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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LARRY K. HETTICK, VERN GREEN, and all
named Appellants to MUP-05-009 and 010,

Petitioners,

v.

THE CITY OF SEATTLE, A Washington
Municipal Corporation, and THE BERTSCHI
SCHOOL, a Washington Non-Profit
Corporation,

Respondents.

No. _____

LAND USE PETITION

Pursuant to the Land Use Petition Act, chapter 36.70C RCW, petitioners alleges as follows:

1. Name and address of Petitioners:

Larry K. Hettick
2316 Broadway Avenue East
Seattle, WA 98102

Vern Green
2218 Broadway Avenue East
Seattle, WA 98102

All Appellants identified and listed in Appeals MUP-05-009 and 010, as filed before the Hearing Examiner for the City of Seattle, totaling 54 individual Appellants, including Petitioners Larry K. Hettick and Vern Green. Each of the 54 individual Appellants is listed in

1 Exhibit A, attached hereto, which is a copy of all Appellants to Seattle Master Use Permit
2 No. 2306429 Decision and Approval, dated March 3, 2005.

3 **2. Name and address of Petitioners' attorney:**

4 Craig D. Magnusson, WSBA # 12733
5 Oles Morrison Rinker & Baker, LLP
6 701 Pike Street, Suite 1700
7 Seattle, WA 98101
8 Telephone: (206) 623-3427
9 Fax: (206) 682-6234

10 **3. Name and address of local jurisdiction:**

11 The City of Seattle
12 700 Fifth Avenue, Suite 2000
13 P.O. Box 34019
14 Seattle, WA 98124

15 **4. Identification of decision-making body or officer, and identification of
16 decision:**

17 On October 11, 2005, Deputy Hearing Examiner Ann Watanabe signed findings and
18 decision of the Hearing Examiner for the City of Seattle; Hearing Examiner files MUP-05-
19 009/010; Department Reference: 2306429. A copy of the decision dated October 11, 2005
20 is attached, as Exhibit B. The decision states: "The decision of the Hearing Examiner in
21 this Case is the final decision for the City of Seattle."

22 **5. Identification of persons to be made parties:**

23 5.1. Applicant: Respondent The Bertschi School is listed as the applicant
24 for application No. 2306429. The Bertschi School is a Washington non-profit corporation,
25 with the Registered Agent being Brigitte Bertschi, 2227 Tenth Avenue East, Seattle, WA
26 98102. The business office and location of the Bertschi School is also 2227 Tenth Avenue
East, Seattle, WA 98102.

The Applicant is identified in the October 11, 2005 Decision as Bertschi School c/o
Melody B. McCutcheon, 500 Gallant Building, 1221 Second Avenue, Seattle, WA 98101-

1 2925. The Applicant name as set forth in the City of Seattle Decision No. 2306429 dated
2 March 3, 2005 is Melody McCutcheon, Attorney for The Bertschi School

3 5.2. Property owners: The Bertschi School, the applicant identified above,
4 is identified as the Owner of the property on which the development at issue is located.

5 5.3 All Appellants to MUP-05-009/010 are Petitioners in this Appeal.
6 Petitioner Larry K. Hettick is identified as the layperson representative of all Petitioners, as
7 allowed by the Rules of the Office of the Hearing Examiner, and is a Petitioner both
8 individually and as the representative of the Appellants/Petitioners in this matter. There are
9 no other parties to the Hearing Examiner Appeal.

10 6. **Facts demonstrating petitioner's standing to seek judicial review:**

11 6.1. The petitioners Hettick, Green, and the additional 52 petitioners who
12 joined in MUP 05-009 and 010 are all residents who live either immediately adjacent to the
13 Bertschi School or in the immediate vicinity. Petitioners Hettick and Green are property
14 owners of residential property on which they reside in the vicinity of the Bertschi School.
15 Petitioner Green's property shares a common boundary with the Bertschi School; petitioner
16 Hettick's property is across the street, but effected directly by parking, traffic, congestion,
17 and noise generated at and/or by the Bertschi School operations.

18 6.2. Application 2304629, as approved with conditions March 3, 2005,
19 approves a nearly 50% expansion of the Bertschi School by allowing a change in use for
20 property owned by the Bertschi School from residential to institution and by allowing for the
21 construction of new buildings, classrooms, playground areas, and gym and assembly areas.
22 Conversion of the land from residential to institution, and construction and use of the
23 approved development will increase offsite traffic congestion; offsite traffic impacts; offsite
24 noise generation and impact; and increase the demand and need for both onsite and offsite
25 parking by increasing both the total enrollment and total employment at the Bertschi School.

1 6.3. The offsite impacts to be created and generated by the Bertschi
2 School expansion will negatively influence and harm all of the surrounding residential
3 properties by subjecting those surrounding properties to the negative impacts set forth in
4 Paragraph 6.2 above, to the detriment of the residences, occupants and property owners in
5 both the immediately adjacent properties and surrounding properties near the Bertschi
6 School.

7 6.4. Construction of new outdoor playground areas and play or “activity”
8 areas as approved by Application 2306429 and the Hearing Officer Decision dated October
9 11, 2005 will allow to be constructed and used by the Bertschi School outdoor activity/play
10 areas for students which will generate outdoor noise received by surrounding properties in
11 excess of noise levels allowed by Seattle city codes, and create new negative impacts in
12 violation of impacts allowed by both state and city regulations, codes and statutes.

13 6.5. Petitioners Hettick and Green, and the additional 52 co-
14 appellants/petitioners, opposed the approval of Application 2306429 before approval;
15 appealed the approval pursuant the City of Seattle development code before the Office of
16 the Hearing Examiner, MUP 05-009 and 010, and appeal the Hearing Officer’s Decision and
17 approval of the project because of the negative offsite impacts to be created by the
18 construction of the project and subsequent use by the Bertschi School. All administrative
19 remedies have been exhausted, and petitioners have standing pursuant to RCW
20 36.70C.060(2)(b,c).

21 6.6. Pursuant to RCW 36.70C.040, Commencement and Review, the
22 “date on which a land use decision is issued” is three days after a final, written decision is
23 mailed by the local jurisdiction. The Hearing Examiner’s Decision under appeal was dated
24 October 11, 2005, and mailed on or after that date. Accordingly, the land use decision
25 under appeal in this matter was issued on or after October 14, 2005.

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7. Petitioner’s Statement of Errors:

7.1. The Hearing Examiner erred as a matter of law by approving the application through the addition of an additional condition, agreed to by applicant, which both requires and allows for the construction of structures otherwise only permitted through the application, review, public hearing, and administrative conditional use approval process. The Hearing Examiner’s jurisdiction is limited to review of a final Director’s Decision, with authority to approve, reverse, or approve with conditions the Director’s Final Decision. The authority to add conditions does not include authority to pre-approve proposed construction or structures, nor to vary, eliminate or bypass code requirements and/or development standards. Neither the Examiner, nor the Director, have any authority to waive, bypass, eliminate, or ignore development standards and/or code requirements without the applicant having first complied fully with all application requirements.

7.2. The Hearing Examiner erred as a matter of law by approving the Application with new conditions, and relying upon information submitted by the applicant as a factual basis on which to “modify and affirm” the Director’s Decision. The factual evidence submitted by the applicant after the appeal hearing was closed and all parties rested, without reopening the appeal hearing, cannot be relied upon by the Examiner as evidence in the record upon which to make Findings in which to support a Final Decision. Although post-hearing submittals may be reviewed by the Examiner to assist the Examiner in understanding and/or interpreting evidence and argument in the record before the hearing is closed, the Examiner is without authority to independently supplement the record on appeal after the appeal is closed. Without reliance on applicant’s post-hearing August 5, 2005 “Noise Study”, the Examiner’s Decision is without any factual support and must be reversed.

7.3. The Hearing Examiner erred as a matter of law by approving, as modified, which will generate noise received offsite from playground use and activities,

1 which admittedly violates the Seattle noise ordinance. The Director's Decision of March 3,
2 2005 finds that the project meets development standards concerning noise in compliance
3 with the Seattle noise ordinance, and approved the Application as being in compliance with
4 the Seattle noise ordinance. The Director's Final Decision dated March 3, 2005 was not
5 appealed by either the applicant nor the City of Seattle, and as such are bound by the
6 approval which does not exempt the project from the Seattle noise ordinance nor allow by
7 variance or administrative conditional use approval any violations of the Seattle noise
8 ordinance. Without the argument that the School is not bound by the Seattle noise
9 ordinance having been raised on appeal through the filing of a timely administrative appeal,
10 the Hearing Examiner is without authority or jurisdiction to waive or ignore requirements for
11 compliance with the Seattle noise ordinance.

12 7.4. The Hearing Examiner erred as a matter of law in approving the
13 application allowing expansion of the current Bertschi School without making a Finding that
14 the current operation, for which the approved application would constitute an expansion as
15 compared to a new use, is operating at a level and use either in compliance with existing
16 permit approvals and conditions; code standards; or two (legally established, non-
17 conforming) standards. Appeal for expansion of an existing use, with admitted and
18 extensive impacts, requires as a minimum a finding by the Director, or by the Examiner, that
19 the current use being approved for expansion constitutes a legal, allowable use. Neither the
20 applicant, nor the Director, nor the Examiner, assert or find that current levels of use at the
21 Bertschi School are approved or legally established, and as such as a matter of law any
22 approval for "expansion" of the existing use cannot provide the foundation to legally
23 authorize expansion.

24 8. **Petitioner's Statement of Facts:**

1 8.1. Petitioners rely upon the Hearing Examiner's Findings of Facts,
2 Conclusions, and Decisions to sustain the Statements of Error, as set forth in petitioner's
3 Statements of Error.

4 8.2. Findings of Fact of the Examiner's Findings, dated June 7, 2005,
5 identify uses, operations and impacts of the current Bertschi School. However, no Findings
6 or any Conclusions were issued by the Examiner which in any way state, assert, affirm, or
7 allege that current operations are either legal, approved, or allowed by either permit
8 conditions or court interpretation. Instead, in Finding No. 32, the Examiner states,
9 "Questions were also raised about the School's compliance with previously issued permits
10 or City approvals, but those issues were not a part of the appeals." These Findings show as
11 a matter of fact that neither the Director nor the Examiner with any factual basis on which to
12 allow or approve an expansion of the Bertschi School, as there is no factual basis for either
13 the applicant or the City to find that the current use was legal and approved and therefore
14 may be expanded.

15 8.3. In the Decision dated June 7, 2005, the Hearing Examiner states,
16 "After due consideration of the evidence elicited during the hearing, the following shall
17 constitute the Findings of Fact, Conclusions and Decision of the Hearing Examiner on this
18 appeal." Notwithstanding this clear recognition that the appeal hearing had been
19 concluded, the Hearing Examiner accepted as further evidence the applicant's noise study
20 dated August 5, 2005. Without reopening the hearing as set forth in the Introduction to the
21 Final Decision dated October 11, 2005, the Examiner subsequently accepted without further
22 motion, order, or hearing applicant's post-hearing study and relied exclusively upon the
23 inadmissible evidence in order to get their Findings, Conclusions and Final Decision. The
24 study is inadmissible for the uses to which the Hearing Examiner relied upon reaching the
25 Final Decision.

1 8.4. In Paragraph 8 of the Hearing Examiner’s Conclusions dated October
2 11, 2005, the Examiner states, “The Examiner may also modify conditions under SMC
3 23.76.022 as part of the decision.” The Examiner provides no legal basis nor factual basis
4 for this Conclusion, but proceeds to “approve”, without application or compliance with zoning
5 or development rules, the construction of acoustical structures as required by the
6 Examiner’s modified Condition No. 17 – assuming the authority of the Director, without any
7 requirement for permit submittal, application, review, approval, or opportunity for challenge
8 or appeal.

9 9. **Relief Requested:**

10 9.1. The petitioners request that this court reverse the Hearing Examiner’s
11 Decision; grant petitioners’ appeal requesting that the Director’s Decision be overturned;
12 and remand the Decision to the Director for further consideration with a requirement that the
13 Director establish that current Bertschi School operations are legal and/or approved; require
14 that the project and application include design features to control noise in compliance with
15 the Seattle noise ordinance; and that any proposed of required structures to comply with the
16 Seattle noise ordinance be submitted under the requirements for project submittal, review,
17 and approval.

18 9.2. Petitioners request such other relief as appears equitable and just,
19 and protects the interest of petitioners.

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25 DATED this _____ day of November, 2005.

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OLES MORRISON RINKER & BAKER LLP

By _____
Craig D. Magnusson, WSBA #12733
Attorneys for Petitioners Larry K. Hettick and Vern Green