan/Dolan test applies to the proposed dedication. It does not apply to the requirement to install frontage improvements once the dedication is present.

37. Two decisions of the state Court of Appeals well illustrate the application of Nollan/Dolan in circumstances similar to these. In Burton v. Clark County, 91 Wn. App. 505, 527, 958 P.2d 343 (1998), the site owner, Mr. Burton, had applied for a short subdivision of a small tract of land bordered by another undeveloped tract on the east owned by an individual named Maddux. A public street running generally east and west ended at the western boundary of Burton's parcel. Another public street running generally north and south ended at the northern boundary of the Maddux parcel, a few feet east of Burton's northeast corner. Since the 1980's, county planners had wanted to connect the

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two roads by extending them across Burton's property and the corner of the Maddux parcel to the east. As a condition of short subdivision approval, the County required Burton to dedicate right-of-way for the segment of the connecting road on his property.

38. Burton could have obtained adequate access to his proposed lots without the connecting road. See Burton, 91 Wn. App. at 510. Nevertheless, the Court found three public problems which would be exacerbated by Burton's project to at least a slight degree. Id. at 526. By bringing more residents to the neighborhood and generating additional vehicle trips, the project would increase the need for adequate traffic circulation, increase traffic congestion on neighborhood roads, and increase the likelihood of emergency calls to the area. Id.

39. If the two roads were connected, the Court held, the dedication across Burton's property would tend to alleviate those problems in a way that is roughly proportional to the project's effect on those problems. Id. The Court held that the requested road was roughly proportional to the project's effect on traffic, because

"[e]ven though Burton's project will exacerbate the identified problems to only a small degree, the exacted road is only a small part of the solution to those problems . . ."

40. Like Mr. Burton, the Applicant here has adequate access to its property without the proposed dedication. But, as also in Burton, the present project will generate more vehicle trips on the nearby street network after completion and bring more individuals into the immediate area. A view of the Comprehensive Plan Map at Ex. 4 shows that the proposed major collector to the north, of which this dedication would be a segment, would afford an efficient alternate route to the Church from population centers to the north. As in Burton, this would improve traffic circulation, help decrease traffic congestion on

neighborhood roads, and increase optional routes for emergency traffic. Thus, in the same way as in Burton, the dedication at issue would help address the problems of increased traffic to which the proposal contributes. This meets the nexus test.

41. As noted, Burton held that the requested dedication was roughly proportional to the project's effect on traffic, because Burton's project will exacerbate the identified problems to a small degree, and the exacted dedication is only a small part of the solution to those problems. That is the case here. Further, requiring dedications for a future street from the frontages of each property owner along the street helps assure that each will roughly bear its fair share, absent odd boundary configurations. Under Burton, the requested dedication is roughly proportionate to the effects of the proposal.

42. However, the nexus and proportionality just described will only arise if the new street is actually built and connected to the street network. The Burton court, faced with the same issue, allowed reliance on future possibilities in deciding whether Nollan and Dolan are met, but only if "the record furnishes a basis for inferring what the foreseeable future holds." Burton, 91 Wn. App. at 525. The record in Burton was clear that the road which the County required Burton to dedicate was designed and intended to connect the two public roads and that it was needed to allow that connection. Id. at 528. The record, though, was "devoid of *any* evidence from which to infer when, if ever, the exacted road will cross Maddux's parcel and connect with Northeast 20th Avenue". Id. (Emph. in orig.) On this basis, the Court concluded that

"[e]ven taken in the light most favorable to the county, none of this evidence provides a basis for reasonably inferring that the exacted road will connect with Northeast 20th Avenue in the foreseeable future, and without such an inference, the exacted road lacks any tendency to solve or even alleviate the public problems that the county identifies. We conclude that the county has failed to bear its burden

of showing that the exacted road is a reasonable exercise of its police power . . ."

Id. at 528-29.

43. The needed evidentiary basis could be supplied, the Court stated,

"by the county's statement that it will condemn and construct a road across Maddux's parcel if, after a certain period, Maddux has not done so; by a combination of Maddux's statement that she intends to develop soon and the county's statement that it will exact a road when she applies for a permit to develop; by evidence showing that in the experience of reputable and qualified urban planners, "infill" parcels like Maddux's are usually developed within a certain time after the urbanization process starts; or in a variety of other ways."

Id. at 528, fn 60.

44. The evidence leads to the same result here. We only know from the evidence that there is a pending application for a 293-lot subdivision on land immediately to the west of the site and that the Kaiser Heights subdivision somewhere west of the project site would construct a portion of the proposed major collector and connect it to Kaiser Boulevard. The evidence does not show whether these are the same or different developments. The evidence does not show where they are located. The evidence does not show what segments of the future collector run through or next to these developments. The evidence does show that the proposed Kaiser Heights subdivision would likely dedicate and build a portion of the collector which would connect it with Kaiser Road. It does not show, though, whether this would connect with the segment dedicated by Hope Church or if not, the length and development status of the intervening gap. These uncertainties are greater than those found fatal in Burton. Under that case, the required

nexus has not been shown by the Department.

45. Another situation similar to this is presented in Unlimited v. Kitsap County, 50 Wn. App. 723 (1988). As a condition to approval of a proposed development, the County required that Unlimited dedicate a strip along its property frontage for the future extension of Randall Way, a street included in the Comprehensive Plan. The Court struck this down, stating:

"[t]here is nothing in the record before us to show that Unlimited's development will make extension of Randall Way necessary. To the contrary, the record discloses that the County has no immediate plans for an extension. Rather, it intends to hold the exacted property until some undefined future time when Randall Way can be extended to connect with other, as yet unbuilt, roads. This uncompensated exaction, too, is invalid [cits. om.]

On the evidence submitted, the same conclusion must also be drawn here.

46. It seems unfortunate both pragmatically and constitutionally to hold that a city may require the dedication of right-of-way for a street called out in the Comprehensive Plan and located in a developing area of the Urban Growth Area only if it presents some evidence showing when the dedication will be connected to the street network or that the segment is in an "infill" parcel. Such, however, is the apparent force of Burton and Unlimited. The reference to a "variety of other ways" of making this showing in Burton appears not to include mere presence in the Comprehensive Plan and Urban Growth Area.

47. Because I am bound by Burton and Unlimited and because no evidence was offered suggesting even very generally when the dedicated segment might connect with the street network, the dedication cannot stand.

2. Frontage improvements.

48. Without a dedication to the public or a requirement of a private street, frontage improvements would be of no use and therefore also cannot be required.

49. More specific to the utility improvements, the court in United Development v. Mill Creek, 106 Wn. App. 681 (2001), struck down a development condition requiring the construction of stormwater facilities in an adjacent right-of-way, because the evidence did not disclose any effect the development would have on drainage on that street. The court rejected the argument that the improvements were justified because they brought the street "up to Code" and generally were helpful. The subsequent decisions in Benchmark v. City of Battleground, 146 Wn.2d 685 (2002) and Isla Verde v. City of Camas, 146 Wn.2d 740 (2002) would likely compel the same result.

50. Here, the evidence shows that the proposal would be served with water and sewer without the requested improvements on the southern boundary. The evidence does not any impact or need of the development which the requested improvements would meet. Therefore, under United Development these sewer and water improvements along the southern boundary cannot be required.

3. Sight distance.

51. As conditioned, adequate sight distance looking in either direction onto Black Lake Boulevard will be provided.

4. Transportation impacts.

52. As found, the level of service on public streets and intersections will remain at an acceptable level of service after the completion of this project.

53. It does not appear that the minimum levels of service required by RCW 36.70A.070 and implemented by Chap. 15.20 OMC apply to private driveways. Thus, the otherwise unacceptable LOS E on the Applicant's driveway would not offend City standards. If the Department disagrees, it may require mitigation for the LOS E driveway movement at the building permit stage under Chap. 15.20 OMC, subject to appeal to the Hearing Examiner.

F. Tree retention.

54. As conditioned, the proposal complies with the Tree Retention Ordinance, Chap. 16.60 OMC.

G. Other City land use standards and plans.

55. OMC 18.04.060 U sets out a number of requirements which apply to places of worship subject to conditional use approval. The locational requirements in subsection 1, however, do not apply to this proposal, because it is not located in any of the zones listed in that subsection.

56. Of the remaining requirements in OMC 18.04.060 U, subsection 6 requires sight-obscuring screening along the perimeter of parking lots adjunct to a place of worship which are located across the street from or abutting a residential use. The Department states at Ex. 1, p. 10 that this requirement is met. The Staff Report, though, does not analyse the additional landscaping requirements imposed in Chap. 18.36. Under OMC 18.36.040, this chapter appears to be applicable to this proposal. Therefore, this decision

is conditioned to require the Department to review the proposal for compliance with Chap. 18.36 and impose any additional requirements necessary to achieve compliance.

57. As conditioned, this proposal complies with the applicable requirements in OMC 18.04.060 U.

58. As conditioned, this proposal complies with other applicable specific standards in Title 18 OMC and with the standards discussed in the Conclusions above.

59. As noted above, OMC 18.48.020 and .040 also require that the proposed use be compatible with other existing and potential uses in the neighborhood, that it be equivalent to other permitted uses in the same zone with respect to nuisance generating features, such as noise, odor, traffic and similar matters, and that it minimize hazards to life and property.

60. Mr. McMillan, a nearby property owner, points out in Ex. 9 that construction on this rocky site may involve the ripping or blasting of rock which could be very loud and disturb the peace of nearby neighbors. He asks that the Applicant notify neighbors of such activities and confine them to the period between 10 a.m. and 4 p.m.

61. The Applicant responds by stating that it is subject to the City's general restrictions on noise and that no evidence has been submitted that those standards are insufficient.

62. The City's noise standards are at OMC 18.40.080 B. They set a maximum of 55 decibels or dBA for sound generated in and received by residentially zoned areas between 7 a.m. and 10 p.m., as heard at the property line. Between 10 p.m. and 7 a.m. and at all hours on weekends and holidays, the maximum is 45 dBA. These maximums

may be exceeded by five dBA for any 15 minute period in an hour, by ten dBA for any five minute period per hour, and by 15 dBA for any one minute period. OMC 18.40.080 B also contains a notation suggesting that the base level may be exceeded by 15 dBA for a total of 15 minutes each hour. If this is its proper interpretation, it would be preempted by WAC 173-60-040, which plainly allows the 15 dBA for a maximum of only 1.5 minutes per hour.

63. The City standards at OMC 18.40.080 B also state that Chap. 173-60 WAC is incorporated by reference, except as otherwise provided. WAC 173-60-050 exempts blasting and temporary construction noise from the noise restrictions of WAC 173-60-040 between 7 a.m. and 10 p.m. in these circumstances. Because OMC 18.40.080 B does not modify these exemptions, its text incorporates them by reference.

64. RCW 35A.63.170 authorizes a city council to vest the Hearing Examiner with the authority to decide conditional use permits. The City Council has done this through Chap. 18.48 OMC. In granting a conditional use permit, the Hearing Examiner is authorized by OMC 18.48.040 to increase the standards prescribed by Title 18 OMC, if needed to protect surrounding properties, the neighborhood or the general welfare of the public. Therefore, the Hearing Examiner may increase these legislatively adopted noise standards for those purposes.

65. All homeowners must be prepared to tolerate a reasonable amount of temporary construction noise as adjacent properties are developed. However, the unusual geological circumstances of this site, together with the apparent exemptions of blasting and construction noise from the ordinance, mean that nearby homeowners could be subjected to blasting and bedrock removal without noise limitations at any time from 7 a.m. to 10 p.m. The damage this could do to their peace, quiet and health is plain and is the sort of consequence intended to be mitigated through the conditional use permit process.

66. There is insufficient evidence for me to decide what restrictions on blasting and bedrock removal would strike the most reasonable balance between the neighbors' interest in quiet and the Applicant's interest in efficiently developing its project. Therefore, the Applicant is directed to confer with the Department and Mr. McMillan and attempt to agree on a set of restrictions for blasting and bedrock excavation to mitigate noise. The parties should consider at the least limitations on the hours of the day for such activities, an overall period in which these activities will be completed, and notice to neighbors. If the parties cannot agree, the Department is directed to issue an administrative order imposing restrictions on blasting and bedrock removal to protect the peace and quiet of the surrounding property while allowing the Applicant a reasonable time to carry out these activities. The Applicant, Mr. McMillan or any other person with appropriate standing, may appeal this order to the Hearing Examiner.

67. As conditioned, this proposal meets the requirements of OMC 18.48.020 and .040.

68. As conditioned, this proposal is consistent with the Comprehensive Plan.

H. The Religious Land Use and Institutionalized Persons Act.

69. 42 UCS 2000cc (a) (1) states that no government, including a city, shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, unless the government demonstrates that imposition of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. 42 USC 2000cc-5 (7) (B) specifies that building on or converting real property for the purpose of religious exercise itself counts as religious exercise under this statute.

70. The Applicant argues in its brief at Ex. 5, pp. 18, et seq. that requiring the dedication and frontage improvements along the southern site boundary and imposing the 150-foot critical area buffer would violate this statute. The requirement to dedicate and construct site improvements is not imposed by this decision. The Applicant's proposal to reduce and enhance the critical area buffer has in large part been accepted. Therefore, the ways in which the Applicant claimed a substantial burden would be imposed on religious exercise have been removed. This decision, as conditioned, does not impose a substantial burden on the Applicant's religious exercise.

DECISION

The application for a conditional use permit is granted, subject to the following conditions:

- A. Associated uses of the type listed in OMC 18.04.060 U are not permitted, unless separately authorized.
- B. The Department shall calculate the buildable area of the site using the definition from OMC 16.60.080, see Findings, above, and determine whether the proposed 142 tree units to be saved meets the standard of 30 tree units per buildable acre. If there is a deficit, the Applicant shall plant trees needed to meet the standard of 30 tree units per acre.
- C. The Applicant shall retain the 142 tree units proposed in its Preliminary Tree Protection Plan, Ex. 1, Att. Q, and shall follow all measures and recommendations contained in that Plan.

D. No more than a total of 124 parking spaces shall be provided on the site, unless the Applicant requests and receives a modification pursuant to Title 18 OMC.

E. Bicycle spaces shall be provided consistently with OMC 18.38.100, Table 38.01.

F. The Applicant shall install sight-obscuring screening along the perimeter of its parking lots which are located across the street from or abutting a residential use. The Department shall promptly review the proposal for compliance with Chap. 18.36 and impose any additional requirements necessary to achieve compliance.

G. The Applicant shall follow all directions and recommendations and take all measures set out in the Wetland and Stream Buffer Reduction and Enhancement Plan, Ex. 5, Att. E. As part of these measures and requirements the Applicant shall plant at least 75 Douglas Fir and 75 Big leaf maples in Area A and at least 30 Western red cedars, 20 Oregon ash and 30 Sitka willows in Area C. The Department Staff shall confer with Mr. McMillan and Mr. Haderly and determine the correct number of Western red cedars to be planted in Area D.

H. If any performance standards in the Wetland and Stream Buffer Reduction and Enhancement Plan, Ex. 5, Att. E, are not met, the Applicant shall, in addition to those measures listed in the Plan, take all steps needed to meet such performance standards.

I. The Applicant shall inform Mr. McMillan when on-site decisions about the precise location of tree plantings will be made and shall allow McMillan to be present and express his opinion when such decisions are made.

J. All lights on the Church property shall be shielded and directed so that no light directly shines or intrudes into the wetlands, buffers or adjacent properties.

K. The wetland and buffer compensation shall be fully installed and completed by the time the project is completed or within one year of the commencement of any actions that disturb any part of the originally required buffer, whichever is earlier.

L. The Applicant shall install compost-amended soils consistently with Minimum Requirement #5 from the City's Stormwater Manual and directions from the Department.

M. A fee-in-lieu may be accepted in place of otherwise required detention facilities if the Department agrees that there are no reasonable options available for additional actual detention and if the Department believes that allowance of a fee-in-lieu will not result in damage to downstream properties or fish or wildlife habitat. In making this determination the Department shall confer with the Applicant. If the Applicant disagrees with the Department's determination, it may appeal the same to the Hearing Examiner.

N. The Applicant shall demonstrate to the Department's satisfaction that the Black Lake Drainage Ditch has adequate capacity for the increased runoff generated by this proposal.

O. The Applicant shall demonstrate to the satisfaction of the Department whether 555 or 500 feet of sight distance is needed looking to the south on Black Lake Boulevard from the site driveway under current speeds and conditions. If anything more than 500 feet is required, then the reduction in the speed limit

described in the Findings above must be implemented, since the Applicant's own evidence shows the option of removing the bank would only increase available sight distance to 500 feet. If 500 feet is required under current conditions, then the Applicant shall provide adequate sight distance by either reducing the speed limits as proposed and/or achieving at least 500 feet of available sight distance by cutting back the bank.

P. Before blasting or bedrock removal commences, the Applicant shall confer with the Department and Mr. McMillan to attempt to agree on a set of restrictions for blasting and bedrock excavation to mitigate noise. The parties should consider at the least limitations on the hours of the day for such activities, an overall period in which these activities will be completed, and notice to neighbors. If the parties cannot agree, the Department is directed to promptly issue an administrative order imposing restrictions on blasting and bedrock removal to protect the peace and quiet of the surrounding property while allowing the Applicant a reasonable time to carry out these activities. The Applicant, Mr. McMillan or any other person with appropriate standing may appeal this order to the Hearing Examiner. No blasting or bedrock removal shall be carried out until such agreement is made or, if it cannot be reached, until the administrative appeal deadline for such Department order has passed. If either the Department or Mr. McMillan (or a designee of Mr. McMillan) is unable to confer with the Applicant within ten days of a request by the Applicant to confer, the Applicant is relieved from the terms of this condition.

Q. The proposed conditions in the Staff Report, Ex. 1, pp. 20-22, are incorporated, modified or deleted as follows:

1. Condition 1 is incorporated as modified to read as follows: "The project must conform to all the applicable standards set forth in the Engineering

Design and Development Standards, except as limited in this Decision."

2. Condition 2 is incorporated, except for the final sentence, which is deleted.
3. Condition 3 is incorporated, except for its Part A, which is deleted.
4. Condition 4 is incorporated, except for its Part A, which is deleted.
5. Condition 5 is deleted. Its subject matter is covered in the conditions above.
6. Condition 6 is deleted. A TIA has already been prepared.
7. Conditions 7-13 are incorporated as proposed.
8. Condition 14 is incorporated with the reference to 75' changed to 100'.
9. Condition 15 is deleted.
10. Conditions 16 and 17 are incorporated as proposed.

Dated this 22nd day of July, 2008.

Thomas R. Bjorgen
Olympia Hearing Examiner

