

OFFICE OF THE HEARING EXAMINER

CITY OF BUCKLEY

DECISION ON RECONSIDERATION

CASE NO.: **Conditional Use Permit CUP# 2014-03
Brookstom LLC**

APPLICANT: Angela Toman
834 Sheets Road
Buckley, WA 98321

PLANNER: Kathy Thompson, City Planner

By Report and Decision dated August 24, 2015, the Examiner approved the applicant's request for a conditional use permit that authorized a commercial recreation use at 834 Sheets Road, Buckley, subject to numerous conditions of approval. In the same Report and Decision the Examiner also denied the appeal of the SEPA threshold Mitigated Determination of Non-Significance (MDNS) filed by Buckley Citizens for Responsible Decisions. Timely requests for reconsideration were submitted by Bill Diamond, Larson and Associates, on behalf of the applicant dated August 28, 2015, and by Phil Olbrechts, Buckley city attorney, on August 31, 2015.

The Examiner circulated the Reconsideration Request to parties of record on September 8, 2015, and received the following responses:

- A. Letter from Bill Diamond responding to the City's reconsideration request dated September 16, 2015.
- B. Letter from Marvin and Sandra Sundstrom dated September 16, 2015.
- C. Letter from Connie Bender dated September 18, 2015.
- D. Note from Connie Bender dated September 20, 2015.
- E. Letter from Bob and Janice Pacific dated September 21, 2015.
- F. Letter from Kathy Thompson dated September 22, 2015.

Based upon the reconsideration request and responses thereto the following additional findings are made hereinafter:

Applicant's Reconsideration Request

- 1R. The applicant by and through its representative Bill Diamond requests reconsideration of condition of approval 4.1(c) that reads:

All activities shall be limited to the south side of Spiketon Ditch.

The applicant proposes to revise the condition to allow a platform and seating area on the lawn on the north side of the ditch for wedding and other ceremonies. The applicant proposes to plant trees and/or shrubs around the platform and seating area. However, Condition 4.1(c) is a mitigating measure imposed by the City responsible official in the SEPA MDNS. The applicant did not appeal the threshold determination nor did she object to the mitigating measure at the public hearing. While it is true that the site plan may show the platform/seating area on the north side of the ditch, the responsible official imposed a mitigating measure that eliminated the proposed improvement. Because the SEPA determination is final the Examiner has no authority to change the above mitigating measure and therefore Condition 4.1(c) will remain as written.

- 2R. The Examiner likewise has no authority to change Conditions 4.1(a) and 4.1(d) as they are also SEPA mitigating measures. However, as set forth in staff's response to the reconsideration request, the area required for storm drainage should have been excluded from the area calculations for the project. Furthermore, staff also clarified that mitigating measures prohibit all construction activities closer than 25 feet from the ditch. Finally, use of herbicides, pesticides, or fertilizers that are considered safe for usage near water bodies by the State Departments of Ecology and Fish and Wildlife meet the intent of Condition 4.1(d). Therefore, the following clarifications to Condition 4 are hereby made as follows:

4.1(a) The setbacks to Spiketon Ditch for all activities shall be as shown on the site plan. Provided, however, that no activity will occur on the north side of Spiketon Ditch; and provided further, that no construction activities will occur closer than 25 feet from the top of the bank of Spiketon Ditch.

4.1(d) The applicant may use herbicides, pesticides, or fertilizers deemed organic and environmentally safe by the State Departments of Ecology and Fish and Wildlife and the United States Environmental Protection Agency for use around water bodies within 25 feet of the top of Spiketon Ditch to provide a "park-like atmosphere" for the proposed use.

- 3R. The applicant requests clarification of Condition 21 which reads:

21. The business will occur on no more than .68 acres of the site, as shown on the site plan.

Staff also requests clarification of said condition noting that the BMC requires an area approximately 100 feet wide along the length of the driveway and parking areas to accommodate stormwater runoff, and that such area is shown on the site plan. The site plan also shows a 300 foot long driveway and parking spaces that will require approximately 1.7 acres to accommodate event participants. The City therefore requests that the area shown for fill and storm drainage be excluded from the area used for the business. The Examiner has therefore revised Condition 21 to eliminate the inconsistency as follows:

21. No business activities will occur in areas not shown on the site plan; provided, that no business activities will occur north of or within 25 feet of the top of the bank of Spiketon Ditch. Portions of the site used for the driveway, parking, stormwater, vegetated dispersal flow path, 20 foot wide landscape buffer, temporary tent, port-a-potties, and dumpster shall be as shown on the site plan.

City Request for Reconsideration

- 4R. The City's request for reconsideration submitted by Phil A. Olbrechts, Buckley city attorney, requests a revision of Condition 2 that requires the applicant to comply with City noise requirements "as now or hereafter amended". The applicant objects to said language, asserting that future amendments to the noise ordinance could place an unfair and impossible condition on the business. The Examiner questions the need for the additional language as the business must comply with future noise and other ordinances adopted by the Buckley City Council pursuant to its police powers. While the applicant vested its conditional use permit application for consideration under the zoning and land use ordinances in effect on the date of submittal of a completed application, its conditional use permit does not authorize the business to continue operating under City regulations in effect on said date. Even if the business becomes nonconforming, it will need to comply with later adopted police power regulations. As held by our Washington Supreme Court in RHOD-A-ZALEA v. Snohomish County, 136 Wn. 2d 1 (1998):

Courts have consistently recognized that nonconforming uses are subject to subsequently enacted reasonable police power regulations... Only where the regulation would immediately terminate the nonconforming use have courts found the regulation to be invalid as applied to the nonconforming use. 136 Wn. 2d 1 @ 9

The Supreme Court in Footnote 1 of its Decision (page 16) addresses the "vested rights doctrine" as follows:

Even if the “vested rights doctrine” were at issue in this case, it would not allow a business to operate exempt from later enacted police power regulations. The “vested rights doctrine” only protects a permit applicant from regulations enacted after a permit application has been completed and filed and only serves to fix the rules that would govern a particular land use permit application...Once the development is established, it must then comply with later enacted police power regulations which are limited only by constitutional safeguards....(emphasis the Court’s)

Thus, the applicant must comply with future City ordinances that include noise ordinances. While the language suggested by the City is not necessary, the Examiner will revise Condition 2 by adding said language to the first sentence thereof as follows:

2. The applicant shall comply with BMC noise requirements, as now or hereafter amended, and also implement mitigation measures set forth in the SSA Acoustics Noise Study....
- 5R. The City requests clarification of Findings 20 and 21 regarding noise generated by the business. Finding 20 erroneously refers to Section 8.76.060 of the Buckley Municipal Code (BMC) as limiting noise levels at property lines to 55 dB(A) during daytime hours and 45 dB(A) during nighttime hours defined as between 10 p.m. and 7 a.m. The BMC does not provide such limitations. However, said limitations are found in Section 173-60-040(2) of the Washington Administrative Code (WAC). These maximum permissible noise levels are effective on a statewide basis unless a local government specially designates certain lands that it finds tranquil or quiet and imposes appropriate noise level standards. Furthermore, prior to the more stringent noise levels becoming effective, the State Department of Ecology (DOE) must approve said levels. The BMC does not reflect any specific designation approved by DOE for any lands within the City limits. Thus, WAC standards apply. See also WAC 173-60-110(2) that also prohibits local noise control requirements differing from the WAC until approved by DOE. See also RCW 70.107.060(3).
- 6R. However, WAC 173-60-060 does not prohibit the City from regulating noise as a nuisance. Said section provides:

Nothing in this chapter or the exemptions provided herein shall be construed as preventing local government from regulating noise from any source as a nuisance. Local resolutions, ordinances, rules or regulations regulating noise on such a basis shall not be deemed inconsistent with this chapter by the department.

Section 8.30.020 BMC, entitled “Public disturbance noises”, designates in Subsection 2 certain sources of sound which the City has determined are “public disturbance noises”. The applicant must ensure that the business as well as

persons attending celebrations and functions do not create “public disturbance noises”. “Public disturbance noises” include repetitive or continuous sounding of vehicle horns; yelling or shouting that is audible on public streets and unreasonably disturbs or interferes with the peace and comfort of other property owners; operating motor vehicle audio sound systems that can be heard 50 feet from the source; operating a tape player, radio, CD player, etc., that can be heard 50 feet from the source; squealing and screeching of motor vehicle tires; as well as other sounds during the nighttime hours of between 10 p.m. and 7 a.m.

- 7R. The City’s reconsideration request asks that the applicant be required to comply with the State standards set forth in WAC 173-60-040(2). Such would allow sound levels of 55 dB(A) at the property line. However, the applicant’s noise study prepared by SSA Acoustics determined that existing, ambient noise levels range between 35 dB(A) at the west property line (Sheets Road) and 37 dB(A) at the north property line. The study noted that the average sound level in the area is 20 dB less than the WAC standard of 55 dB(A). The noise study then provided mitigation measures that would result in a noise level of 40 dB(A) at the property lines, very close to the ambient noise level.
- 8R. Allowing the business to create a sound level of 55 dB(A) at the exterior property lines would significantly impact the quietness of the area. The conditional use criteria set forth in BMC 19.40.130 requires the applicant to show that the conditional use will not detrimentally impact the public health, safety, comfort, convenience, and general welfare and that it will not injure property or improvements in the vicinity. Property owners along Sheets Road testified that they purchased their parcels specifically because of the quietness afforded them by the large parcels, lack of development, and quietness of the area. Therefore, based upon the SSA noise study and recommended mitigation measures, a condition of approval requires the applicant to preset its music and amplifier system to create no more than 40 dB(A) at the nearest property line, and to ensure that that business and guests comply with BMC 8.30.020.
- 9R. The City also requests a significant monitoring program for a two year period with on call monitors available at the applicant’s expense. However, such condition presupposes violations of conditions of approval by the applicant. Such measures appear appropriate should violations of conditions of approval occur. A condition of approval requires the applicant to show City staff prior to issuance of the conditional use permit that its amplified speaker system is preset such that noise generated by the business will not exceed 40 dB(A) at any property line.

CONCLUSIONS:

1R. The Hearing Examiner has the jurisdiction to consider and decide the issues presented by the reconsideration requests.

2R. Finding 20 is hereby revised to read as follows:

20. Residents raise significant concerns regarding noise generated by events at the site. In response thereto the applicant engaged SSA Acoustics to perform an "Environmental Noise Study" for the event venue. Erik Miller-Klein, professional engineer, prepared the noise study and testified at the hearing. Noise meters were installed on the west, north, and south property lines of the parcel to measure ambient sounds present in the area and to determine the maximum level for event music and activities. The area is very quiet and sounds will carry from the events. At the hearing the applicant proposed to restrict speakers to a preset volume that will not allow sounds to exceed the ambient noise level at the property lines. Such would include occasional, unamplified music such as a guitar or string quartet. The SSA study found that ambient sound levels in the area vary between 35 and 37 dB(A) during the daylight hours. By comparison, Section 173-60-040(2) of the Washington Administrative Code (WAC) allows noise generated by residential parcels to equal 55 dB(A) during the day and 45 dB(A) during the nighttime hours, defined as between 10 p.m. and 7 a.m. Thus, the ambient sound levels in the area along Sheets Road are approximately 20 dB(A) less than the maximum authorized by the WAC.

3R. Finding 21 is revised to read as follows:

21. Residents also express concerns regarding noise from event attendees circulating around the site outside of the tent. Chapter 8.30 BMC, entitled "Noise Control", sets forth the "purpose" of the ordinance in Section 8.30.010 in part as follows:

...The intent of the city council is to control the level of noise pollution in a manner which promotes commerce, the use, value and enjoyment of property, sleep and repose and the quality of the environment....

Section 8.30.020 BMC provides that the following sources of sound are considered public disturbance noises:

(a) The frequent, repetitive or continuous sounding of any horn...attached to a motor vehicle...so as to unreasonably disturb or interfere with the peace and comfort of owners or possessors of real property.

- (c) Yelling or shouting which is audible on the public streets or public grounds...at any time and place so as to unreasonably disturb or interfere with the peace and comfort of owners or possessors of real property. (emphasis added)
- (d) The creation of frequent, repetitive or continuous sounds which emanate from any building, structure...and which unreasonably disturb or interfere with the peace and comfort of owners or possessors of real property, such as sounds from band sessions or social gatherings. (emphasis added)
- (e) The creation of sound from any motor vehicle audio sound system, operated at a volume so as to be audible at least 50 feet from the source.
- (f) The creation of sound from any audio equipment, such as a tape player, radio or compact disc player, television, musical instrument, or similar device...operated at a volume as to be audible at least 50 feet from the source....
- (g) The creation of squealing, screeching or other similar sounds from motor vehicle tires in contact with the ground or other roadway surface because of rapid acceleration, breaking, or excessive speed....

While the applicant's business is covered by Subsection (d), and as found above, must not exceed a noise level of 40 dB(A) at the property lines, the applicant must also comply with the criteria set forth in BMC 8.30.020. The applicant must also ensure that attendees comply with said section and not create any of the "public disturbance noises" set forth in said section. The applicant proposes to do so by restricting attendees to areas in close proximity of the tent except when arriving and departing. The applicant will also provide monitors to ensure prudent operation of motor vehicles and no loud motor vehicle stereos. Subsection (f) prohibits other audio equipment, to include that used by clean up crews, from extending more than 50 feet from the source. Based upon the noise study and mitigation proposed as well as the requirements to ensure guests do not create "public disturbance noise", the business can comply with Chapter 8.30 BMC. Residents presented no expert testimony to challenge the SSA Acoustic study.

4R. Condition 4(2) is hereby revised to read as follows:

- 2. Noise:
 - a. The applicant shall implement the mitigating measures set forth in the SSA Acoustics Environmental Noise Study and shall preset speakers

such that sounds at all property lines do not exceed 40 dB(A). Music shall occur only through a disc jockey (DJ) using the applicant's preset speakers within the tent, or by unamplified music from string instruments or softly played brass instruments.

- b. The applicant shall ensure that no violations of BMC 8.30.020 that sets forth "Public disturbance noises" occurs on the site. Such includes noises produced by the business and by attendees of functions at the site.

5R. The last sentence of Condition 19 is revised to read as follows:

- 19. The applicant will provide traffic monitors for events that generate more than 30 vehicles. The monitors will stagger the number of cars leaving the premises to ensure no inconvenience to residents and only minor queueing at the Sheets Road/Ryan Road intersection.Regardless of the number of attendees, the applicant will ensure that attendees do not sound horns, cause excessive engine noise, cause squeaking or screeching of tires, or operate radios or other amplified music that can be heard more than 50 feet away.

6R. Condition 21 is hereby revised to read:

- 21. The business will occur in the areas shown on the site plan except that no activities will occur on the north side of Spiketon Ditch.

7R. A new condition (31) is hereby added as follows:

- 31. Prior to the issuance of the conditional use permit the applicant shall show to the satisfaction of the City that the amplified music from the tent per the preset speakers does not exceed 40 dB(A) at any property line.

DECISION:

The request for reconsideration is hereby granted in part and denied in part as set forth above.

ORDERED this 12th day of October, 2015.

STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

TRANSMITTED this 12th day of October, 2015, to the following:

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CITY OF BUCKLEY

**CASE NO.: Conditional Use Permit CUP# 2014-03
Brookstom LLC**

APPEAL OF EXAMINER'S DECISION:

The final decision by the Examiner may be appealed in accordance with Chapter 20.01.260 of the Buckley Municipal Code.