

## **RESOLUTION NO. 569**

### **A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, RELATING TO LAND USE AND ZONING, RENDERING THE FINAL DECISION OF THE CITY ON CASE NO. CUP 01-02, AFFIRMING THE JUNE 6, 2001 DECISION OF THE GIG HARBOR HEARING EXAMINER, APPLICATION FOR APPROVAL OF A CONDITIONAL USE PERMIT AND SITE PLAN; AND APPEAL OF APPROVAL OF ADMINISTRATIVE VARIANCE FOR HENDERSON BAY ALTERNATIVE SCHOOL IN GIG HARBOR, WASHINGTON.**

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WHEREAS, applicant Peninsula School District #401 submitted applications for a conditional use permit (CUP 01-01), site plan (SPR 01-01), design review (DRB 01-02) and for an administrative variance for development of property located off Skansie Ave. N.W., north of Rosedale Street N.W., in Gig Harbor, Washington; and

WHEREAS, the City Responsible SEPA Official issued a Mitigated Determination of Significance (“MDNS”) for the development on April 2, 2001; and

WHEREAS, the MDNS and the administrative variance was appealed by the Coalition to Save the Field on April 18, 2001; and

WHEREAS, the City Hearing Examiner held open public hearings on the applications and the SEPA appeal on April 18, 2001, May 16, 2001, and May 24, 2001. The hearing was held open administratively until May 25, 2001; and

WHEREAS, the Hearing Examiner issued his decision approving the conditional use permit and site plan with conditions and approving the administrative variance on June 6, 2001; and

WHEREAS, the Hearing Examiner issued his decision denying the SEPA appeal on June 6, 2001; and

WHEREAS, the Coalition to Save the Field appealed the Hearing Examiner’s June 6, 2001 decision approving the conditional use permit and site plan with conditions and approving the administrative variance on June 20, 2001; and

WHEREAS, the City Council does not have jurisdiction to consider an appeal of the Hearing Examiner’s decision on an appeal of an administrative variance (GHMC Section 17.66.050); and

WHEREAS, the City Council scheduled a closed record appeal hearing for July 9, 2001, to hear the Coalition's appeal of the Conditional Use Permit and Site Plan, pursuant to chapter 19.06 GHMC; and

THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, HEREBY RESOLVES AS FOLLOWS:

**Section 1.      Closed Record Appeal Hearing.**

A. Notice. The closed record appeal hearing before the Gig Harbor City Council was convened on July 9, 2001. All required public notice of the closed record hearing was provided.

B. Appearance of Fairness.

All members of the Council and the Mayor were asked to disclose any ex parte contacts with opponents or proponents of the development, appearance of fairness or conflict of interest matters. The following disclosures were made:

1. Derek Young. Councilmember Young disclosed that several e-mails had been sent to him prior to the closed record hearing from Jim Jung, asking him whether he was in favor of ball parks. Councilmember Young responded by asking for more information because he did not know whether the question related to an application that had been submitted to the City. The second e-mail was sent to Councilmember Young asking why the attorney for the applicant could submit materials to the Council prior to the closed record hearing, but he could not.

2. Bob Dick. Councilmember Dick stated that he received comments from people regarding ball parks in the City. He asked whether an application had been filed, and when he learned that one was being processed by the City, Councilmember Dick did not have any further communications about this issue.

3. Jim Pasin. Councilmember Pasin communicated with several business owners regarding the need for the school to be moved.

4. Marilyn Owel. Councilmember Owel had conversations with people regarding the Henderson Bay Alternative School, but these were general in nature and took place before an application had been submitted to the City.

5. Steve Ekberg. Councilmember Ekberg disclosed that his wife is an employee of the applicant Peninsula School District, but he did not feel that this would influence his decision in any way.

6. John Picinich. Councilmember Picinich recused himself from all participation in

this matter because he is an employee of the applicant School District.

The Mayor asked the public whether anyone had any objection to her participation or the participation of any Councilmember in the Coalition's appeal. After hearing all of the above, no one objected.

Section 2. Record for the Closed Record Hearing. The following documents were entered into the record for the Closed Record Appeal:

**ALL EXHIBITS LISTED IN THE HEARING EXAMINER'S JUNE 6, 2001 DECISIONS ARE INCORPORATED HEREIN BY THIS REFERENCE.**

<b>Exhibit No.</b>	<b>Date</b>	<b>Description</b>
49	7/9/01	E-mail from J. Jung
50	7/9/01	Notebook received from J. Guernsey, attorney for applicant School District

Section 3. Witnesses. No witnesses testified at the closed record appeal hearing. The appellants, applicants and/or their representatives were allowed to present oral argument based on the issues described in their appeals and the evidence in the administrative record. New evidence and testimony was prohibited under GHMC Section 19.06.005.

Section 4. Standard of Review in Closed Record Hearings. The Council makes the following conclusion of law regarding the appropriate standard of review in this closed record appeal hearing: "Closed record appeals shall be on the record established at the hearing before the hearing examiner." GHMC Section 19.06.005(A). The Council has the authority to affirm, modify, reverse or under certain limited circumstances, to remand the application to the hearing examiner. GHMC Section 19.06.005(A)(3). With regard to factual issues, the City Council is required to review the evidence before the Hearing Examiner to determine whether his decision was supported by substantial evidence.

"Substantial evidence" is "when the evidence in the record is of sufficient quantity to persuade a fair-minded rational person of the truth of the finding. Isle Verde International Holdings, Inc. v. Camus, 99 Wn. App. 127, 132, 990 P.2d 429 (1999), review granted, 141 Wn.2d 1011(2000); see also, Freeburg v. Seattle, 71 Wn. App. 367, 371, 859 P.2d 610 (1993).

Section 5. Conditional Use Criteria. In order to approve the conditional use permit application, the Hearing Examiner was required to make findings of fact that the following conditions exist:

Each determination granting or denying a conditional use permit shall be supported by written findings of fact showing specifically wherein all of the following conditions are met:

- A. That the use which the conditional use permit is applied for is specified by this title as being conditionally permitted within, and is consistent with the description and purpose of the zone district in which the property is located;
- B. That the granting of such conditional use permit will not be detrimental to the public health, safety, comfort, convenience and general welfare, will not adversely affect the established character of the surrounding neighborhood, and will not be injurious to the property or improvements in such vicinity and/or zone in which the property is located;
- C. That the proposed use is properly located in relation to the other land uses and to transportation and service facilities in the vicinity; and further, that the use can be adequately served by such public facilities and street capacities without placing an undue burden on such facilities and streets;
- D. That the site is of sufficient size to accommodate the proposed use and all yards, open spaces, walls and fences, parking, loading, landscaping and other such features as are required by this title or as needed in the opinion of the examiner.

Gig Harbor Municipal Code Section 17.64.040.

Section 6. Argument of Appellant and Applicant. The Coalition's attorney, Barbara Henderson, provided argument on the Coalition's appeal. The Coalition believes that the site does not meet the City's parking requirements, although the City Planning Staff informed the City Council that the applicant proposes to provide parking on the site consistent with the City's code. Apparently, the Coalition's argument is based on a survey of the parking on site, and the Coalition's conclusion that there are too many cars on the property.

The Coalition argued that the proposal would result in a loss of the sport field, and claimed that the children attending school needed to have an active sport field of sufficient size to accommodate their needs. They admitted that the City's comprehensive plan does not allow the City to deny the application based on the Coalition's perspective that the sport field is not of adequate size. However, the Coalition believes that the City should coordinate and assist the School District in the development of park facilities.

According to the Coalition, the application does not meet the CUP criteria because the use has to be conditionally permitted in the particular zone. While the Coalition admits that a school is a conditionally permitted use in this residential zone, they believe a problem is presented with the

replacement of a permitted use with a conditional use.

However, the applicant does not intend to replace an existing use. The School District is proposing to construct the Henderson Bay Alternative High School facility on the northeastern 1.69 acres of the District's 44.47 acre site that abuts Rosedale Street N.W. and Skansie Avenue N.W. The 44.47 acre site includes the existing Discovery Elementary School and the Gig Harbor High School.

The Coalition believes that the development will be injurious to public health, safety and welfare because the ball field will be decreased in size. This will mean that the children will not have the room they need to engage in activities to foster learning.

However, the City's code does not regulate the size of ball fields for schools, which is admitted by the Coalition. The Coalition also did not find any regulations which require the School District to create ball fields of any particular size for school children, other than certain administrative regulations which apply when grant funding from the state is involved. There is no evidence in the record to indicate that any state funding is involved in this project, or that any state agency has attempted to enforce these regulations on this project.

The Coalition argues that the development is not properly located in relation to other uses because there is an issue regarding traffic. While the Coalition admits that its study was not extensive, they claim that the District's traffic study was inadequate because the traffic was measured only during off-peak hours.

Finally, the Coalition argues that the Hearing Examiner erred by adding into the area available for the development, property owned by Pierce County.

Jill Guernsey, attorney for the School District, stated that the proposal involved four acres of play area. There is one-half acre of play area in front of the school, 7,000 square feet of play area immediately adjacent to the kindergarten rooms, and the 42,000 square foot wooded area will be expanded. The play field will be reduced in size and moved. The District told the Hearing Examiner that he could insert a condition in the approval that if the students ever needed more play area, that they could use the play area at the high school. When all of this is added together, there is a total of 4 and one half acres of play area.

The District reiterated that the use of the property is now under a CUP and the application is for a CUP. The District therefore believes that the Coalition is wrong in its assumption that there is a change from a permitted use to a conditionally permitted one.

The District believes that the appeal is not based on the issues described in the Coalition's appeal statement. Instead, the District believes that the appeal has been raised because of objections to the kids who will be attending Henderson Bay Alternative School. As an example of the fact that a loss of play fields is not the issue, the District cited as an example, the City's approval of purchase

of property for the new Civic Center. There was no objection at that time, and the purchase involved a loss of two School District play fields.

As to the issue of parking, the District stated that the City's code required 65 parking spaces, and the District's proposal is for installation of 65 parking spaces.

#### **Section 8. FINDINGS.**

A. The City Council finds that the Coalition's primary appeal issue is a perception that "the proposal is contrary to the Comprehensive Plan of the City of Gig Harbor." However, under state law, the City is required to determine a project's consistency with development regulations adopted under the Growth Management Act. RCW 36.70B.040(1). In the absence of applicable regulations, the City uses the appropriate elements of a comprehensive plan adopted under the Growth Management Act. RCW 36.70B.040(1).

B. The City Council finds that the City has no development regulations addressing the minimum or maximum size of play fields associated with school buildings. If the City has no development regulations addressing this issue, there is no authority for the City to deny or condition the application on this basis.

C. The City Council finds that the criteria in the City's code relating to conditional use permits, which requires the broad determination that the particular use "will not be detrimental to the public health, safety, comfort, convenience and general welfare . . ." does not allow the City to deny the conditional use permit application because of a perceived lack of play area associated with a school building. The Hearing Examiner heard testimony on the issue whether there would be any detrimental effect, and the City Council accepts the Hearing Examiner's conclusions relating to such testimony. Such evidence obtained at the hearing examiner level, and even a reviewing court is required to view:

The evidence and reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.

Freeburg, 71 Wn. App. at 371-72; see also, Isle Verde, 99 Wn. App. at 132. Here, the District prevailed at the highest forum exercising fact-finding authority (the hearing before the Hearing Examiner).

D. The City Council finds that the City's code requires 65 parking spaces for this development. The City Planning Staff presented evidence, which was confirmed by the School District, that the development would have 65 parking spaces.

### **Section 9. CONCLUSIONS.**

A. The City Council concludes that the Hearing Examiner correctly determined that the applications submitted by the School District were to be reviewed under the City's code criteria for approval of conditional use permit applications. None of the excerpts from the City's Comprehensive Plan in the appeal statement by the Coalition are applicable because the City has adopted regulations under the Growth Management Act, and these were the regulations used by the Hearing Examiner.

B. The City Council concludes that there are no regulations in the City's code or in any other regulations applicable to development in the City, which are enforced by the City, that would allow the City to condition or deny this development based on a loss of play field area.

C. The City Council concludes that the Hearing Examiner's decision regarding the testimony presented at the hearing which affected the consistency of the application with the City's code criteria for approval of conditional use permits is supported by substantial evidence.

D. The City Council concludes that the Hearing Examiner's decision on the issue of parking spaces for the development is supported by substantial evidence.

**Section 10. DECISION.** The City Council denies the Coalition's appeal and affirms the Hearing Examiner's decision of June 6, 2001.

RESOLVED by the City Council this     day of July, 2001.

APPROVED:

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MAYOR, GRETCHEN WILBERT

ATTEST/AUTHENTICATED:

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CITY CLERK, MOLLY M. TOWSLEE

APPROVED AS TO FORM;  
OFFICE OF THE CITY ATTORNEY:

BY: \_\_\_\_\_

FILED WITH THE CITY CLERK: 7/23/01  
PASSED BY THE CITY COUNCIL: 7/23/01  
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