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## **REPORT and DECISION of the SNOHOMISH COUNTY HEARING EXAMINER**

DATE OF DECISION: June 22, 2006

PLAT/PROJECT NAME: *ARCHBISHOP MURPHY HIGH SCHOOL*

APPLICANT/  
LANDOWNER: North Sound Association for Catholic Education

FILE NO.: 98 100213-004

TYPE OF REQUEST: A major modification to an existing Conditional Use Permit to relocate the stadium bleachers from the required north side of the field to the south side of the field where they were erroneously placed, and to retain existing classroom portables with storage buildings for student clubs.

DECISION (SUMMARY): Requests APPROVED IN PART and DENIED IN PART pending further review

### **BASIC INFORMATION**

GENERAL LOCATION: The property is located at 12911 39<sup>th</sup> Avenue SE, Everett, WA

ACREAGE: 22.5 acres

ZONING: R-9600

#### **COMPREHENSIVE PLAN DESIGNATION:**

General Policy Plan Designation: Urban Low Density Residential (ULDR: 4-6 du/ac)  
Subarea Plan: North Creek  
Subarea Plan Designation: Rural (.4-1 du/ac)

#### **UTILITIES:**

Water: Silver Lake Water and Sewer District  
Sewage: Silver Lake Water and Sewer District

SCHOOL DISTRICT: Everett

FIRE DISTRICT: No. 1

SELECTED AGENCY RECOMMENDATIONS:

Department of:

Planning and Development Services: Approve subject to conditions

Public Works: Approve subject to limitation on students

**INTRODUCTION**

The applicant filed the Master Application on January 4, 2006. (Exhibit 1)

The Hearing Examiner (Examiner) made a site familiarization visit on June 1, 2006 in the afternoon.

The Department of Planning and Development Services (PDS) gave proper public notice of the open record hearing as required by the county code. (Exhibits 15, 16 and 17)

A SEPA determination was made on April 28, 2006. (Exhibit 14) No appeal was filed.

The Examiner held an open record hearing on June 7, 2006, the 54<sup>th</sup> day of the 120-day decision making period. Witnesses were sworn, testimony was presented, and exhibits were entered at the hearing.

**PUBLIC HEARING**

The public hearing commenced on June 7, 2006 at 9:03 a.m.

1. The Examiner indicated that he has read the PDS staff report, reviewed the file and viewed the area and therefore has a general idea of the particular request involved.
2. Mr. Tom Graafstra, an attorney representing the applicant appeared, and stated that the applicant had moved here in October of 1999 and that they have grades from 9-12 in school and there were currently 450 students.

He stated that they provide an all around program in education for the youth.

He indicated that the request is to reserve the portables and that they accept all of the recommended conditions of PDS.

He stated that originally the bleachers were to be on the south side, but after the previous hearing on the conditional use permit, they were required by the Hearing Examiner to be on the north side.

He indicated that they desired to keep the bleachers in their present location.

3. Ms. Julie Wiebusch, of the Greenbusch Group, appeared as a noise expert and submitted Exhibit 44, which shows her background and Exhibit 3 which is her written report. (Exhibits 3 and 44)

She stated that they had done testing of students yelling in trying to compare with the background noise of cheering and that the noise levels are inside in the homes. She stated that while they are probably exempt, the noise is still within the legal range of 55-60 dBA.

She stated this best location for the bleachers is on the south side.

3. Mr. Thomas Pors, an attorney for the neighbors appeared, and stated that PDS had allowed the bleachers to remain in error when they issued the building permit.

He stated that any noise tests should be done during a football game, and not reproduced as other similar kinds of noises.

4. Mr. Erik Olson, PDS, submitted a revised Condition D.

5. Mr. Gere Vik, president of the local homeowners association stated that the association and the homeowners are opposed to allowing the bleachers to remain.

He stated that the people in Pioneer Trails were not aware that the bleachers would be on the south when they were constructed.

6. Ms. Sherry Maupin appeared and stated that she was the past president of the Association at that time and that they tried to get the County to enforce the condition, but nothing happened.

7. Mr. John Alberti, an acoustical engineer spoke and feels that an actual football game, if measured, would be a violation of the noise ordinance.

He stated that the solution is to move the bleachers to the north and put up a back stop. He indicated that these are aluminum bleachers that can be moved.

He concluded by stating that he is willing to do a check voluntarily of the actual noise.

8. Mr. John Peck, a neighbor, stated that the games are played where there is no foliage on the field. He said that some games are played mid-week and that he wanted to have his area included in any new studies.

9. Mr. Paul Fischler stated that the day games were not a problem and that the night games result in the neighborhood being bathed in light.

10. Ms. JoAnn Becker appeared and stated that it is a wonderful school, but that she is affected by lights, noise, cars and the cars staying in the parking lots for long periods of time.

11. Mr. Pors concluded by stating that there is a history of non-compliance with the law and failure to enforce it by the county staff, and thus no weight should be given to their recommendations.

He stated that no one was present from the neighborhood to the south, and asked that the case at least be remanded for a noise test during a football game.

12. By way of rebuttal, Mr. Terry Ennis, the athletic director for the school, stated that they play five games at home, and that they are evening games starting at 7:00 p.m. He felt that the simulation of noise was a good way to check.

13. Ms. Wiebusch, by way of rebuttal, stated that moving the bleachers won't solve all the noise problems.

14. Mr. Graafstra stated that the extraneous issues should be separated and it must be determined if there is a material detriment to the neighborhood of the four or five games played.

15. Mr. Pors stated that the detriment is to the individual.

16. Exhibits 42A and 43 were submitted at the hearing.

The hearing concluded at 11:10 a.m.

**NOTE:** Audio tapes of this hearing are available in the Office of the Hearing Examiner.

## **FINDINGS, CONCLUSIONS AND DECISION**

### **FINDINGS:**

1. The master list of Exhibits and Witnesses which is a part of this file and which exhibits were considered by the Examiner, is hereby made a part of this file, as if set forth in full herein.
2. The PDS staff report has analyzed the nature of the application, the issues of concern, the application's consistency with adopted codes and policies and land use regulations, and the State Environmental Protection Act (SEPA) evaluation with its recommendation and conditions. This report is hereby adopted by the Examiner as if set forth in full herein.
3. The PDS staff, in their revised staff recommendations, Exhibits 41 and 42, stated that the request is for a major revision to Conditional Use Permit No. 98-100213 LU, to relocate stadium bleachers from the south side of the existing football field to the north side of the field, and to retain and convert seven existing portables from permanent classrooms to meeting and storage rooms for school clubs and other extra circular activities. The report indicates that as a precondition to approval of the original conditional use permit, the bleachers were approved to be constructed on the north side of the football field.

He stated that in 1998, work was stopped on the construction of a grandstand without the proper permits. In 2002, the applicant applied for a permit to construct the grandstands and press box on the south side of the football field and in 2003, a permit was issued to allow the construction, and was issued in error by the County and has not been finalized.

4. The properties around the site, with the exception of the Buffalo Square Shopping Center, which is zoned PCB, are zoned residentially. The property to the south is developed with a Snohomish County Housing Authority Mobile Home Park and to the south of it is Penny Creek Elementary. The Pioneer Trails subdivision is located directly north of the property.
5. Letters were received from the general public and expressed concern about noise, glare of the field lights, and perceived expansion of the school. (Exhibits 20-30 and 42A and 43)
6. In their report, PDS recommended approval of the request subject to various conditions which provided among other things, for a 650 student cap on the conditional use permit. This report contains the rationale from PDS for the approval of the amendments to the existing conditional use permit.
7. The aerial photograph, Exhibit 6, provides a clear view of the property and its location and how the area might be affected.
8. On July 8, 1998, the previous Deputy Hearing Examiner, Mr. Peter Donahue, issued a decision approving the request subject to various conditions, one of which required the placing of football bleachers on the north side of the football field. (Exhibit 3, p. 11)

9. It appears from that time until now, it has been a series of errors with regard to the construction of the bleachers which were supposed to be on the north side. Apparently the applicant was the first in line to know what was happening and failed to do so, or catch the error, and this was compounded by the County staff who erroneously issued the building permit, which was later concurred in by the staff, by allowing the applicant to proceed.

It is now at the point where the aluminum bleachers, the broadcasting stand and the lights have been allowed to remain until this review by the Examiner of the amended request.

10. A noise study was made of simulated noise by the students who were called together and told to yell. No testing was done under the actual noise conditions, which would happen at a football game, especially if your team made a touchdown.

Ms. Wiebusch indicated that there would be no basic change.

11. Another equally qualified noise expert, Mr. Alberti, who resides in the area, indicated that he would be willing to conduct a noise study for free. He believes that the study would show that the noise levels are violated. (Exhibit 45)

12. It is interesting to note that during all of this time, no noise studies were made of the actual crowd noise.

13. With regard to the seven portables being allowed to remain, it would appear that there is little or no real objection to that, as long as the limitation of 650 students is kept at that level, and that the conditions of approval are imposed.

The main issue to be resolved here is whether or not the noise levels, as codified in the law, are exceeded and if so, is there authority to waive the statutory noise level by virtue of conditions.

14. There appears to have been no real effort made by the parties to attempt to resolve the issues, whether by controlling the noise level of the speakers, the replacing of the lights, and/or removing or replacing the moveable bleachers.

15. There is no showing that the moving of the bleachers would resolve the problem, or would it create further problems for the mobile homes which have been constructed to the south.

16. The evidence shows that Archbishop Murphy High School's portables generally can be allowed where they are now located by meeting the requirements of the conditional use permit.

Here they appear to do so and they provide a service for the school, which is in demand in this day and age.

17. On the other side, the property owners who were residing there and who are entitled to not be unreasonably disturbed in the use and enjoyment of their property, were willing to accept that, as long as certain conditions were complied with, which protected those rights.

18. The real issue that must now be resolved, is whether or not the aluminum bleachers can or should be removed; and if removed, will eliminate some or all of the problems, or would they merely be a useless gesture and possibly exacerbate the issue with regard to other mobile homes to the south.

19. Nevertheless, all of this came about because of the failure of the parties involved to insure that the initial conditional use permit condition as to the bleachers, was properly attended to, which of course it was not. Now, the issue must be resolved as to what is the best solution to the noise in the area, and can this be done by either allowing the bleachers to stay in their present location, or removing them to the north side and placing additional noise buffers and/or the placing and location of lights and limitations placed on the public address speaker and its locations.
20. Any Finding of Fact in this Report and Decision, which should be deemed a Conclusion, is hereby adopted as such.

### **CONCLUSIONS:**

1. The Examiner concludes first that the allowance of the portables to remain is reasonable and proper and should be allowed to remain subject to conditions.
2. The Examiner is not convinced that everything has been done, which could be done, to eliminate the problem of the noise, starting with testing of the noise under similar conditions of a football game, and probably best tested by the football game. At that time, testing could be done with regard to the sound levels of the loud speaker and the placing of the lights in the location where they would have the minimum effect on the surrounding homes. One of the factors that might also be considered, is the playing of the games, i.e. how many and when. Since there is an offer to conduct a test during a football game, the Examiner believes that this should be done. At that time, both sides may make their own tests and obtain their own noise readings under real conditions.
3. Absent that, and until more conclusive evidence is received, the Examiner cannot approve *carte blanc* the request to leave the bleachers where they are, thereby compounding a violation of the laws.
4. The request should be approved as to the portables, subject to compliance by the applicant with the following Conditions:

### **CONDITIONS**

- A. The site plan marked Exhibit 8, shall be the official approved site plan for this project. Any discrepancy between the content of the official approved development plan(s) and the performance standards of the UDC SCC shall be resolved in favor of the standards contained within the UDC SCC. Revision of official approved development plan(s) is regulated by SCC 30.42C.110.
- B. A 650 student cap is placed on the Conditional Use Permit for the Archbishop Murphy High School, for the purposes of traffic mitigation. In the event the student population exceeds 650, a new concurrency determination and additional traffic mitigation will be required as long as there is sufficient capacity available on the road system.
- C. The retention of the 7 classroom portables is approved with the restriction that the portables not be used as classrooms and only be used as meeting and/or storage rooms for school clubs and/or other extra curricular activities.
- D. With the exception of the revision of Condition Gii, all conditions from the original conditional use permit approval, dated July 6, 1998 still apply and are incorporated herein by reference.

Nothing in this permit/approval excuses the applicant, owner, lessee, agent, successor or assigns from compliance with any other federal, state or local statutes, ordinances or regulations applicable to this project.

5. Any Conclusion in this Report and Decision, which should be deemed a Finding of Fact, is hereby adopted as such.

**DECISION:**

The request to allow the seven portable units to remain is hereby APPROVED subject to compliance by the applicant with the conditions set forth in Conclusion 4, above.

The request to allow the bleachers to remain on the south side is DENIED until there has been further review and study of the possibilities for a solution of the noise problem as it now exists. The Examiner would recommend that the parties follow through on resolving this issue together, at which time further review will be held by the Examiner at the request of the parties. If no solution can be reached after the first home football game; the Examiner, at the request of PDS, will re-open the hearing and issue a final decision on the bleachers and press box and will resolve the issue.

Decision issued this 22 day of June, 2006.

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Robert J. Backstein, Hearing Examiner

<b>EXPLANATION OF RECONSIDERATION AND APPEAL PROCEDURES</b>
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This decision of the Hearing Examiner is final and conclusive with right of appeal to the County Council. However, reconsideration by the Examiner may also be sought by one or more parties of record. (The Examiner's action on reconsideration would be subject to appeal to the Council.) The following paragraphs summarize the reconsideration and appeal processes. For more information about reconsideration and appeal procedures, please see Chapter 30.72 SCC and the respective Examiner and Council rules of procedure.

**Reconsideration**

Any Party of Record may request reconsideration by the Examiner. A Petition for Reconsideration must be filed in writing with the Office of the Hearing Examiner, 2802 Wetmore Avenue, 2<sup>nd</sup> Floor, Everett, Washington, (Mailing Address: M/S #405, 3000 Rockefeller Avenue, Everett WA 98201) on or before **July 3, 2006**. There is no fee for filing a Petition for Reconsideration. **“The petitioner for reconsideration shall mail or otherwise provide a copy of the petition for reconsideration to all parties of record on the date of filing.” [SCC 30.72.065]**

A Petition for Reconsideration does not have to be in a special form but must: contain the name, mailing address and daytime telephone number of the petitioner, together with the signature of the petitioner or of the petitioner's attorney, if any; identify the specific findings, conclusions, actions and/or conditions for which reconsideration is requested; state the relief requested; and, where applicable, identify the specific nature of any newly discovered evidence and/or changes proposed by the applicant.

The grounds for seeking reconsideration are limited to the following:

- (a) the Examiner exceeded his jurisdiction;
- (b) the Examiner failed to follow the applicable procedure in reaching his decision;
- (c) the Examiner committed an error of law or misinterpreted the applicable comprehensive plan, provisions of Snohomish County Code, or other county or state law or regulation;
- (d) the Examiner's findings, conclusions and/or conditions are not supported by the record;
- (e) newly discovered evidence alleged to be material to the Examiner's decision which could not reasonably have been produced at the Examiner's hearing; and/or
- (f) changes to the application proposed by the applicant in response to deficiencies identified in the decision.

Petitions for Reconsideration will be processed and considered by the Hearing Examiner pursuant to the provisions of SCC 30.72.065. Please include the county file number in any correspondence regarding this case.

Appeal

An appeal to the County Council may be filed by any aggrieved Party of Record. Appeals shall be addressed to the Snohomish County Council but shall be filed in writing with the Department of Planning and Development Services, 5th Floor, County Administration Building, 3000 Rockefeller Avenue, Everett, Washington (Mailing address: M/S #604, 3000 Rockefeller Avenue, Everett, WA 98201) on or before **July 5, 2006** and shall be accompanied by a filing fee in the amount of five hundred dollars (\$500.00); PROVIDED, that the filing fee shall not be charged to a department of the county and PROVIDED FURTHER that the filing fee shall be refunded in any case where an appeal is dismissed in whole without hearing under SCC 30.72.075.

An appeal must contain the following items in order to be complete: a detailed statement of the grounds for appeal; a detailed statement of the facts upon which the appeal is based, including citations to specific Hearing Examiner Findings, Conclusions, exhibits or oral testimony; written arguments in support of the appeal; the name, mailing address and daytime telephone number of each appellant, together with the signature of at least one of the appellants or of the attorney for the appellant(s), if any; the name, mailing address, daytime telephone number and signature of the appellant's agent or representative, if any; and the required filing fee.

The grounds for filing an appeal are limited to the following:

- (a) the Examiner exceeded his jurisdiction;
- (b) the Examiner failed to follow the applicable procedure in reaching his decision;
- (c) the Examiner committed an error of law or misinterpreted the applicable comprehensive plan, provisions of Snohomish County Code, or other county or state law or regulation; and/or
- (d) the Examiner's findings, conclusions and/or conditions are not supported by the record.

Appeals will be processed and considered by the County Council pursuant to the provisions of Chapter 30.72 SCC. Please include the county file number in any correspondence regarding this case.

Staff Distribution:

Department of Planning and Development Services: Erik Olson  
 Department of Public Works: Norm Stone

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation." A copy of this Decision is being provided to the Snohomish County Assessor as required by RCW 36.70B.130.

