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CITY OF EDMONDS

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DEVELOPMENT SERVICES DEPARTMENT • PLANNING DIVISION

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BEFORE THE HEARING EXAMINER FOR THE CITY OF EDMONDS

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Phil Olbrechts, Hearing Examiner

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RE: WSDOT Noise Variance PLN2014-0004	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION
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SUMMARY

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The applicant has requested a variance to City of Edmonds noise standards for temporary nighttime construction work for right-of-way improvements to SR 104. The application is denied without prejudice for apparent lack of credible and sufficient noise information.

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The materials and testimony provided by the applicant raise serious concerns over accuracy and credibility. In attachment 14 to the staff report, the applicant notes that for the loudest equipment used in the proposal, “[t]he sounds of this construction equipment would be perceived at or near same as existing background from SR 104 at night”. This is a key factual issue in the variance application, since clearly the proposal will not create any detrimental impacts if it is not perceived to be any louder than existing ambient levels. The examiner requested information on SR 104 ambient night time noise levels for verification of these comments. The applicant submitted a report from 1995 with the conclusion that ambient night time noise levels are 51-52 dBA along SR 104. As shown in attachment 14, the noise of several pieces of equipment, fifty feet away, is 80-82 dBA. In short, the noise level of this equipment is 30 dBA more than the ambient noise levels of SR 104. A 30 dBA increase in noise levels is nowhere near perceived as inconsequential.

Giving the applicant the maximum benefit of the doubt, it could be that the applicant is referring to perceived noise at the closest residences. The applicant did not provide

Noise Variance

1 any information on the distance to the nearest residences (a major omission), but from
2 the aerial photograph and the sound buffer diagram attached to the staff report, it
3 appears that the nearest homes are located 500 feet from the project location.
4 According to attachment 14, the noise generated by the equipment creating
5 approximately 80 dBA noise levels at 50 feet is reduced to approximately 55 dBA at
6 500 feet. The lowest noise levels addressed in attachment 14 are pick-up trucks,
7 which produce 64 dBA noise fifty feet away and 38 dBA 500 feet away. Given that
8 the ambient noise levels are 52 dBA at SR 104, it can reasonably be concluded that
9 the ambient noise level from SR 104 will be less than 38 dBA 500 feet away. At a
10 distance of 500 feet, it appears that the equipment will still create noise levels that are
11 approximately 20 dBA louder than the “background noise from SR 104 at night” as
12 referenced in attachment 14.

13 Given the apparent discrepancies in the information provided by the applicant, none
14 of the information provided by the applicant at this time can be relied upon in
15 assessing the merits of the variance request. Without the applicant’s information, it
16 cannot be concluded that the proposal will not be injurious to property in the vicinity,
17 a required finding for approval of a variance by ECDC 20.85.010(E). There is no
18 other information in the record that addresses the noise impacts of the proposal. As a
19 result, the variance must be denied.

20 The applicant is encouraged to request reconsideration if there has been a
21 misunderstanding. It is recognized that the applicant would like to commence
22 construction ASAP and that the project has considerable public merit. A request for
23 reconsideration will be handled expeditiously and a decision issued within a few days
24 of the request for reconsideration. The primary delay in issuing a decision will be
25 giving other parties of record an opportunity to respond to the request for
reconsideration. Since the number of parties of record are limited, staff has the option
of securing their waiver to any response in order to expedite resolution. The
procedures for reconsideration are governed by ECDC 20.06.010. The applicant
should recognize that no new information may be provided in the reconsideration
request. The applicant must use information that has been admitted into the record
(composed of the admitted exhibits and testimony as summarized and identified
below) in presenting its reconsideration request.

The application is denied without prejudice. The applicant may file a re-application if
the applicant’s noise assessment is subject to qualified third party peer review funded
by the applicant. The noise assessment should identify (1) the distance of the nearest
residences to the construction project, (2) the increase in noise levels that will be
generated by the project at those residences, (3) the zoning of the source and nearest
residential receiving properties, and (4) information on how that increase in noise will
be perceived and whether such an increase will be loud enough to disrupt sleep. As
in the analysis provided for this application, the applicant shall also identify all
reasonable mitigation measures that can be employed to reduce noise levels.

ORAL TESTIMONY

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Staff

Mr. Mike Clugston from the planning division stated that the Washington State Department of Transportation has applied for a noise variance for a project on Washington State Route 104. He submitted the Staff Report from April 14 with ten attachments to the record, and he submitted a public comment letter. Both were admitted to the record. He stated that the variance has been requested because the work that this project requires cannot be completed during the day, thus they have to do it at night. The city code in chapter 5.30 requires that work be conducted between 7 a.m. and 10 p.m., and a noise variance is required to do work outside that time. Additionally, chapter 5.30 identifies the sound levels that need to be met for projects, and the work that would be done at night for this project would exceed these sound levels.

Mr. Clugston stated that the application asks for twenty nights of noise variance between May 1 and December 31, 2014, and the city must be notified each of the twenty nights that the variance is used. Also, the application proposes several mitigation measures that are described in attachments 2 and 5 to the Staff Report. These measures will attempt to reduce noise from the project; attachment 5 is a spread sheet that lists a host of mitigation measures proposed for the equipment that would be used. He stated that noise variances are different from regular variances that are described in chapter 20.85. The process for a noise variance is the same, but the criteria for a noise variance is specific, and it is described in chapter 5.30. Specifically, ECC 5.30.120.A requires that the Hearing Examiner make a finding that compliance with the noise requirements in chapter 5.30 cannot be achieved because of special circumstances. In this case, where the project is proposed qualifies as a special circumstance that prevents compliance with the noise requirements, and Staff recommends approval of the variance.

The Hearing Examiner asked in reference to attachment 5 what the ambient noise level is at night on SR 104, and Mr. Clugston stated that Staff does not have information on that, but a noise study could be conducted to find out what the average noise level is at night. Also, Mr. Clugston stated that Staff does not know what traffic is like on SR 104 at night. Attachment 9 has information about the residences that are near where the project is proposed on SR 104. Mr. Clugston stated that he worked on a noise variance in 2010, but he is not familiar with an application for a noise variance from the city. The examiner explained that one possible factor that differentiates this project from that one is that this project does not look to be in a relatively quiet area, thus the noise from the project would not have a huge impact; this is why it might be important to know what the ambient noise level at night on the SR 104 is.

Applicants

1 The applicant, Mr. Larry Magnoni, stated that he is the acoustic air quality and energy
2 specialist for the Washington State Department of Transportation. He has been doing
3 this work for 23 years. He stated that the buffer zones identified in the application
4 refer to the zones in which several mailings have been sent to notify residents nearby,
5 or those within a 1,000-foot radius, about the project. Most work in the project is
6 going to be around the crosswalk, which is the area that the 1,000 foot radius is based
7 on. There will be a few activities, e.g. traffic control signing, outside this 1,000-foot
8 radius, but those activities should not exceed the noise levels. The Examiner asked
9 where the closest homes to the construction work would be located and Mr. Magnoni
10 indicated they were located to the sough in Woodway. Mr. Magnoni was unable to
11 note the distances to these homes.

12 Mr. Magnoni stated that, as far as the typical ambient noise level on SR 104 at night, it
13 is fairly loud at 6 p.m. but it gets quieter as the night goes on, and this project would
14 take lanes on the highway from about 7:00 p.m. to 4:00 a.m. There is traffic in the area
15 for the ferry nearby that operates as early as 5:30 in the morning. Mr. Magnoni stated
16 that he did not know the typical ambient noise level on SR 104 at, say, 2:00 in the
17 morning. When the Hearing Examiner asked why the attachments say that the noise
18 from the equipment would not be louder than the noise that is typically in the area, Mr.
19 Magnoni clarified that this is the case at 7 p.m., but the area typically grows quieter as
20 the night goes on. He stated that for the closest nearby residents, the noise would be
21 like a refrigerator kicking on. If there are complaints about the noise, they will respond
22 within 24 hours to address the concerns. In the past, they have responded to
23 complaints by offering ear plugs, providing white noise machines, or putting residents
24 in hotels. Mr. Magnoni stated that he could easily put up a meter on SR 104 for 24
25 hours to take noise measurements that would determine the typical ambient noise level
in the area at night.

17 Mr. David Crisman, who also works for the Washington State Department of
18 Transportation, stated that the noisy work for the project would include cutting into
19 the concrete sidewalk, putting in a ramp, creating an island for pedestrians to cross in
20 the area, and putting in foundations for a signal; the loudest noises would be from
21 using the saw, pouring the concrete, and drilling. These activities would be within the
22 1,000-foot radius, and they would not be continuous throughout the night; the noise
23 level would be up for a bit, down for a bit, up for a bit, etc. during the night. Other
24 work in the project would include striping, controlling erosion, putting up signs, and
25 these activities would be outside the 1,000-foot radius.

22 Mr. Magnoni stated that they have planned mitigation measurements to reduce the
23 noise of the machines; one is to line the bed of the trucks to quiet the noise that they
24 make. But there is not much that they can do to reduce the noise of equipment such as
25 the drills. In response to questions from the Hearing Examiner about how barriers
might be used to mitigate the noise, Mr. Carl Barker, who is from the construction
office, stated that temporary, insulated barriers would be used to mitigate the noise
from small, stationary equipment, but those barriers are not really possible on larger,

1 moving equipment like drills. In general, this is a measure for mitigation that the city
2 puts into contracts, and it is mitigation measure three in the Staff Report.

3 Public Comments

4 Mr. Rutledge asked how many consecutive days would work be done, and whether
5 notifications to residents about the noise would be sent out for each day, or whether
6 one notification would be sent out to warn about the noise that would be heard for
7 several nights in a row. Are people going to receive twenty notifications at a rate of
8 one every twelve days? He asked what the crime watch would be while this
9 construction was going on. It would be easy for a person to put on a construction
10 uniform, break into a home, and leave town without being caught. He asked about a
11 tentative date for when the project would start. He stated that the project could be shut
12 down if there are more than three complaints at once. It is important to remember to
13 notify the residents.

14 Staff Rebuttal

15 Mr. Clugston stated in response to Mr. Rutledge that section ECC 5.30.140 discusses
16 citizen complaints, and it does address the concerns that Mr. Rutledge addresses.

17 Applicant Rebuttal

18 In response to questions about when the project will start, the applicant stated the
19 project would be put up for contract on May 12, there would be a twelve-week period,
20 and it would be awarded potentially June 16, executed potentially July 7, and the
21 contractor would need time to procure the materials for up to four months. That is why
22 the application allows for such a long period; once the contractor starts work, it will
23 most likely be done within about six weeks. Residents need to be notified about the
24 noise at least seven days prior to the noise, and they will most likely be notified that
25 there will be noise for twenty nights within a thirty-day period.

26 EXHIBITS

27 The staff report and its 10 attachments were admitted as Exhibit 1 during the hearing.
28 A letter of support written by Christy Cufley was admitted as Exhibit 2. An April 29,
29 2014 email from Larry Magnoni to Diane Cunningham with three attachments is
30 admitted as Exhibit 3.

31 FINDINGS OF FACT

32 Procedural:

33 1. Applicant. The Applicant is the Washington State Department of
34 Transportation.

1 2. Hearing. A hearing was held on April 24, 2014. The record was held
2 open through May 2, 2014 in order for the applicant to submit noise readings of
ambient night noise levels at the project site.

3 **Substantive:**

4 3. Site/Proposal Description. The Washington State Department of
5 Transportation (WSDOT) is requesting a nighttime noise variance for work on right-
6 of-way improvements to State Route 104 (SR104). According to their cover letter in
7 Attachment 2, WSDOT proposes to construct a mid-block pedestrian and bicycle
8 crossing to make a connection to the sidewalk west of SR104 with a pedestrian trail
9 that leads to Edmonds City Park at approximately Mile Post 25.03. The project will
involve paving and concrete work, digging and other utility placement activities,
signing, striping and traffic control equipment.

10 If this work could be completed during the daytime, a noise variance would not be
11 required. However, because WSDOT can only do lane closures on SR104 at night,
12 the construction work envisioned within the travel lanes can only occur at night.
13 Approval of this variance would permit WSDOT to conduct construction activities
for this project between the hours of 10:00 P.M. and 7:00 A.M. for 20 nonconsecutive
nights between May and December 31, 2014. It would also allow the regularly
allowed nighttime decibel levels for potential receiving properties to be exceeded.

14 4. Adverse Impacts. For the reasons identified in the Summary section of
15 this decision, there is insufficient information in the record to establish that the noise
16 levels generated by the proposal will not be detrimental to property owners in the
vicinity. In point of fact the information strongly suggests the opposite, as the noise
17 generated by the proposal will generate night noise levels that exceed ambient levels
by 30 dBA.

18 **CONCLUSIONS OF LAW**

19 **Procedural:**

20 1. Authority of Hearing Examiner. ECDC 20.85.020 provides the Hearing
21 Examiner with the authority to review and act upon variance applications as Type III-
22 A.

23 **Substantive:**

24 2. Review Criteria and Application. As discussed in the Summary, the
25 project will generate night time noise levels up to 80 dBA at the noise source and up
to 55 dBA at residential receiving properties. ECDC 5.30.040, in conjunction with

1 ECDC 5.30.050(A), limits noise levels, depending on the zoning¹ of the noise source,
2 to 45 dB to 50 dBA at residentially zoned receiving properties between the hours of
3 10:00 pm and 7:00 am. As noted in the staff report, the noise generated by the
4 proposal during daylight hours is exempt from Chapter 5.30 ECDC standards as
5 construction and utility noise. ECDC 5.32.120(C)(3) provides that variances to noise
6 standards shall be processed as required by and meet the criteria of ECDC 20.85.020
7 [sic]. ECDC 5.30.120(A) and (B) also add additional criteria to noise variances.
8 The only criteria that will be addressed in this decision is ECDC 20.85.010(E), since
9 compliance with all criteria is necessary for approval and the applicant did not
10 establish compliance with ECDC 20.85.010(E). Applicable criteria are quoted below
11 and applied through corresponding conclusions of law.

8 **ECDC 20.85.010(E) – Not Detrimental:** *That the variance as approved or*
9 *conditionally approved will not be significantly detrimental to the public health,*
10 *safety and welfare or injurious to the property or improvements in the vicinity and*
11 *same zone;*

11 3. As determined in Finding of Fact No. 4, there is insufficient information in
12 the record to conclude that the proposal will not generate noise levels that are
13 injurious to property in the vicinity. The record strongly suggests the contrary. The
14 criterion is not met.

14 DECISION

15 The variance application is denied without prejudice as outlined in the Summary
16 section of this decision.

17 Dated this 13th day of May, 2014.

18 
19 Phil A. Olbrechts

20 Edmonds Hearing Examiner

22 Appeal Right and Valuation Notices

23 This land use decision is final and subject to closed record appeal to the City Council as
24 authorized by ECDC 20.01.003. Appeals must be filed within 14 days of the issuance

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¹ The applicant and staff did not identify the zoning of the noise generating or noise receiving
properties.

1 of this decision as required by ECDC 20.07.004(B). Reconsideration may be requested
within 10 calendar days of issuance of this decision as required by ECDC 20.06.010.

2 Affected property owners may request a change in valuation for property tax purposes
3 notwithstanding any program of revaluation.

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