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

ALLAN and MARIJKE DEUTSCHER, Respondents, v. PIERCE COUNTY, a Washington municipal corporation; NEIGHBORS UNITED FOR THE LOOP, Appellants.	)	No. 63855-6-I UNPUBLISHED OPINION FILED: November 23, 2009

Ellington, J. — Allan and Marijke Deutscher applied for a conditional use permit for a child care facility in Spanaway. The hearing examiner rejected the proposal as incompatible with the neighborhood, but approved a permit for a smaller facility serving fewer children. The examiner's decision to limit the number of children to be served is not supported by substantial evidence. We reverse and remand to the examiner for consideration of the proposal's compatibility with the neighborhood in view of the size of the structure.

BACKGROUND

In 2002, Allan and Marijke Deutscher applied to the Pierce County Planning and Land Services Department seeking a conditional use permit to build a child care

facility in Spanaway at the intersection of Old Military Road and Spanaway Loop Road. The plan was to serve up to 100 children in a 9,990 square foot, one story building on a 1.58 acre parcel. The proposal included an exterior playground and a parking lot.

The Parkland-Midland-Spanaway Advisory Commission recommended the permit be denied, citing concerns about traffic, compatibility with the surrounding residential area, and water pollution. Pierce County planning staff recommended the permit be approved subject to conditions related to landscaping, fencing, outdoor lighting, and the residential design of the building.

Many neighborhood residents appeared at the hearing to oppose the project. Their concerns included the impact of the traffic that would be generated. Both the Deutschers' and Pierce County's traffic experts, however, testified that these effects could be mitigated and the project would have little impact on traffic.

The examiner denied the permit, finding that the proposal was not compatible with the neighborhood and would, due to increased traffic congestion, pose a risk to public health and safety and general welfare.

The superior court reversed, ruling that the examiner improperly relied on traffic concerns in light of the undisputed expert testimony that traffic impacts could be mitigated. The court remanded for the examiner to determine whether the project met the other criteria for a conditional use permit and to consider alternative designs and mitigation proposals.

The Deutschers submitted a revised proposal relocating the building farther

from neighboring residences and positioning the parking lot away from the intersection. They also submitted two alternative architectural designs, one composed of two buildings about 4,500 to 5,000 square feet in size, and another composed of three 3,300 square foot buildings.

The Parkland-Midland-Spanaway Advisory Commission and the county planning staff reiterated their previous recommendations. At the hearing, neighbors again testified in opposition, emphasizing the residential character of the neighborhood and the comparative size of most residences (about 3,500 square feet). The neighbors contended the size of the building, the noise from children playing outside, and the additional traffic rendered the proposal incompatible with the neighborhood. Some questioned the need for additional child care facilities in the neighborhood.

The Deutschers presented evidence to show these concerns had been or could be mitigated. The facility is to operate between 6:00 a.m. and 6:30 p.m. A solid wood fence together with existing and new landscaping would provide a noise buffer. Children will play outside under supervision, in small groups and at different times. As with the four other facilities the Deutschers operate in Washington, the building is designed to resemble a home. The Deutschers pointed out that the property is zoned for five single family residences. If necessary, they were willing to proceed with several smaller buildings, despite the reduction in efficiency and noise control.

The examiner denied the permit, concluding that a project serving 100 children in a 9,990 square foot building would not be compatible with the residential character

of the neighborhood. The examiner approved a permit for a facility to serve 33 children subject to some 36 conditions. He made no mention of alternative designs.

Again the Deutschers appealed. Neighbors United for the Loop intervened. The superior court ruled that the examiner's modification of the proposal was not supported by substantial evidence, and approved a permit for a 100 child, 9,990 square foot day care facility. Pierce County and Neighbors United for the Loop appeal.

ANALYSIS

Under the Land Use Petition Act, chapter 36.70C RCW, appellate courts "stand in the shoes of the superior court and review the hearing examiner's land use decision de novo, based on the administrative record."[1] We may grant relief if the appellant establishes one of six standards of relief, among them that "[t]he land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court."[2]

The Pierce County Code allows day care facilities as conditional uses in the zoning area.[3] The code recognizes that such uses are unique due to size, equipment or location, and that controls may be required to ensure compatibility with the comprehensive plan, other allowed uses, and the "character of the vicinity."[4] A conditional use permit applicant must prove the proposed use meets all code criteria,[5]

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[1] Sylvester v. Pierce County, 148 Wn. App. 813, 822, 201 P.3d 381 (2009).

[2] Id. at 823 (quoting RCW 36.70C.130(1)(c)).

[3] Pierce County Code (PCC) 18A.28.010.

[4] PCC 18A.75.030(A).

including, as relevant here:

> a. That the granting of the proposed Conditional Use Permit will not:
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> > 1. be detrimental to the public health, safety, and general welfare;
> > 2. adversely affect the established character and planned character of the surrounding vicinity; nor
> >
> > 3. be injurious to the uses, planned uses, property, or improvements adjacent to, and in the vicinity of, the site upon which the proposed use is to be located.
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> b. That the granting of the proposed Conditional Use Permit is consistent and compatible with the intent of the goals, objectives and policies of the County's Comprehensive Plan, appropriate Community Plan (provided that, in the event of conflict with the Comprehensive Plan, the Comprehensive Plan prevails), and any implementing regulation.[6]

The examiner found that the project conformed with the comprehensive plan and with development, zoning and environmental regulations; that noise is not a concern because of landscaping and other buffers; and that traffic will not impact the road system. The examiner also found the proposal to be a compatible use, not detrimental to public health and safety, not injurious to property in the area, and aesthetically compatible with the neighborhood.

Ultimately the examiner found the project met all criteria save one: the requirement that the proposal not adversely affect the established or planned character of the surrounding vicinity. In essence, the examiner concluded the

[5] PCC 18A.75.030(B)(2).

[6] PCC 18A.75.030(B)(1).

proposal is out of proportion to surrounding residences and therefore not compatible with the neighborhood unless limited in number of children and size of structure. The examiner found that a smaller facility would be compatible and would generate less traffic impact, and therefore approved a permit for a day care facility serving up to 33 children, with a corresponding reduction in building size.

The Deutschers assail the examiner's decision on numerous grounds. They contend the examiner improperly relied on general neighborhood discontent in refusing to approve the proposal and improperly considered traffic impacts. They also argue that building size alone does not render the proposal incompatible with the neighborhood. The superior court found the evidence did not support the examiner's limitation on either size of structure or number of children. We review the examiner's decision directly. We agree in part with the superior court.

In his written decision, the examiner summarized the testimony at the hearing. This included an extensive recital of neighborhood opposition, which centered upon traffic, septic system issues, a perceived lack of need for the facility, and particular emphasis upon the incompatibility of a commercial use in a residential neighborhood. The examiner entered several findings recounting the extent of neighborhood opposition,[7] including a finding that "[c]itizens reviewed the proposed use and testified or presented evidence the facility, if allowed, should be reduced to 24 or 50 [children]."[8] The examiner also found that day care facilities in nearby commercial

[7] See, e.g., Administrative Record (AR) at 33 ("the residents in the area, by petition, by presentation of written and oral testimony at this hearing, before the Advisory Committee on two occasions and at the prior Examiner's hearing all spoke against the intrusion of this large commercial use within an all residential

zoning areas have space available.

Local jurisdictions may not deny land use permits based solely on evidence of general neighborhood opposition.[9] Although it appears the examiner was influenced by community opinion, he relied upon several other grounds in reaching his decision: intensity of use and building size.

As to intensity of use, the examiner made findings regarding the number of vehicle trips a 100 child day care facility would generate daily. He did not, however, make similar findings for a 24, 33, or 50 child facility. Further, the trial court ruled on the first remand that based upon the undisputed evidence, traffic impacts for the 100 child facility could be mitigated. The findings as to vehicle trips thus do not support a decision to deny the permit.

The size of the proposed operation relates both to intensity of use and building size. The examiner found that a proposal to serve 100 children in a 9,990 square foot building is "not compatible with the residences in the area and is out of proportion with surrounding residences,"[10] and that "[t]he substantial weight of evidence . . . is to the reduction of the size density and intensity of the day care facility."[11] He found the day

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

[8] AR at 35.

[9] Sunderland Family Treatment Servs. v. City of Pasco, 127 Wn.2d 782, 797, 903 P.2d 986 (1995).

[10] AR at 34.

[11] AR at 35.

care facility would be a compatible use if it "were of a size, density and intensity use similar to the surrounding residences,"[12] and that the permit should therefore be granted "subject to limiting the size, density and intensity to not more than one-third the size of the surrounding residences, or 33 children."[13]

These findings are somewhat confusingly stated, but appear to proceed from a comparison of the size of the proposed building (roughly three times the size of most neighborhood residences) to a rough calculation of the number of children who may be served in a facility of similar size to the residences around it.[14]

The Pierce County Code allows child care facilities as conditional uses in the zoning area. When the Deutschers applied for the permit, the code imposed no limit on the number of children to be served.[15] Given the findings that the proposal was a compatible use, was not detrimental to health and safety, and would have no unmitigated noise impact or impact on the road system, the evidence does not support a finding that a facility serving 100 children is incompatible with the neighborhood simply because of the number of children served.

A reasonable person could conclude that the size of the proposed structure is incompatible with a neighborhood where most of the residences are about 3,500

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[12] AR at 35.

[13] AR at 35.

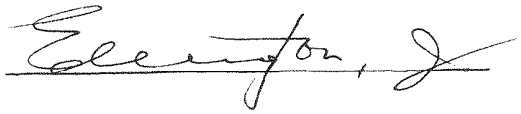
[14] We assume the examiner did not intend to limit the facility size to "one-third the size of the surrounding residences."

[15] See former PCC 18A.25.100F Table (2001). In 2002, the Pierce County Code was amended to allow child care facilities for fewer than 25 children as conditional uses in moderate density single family areas in Spanaway. See PCC 18A.28.010; 18A.33.220; 18A.25.100G Table (2002).

square feet. But current zoning would allow up to five single family homes on the site. The examiner did not address why one architecturally compatible 9,990 square foot building is an unacceptable exchange for five 3,500 square foot residences, and it is unclear whether the examiner would have found the proposal incompatible based solely on building size.

Further, the examiner did not address the alternative structural designs. Consistent with the trial court's original remand order, the Deutschers submitted two alternatives: one with two 4,500 to 5,000 square foot buildings, and one with three 3,300 square foot buildings. These designs are marked as exhibits in the examiner's record, but there is no indication that the examiner or the county staff considered these alternatives.

Any new project will alter the surrounding area. But the law "does not require that all adverse impacts be eliminated; if it did, no change in land use would ever be possible."[16] We therefore reverse the superior court, reverse the examiner, and remand to the examiner to address the proposal's compatibility with the neighborhood in view of the size of the structure or structures.



WE CONCUR:

[16] Maranatha Mining, Inc. v. Pierce County, 59 Wn. App. 795, 804, 801 P.2d 985 (1990).

Leach, J.

Schindler, C.J.