

**WEST LINN CITY COUNCIL
FINAL DECISION AND ORDER ON APPEAL
FROM PLANNING COMMISSION**

AP-14-01/MISC-14-04

**IN THE MATTER OF A REQUEST TO MODIFY DR-09-05, CONDITION OF APPROVAL 3b, TO
ALLOW ATHLETIC FIELD LIGHTS TO REMAIN ON UNTIL 10:00 P.M.**

I. Procedural History

The West Linn/Wilsonville School District ("District," "School District" or "Appellant") received a conditional use approval for Rosemont Middle School in 1999. In 2009, as part of a design review application for some improvements at the school, the District requested the addition of lights to the Rosemont Ridge Middle School athletic fields.

Rosemont Ridge Middle School ("School") is an approved conditional use, and in 2009 the Planning Commission approved the athletic field lights based on a photometric study that illumination would not extend off the athletic fields. The Planning Commission determined the lights meet the criteria after adding condition of approval 3b ("Condition 3b"): "All lighting shall be oriented to create no off site illumination and the light fixtures shall be screened to allow no off-site glare. The pole lighting must be turned off at 9 p.m. including game days."

In June 2014, the District applied for a modification to Condition 3b to allow the athletic field lights to stay on one additional hour, until 10:00 p.m. The lighting study submitted with the 2009 application was also submitted with the application.

Staff provided a staff report and gave a presentation recommending approval at the Planning Commission's August 20, 2014, hearing. Two individuals spoke in opposition to the application and a continuance was requested. There was no evidence submitted showing that the light poles, lighting fixtures, and light shields have been modified from the approved lighting plan. On September 17, 2014, the Planning Commission denied the application and declined to modify the condition. This appeal followed.

The Appellant appealed on the grounds that the Planning Commission misapplied the applicable approval criteria, which are Community Development Code (CDC) 55.100(C) and 55.100(D). The Appellant does not agree that the Planning Commission's six adopted findings demonstrate the Design Review approval criteria Sections 55.100(C) and (D) are not met by the application, or that the application cannot be conditioned to meet the criteria

II. Incorporation of Staff Report

The Staff Report for the August 20, 2014, hearing for MISC-14-04 (Staff Report), is incorporated into this Final Order on Appeal, and all the facts, findings and determinations in that Staff

Report are adopted except where the findings in this Final Order conflict with the Staff Report. Where there is a conflict with this Final Order, the findings in this Final Order shall govern.

III. The Record

At the December 1, 2014, hearing the record was finalized. The record was determined to include the file from AC-14-01 and all submitted arguments, with appropriate redactions, as outlined in Peter Spir's December 1, 2014, memorandum, and reject Commissioner Schwark's November 25 email and any information learned from councilor site visits.

IV. Limited Scope of Review; Other Allegations by Respondents

Rosemont Ridge Middle School, including the athletic fields and the athletic field light fixtures, is an approved conditional use. The original approval occurred in 1997. The scope and extent of that approved conditional use is not the subject of this land use decision. This land use action is solely focused on whether there is an adequate buffer to prevent athletic field lights from trespassing onto neighboring properties. The Council finds that arguments that focus on the impacts of the *use* of the property as a school were finally decided in the unappealed school district conditional use approval, and such arguments are rejected as impermissible collateral attacks on the prior unappealed land use decision. *McCaffree v. Coos County*, LUBA No. 2014-0212 (July 15, 2014); *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282, 296, *aff'd* 195 Or App 763, 100 P3d 218 (2004).

The City is prohibited from considering any facts or evidence that are not directly related to the type and size of the buffer needed to shield neighboring properties from light.

V. Standard of Review

The Council must review the Planning Commission's decision to deny the application by evaluating whether there is "substantive evidence" to determine if it should affirm, reverse, or modify the Planning Commission's decision. CDC 99.280(D); 99.290(B).

In land use proceedings, substantial evidence is evidence in the record that a reasonable person could rely upon to determine that the criteria were met and make the necessary findings. The Council finds that "substantive evidence," is equivalent to "substantial evidence."

The Planning Commission decision should be affirmed if the Council determines that there is not substantive evidence in the record to show there is an adequate buffer to prevent light from the athletic field lights from trespassing onto neighboring properties. Alternatively, the decision of the Planning Commission should be reversed if the Council determines that there is substantive evidence in the record to show that an adequate buffer exists preventing light from the athletic field lights from trespassing onto neighboring properties. CDC 99.280(D).

VI. Impartiality Challenge

Two citizens challenged the ability of Councilor Jones to be impartial based on his participation on the School District Long Range Planning Committee and his statement at the December 1 meeting that he finds it "a bit offensive when one party calls another party a liar in a hearing." On December 1, Councilor Jones stated that his participation on the Long Range Planning Committee would not in any way influence his ability to make a decision on the application.

Councilor Jones' participation on the Long Range Planning Committee does not constitute an actual conflict of interest for which he must recuse himself. In addition, if it constituted a potential conflict of interest, disclosure was sufficient to allow participation. Neither of the issues raised by the challengers indicated a bias on the part of Councilor Jones, and he indicated during the hearing that he was able to make a fair and impartial decision in this matter. Councilor Jones stated that his involvement on the Long Range Planning Committee is not relevant, and he chose not to recuse himself.

None of the challengers described any facts or evidence that can reasonably support a claim that Councilor Jones was biased. After evaluating all of the evidence in the record and voting as required by CDC 99.180(E), the Council finds that Councilor Jones was not biased; therefore, he could continue to participate in the proceedings.

VII. Findings of Fact

- A. The Procedural History set forth above is true and correct.
- B. The applicant is the West Linn Wilsonville School District.
- C. The Council finds that it has received all information necessary to make a decision based on the Staff Report, public hearing testimony, and the evidence in the whole record including any exhibits received.

VIII. Findings and Determinations

The applicable criteria are CDC 55.100(D)(3) and CDC 55.100(C). These findings will first address CDC 55.100(D)(3) because that criterion establishes the appropriate structure, on-site activity, and issue to determine what level of buffering, if any, is required under CDC 55.100(C).

- A. *CDC 55.100(D)(3): Structures or on-site activity areas which generate noise, lights, or glare shall be buffered from adjoining residential uses in accordance with the standards in subsection C of this section where applicable.*

CDC 2.030, Structure: Anything constructed or erected, the use of which requires location on or in the ground or attachment to something having such location, including buildings, fences, towers, utility equipment, utility poles, flag poles, signs, porches, pools, carports, platforms, walks, staircases, driveways and other similar

objects, but not including fixtures or equipment attached to structures (e.g., antennas, lights).

The Applicant has requested modification of Condition 3b to allow the lights to be on until 10:00 p.m. Condition 3b is solely about lighting, specifically, pole lighting, and the condition makes reference to "game days," which focuses this condition on athletic field light fixtures. The Council finds that only if "lighting" is a "structure" or "on-site activity" would buffering be required under this section.

The definition of "structure" in CDC 2.030 specifically excludes "fixtures or equipment attached to structures (e.g., antennas, lights)." The Council finds that although the light poles are structures, the "lighting" or athletic field light fixtures themselves are not "structures" because the definition explicitly excludes fixtures such as lights.

Chapter 55 contains Design Review criteria. It does not contain any criteria to evaluate use on a site. The Council determines that Condition 3b is specific to lights, and the Council finds that lights themselves are not an "on-site activity area" that requires buffering.

- B. *CDC 55.100(D)(4) Businesses or activities that can reasonably be expected to generate noise in excess of the noise standards contained in West Linn Municipal Code Section 5.487 shall undertake and submit appropriate noise studies and mitigate as necessary to comply with the code. (See CDC 55.110(B) (11) and 55.120(M).)*

WLMC 5.487(5): Sounds caused by the following are exempt from this section:...
(g) Outdoor School and Playground Activities. Reasonable activities conducted on public playgrounds and public or private school grounds, which are conducted in accordance with the manner in which such spaces are generally used, including, but not limited to, school athletic and school entertainment events.

The lights are not an "on-site activity area" that requires buffering. Opponents to the application have argued that lighting alone cannot be evaluated because it results in levels of activity that result in additional noise on the neighboring property. Although the athletic field lights do illuminate an "on site activity area," the CDC is clear that only activities that "generate noise in excess" of the WLMC must be mitigated.

The WLMC exempts outdoor school and playground activities from the noise restrictions; therefore, such noises do not require mitigation under the CDC. The Council finds that it is precluded from considering the mitigation of outdoor school and playground noise when considering the School District's

request to modify lighting Condition 3b because such noises are exempt from the noise standards of WLMC 5.487. Therefore, any discussion of noise is irrelevant to whether the application meets the criteria for adequate buffering.

The Council finds that CDC 55.100(D)(3) and (4) do not require buffering for the lights for the reasons stated above. Therefore, buffering is only required to the extent necessary to comply with CDC 55.100(C).

C. CDC 55.100(C): Compatibility between adjoining uses, buffering, and screening.

1. In addition to the compatibility requirements contained in Chapter 24 CDC, buffering shall be provided between different types of land uses; for example, buffering between single-family homes and apartment blocks. However, no buffering is required between single-family homes and duplexes or single-family attached units. The following factors shall be considered in determining the adequacy of the type and extent of the buffer:

- a. The purpose of the buffer, for example to decrease noise levels, absorb air pollution, filter dust, or to provide a visual barrier.*
- b. The size of the buffer required to achieve the purpose in terms of width and height.*
- c. The direction(s) from which buffering is needed.*
- d. The required density of the buffering.*
- e. Whether the viewer is stationary or mobile.*

- 1) Pursuant to CDC 55.100(C)(1)(a), the Council finds that the only purpose for a buffer related to Condition 3b would be to prevent light from trespassing onto the neighboring property. For the reasons stated above, Council determines that noise and the use of the property cannot be considered when determining if the buffer is adequate.
- 2) According to CDC 55.100(C)(1)(b), the Council finds that the size of the buffer required to limit light trespass depends on the extent of the light trespass. The Council also finds that Condition 3b in the 2009 approval did not require a buffer of a particular width and height to prevent light trespass.

The athletic field light fixtures were evaluated by PAE Consulting Engineers, Inc., in its November 3, 2009, memo. The "Illumination Summary" attached to the memo provides foot candle measurements around the perimeter of the School District's property. The Illumination Summary evaluates the amount of light at 144 separate locations; the average foot candle measurement is .124, which is considered to be equivalent to deep twilight. As a reference point, 1 foot candle is considered to be similar to twilight, and it is roughly equivalent to a standard street light. The highest reading along

the perimeter was 1.04 foot candles, and it is one of only two locations where the measurement exceeded 1 foot candle.

The PAE memo also states that the lights are pointed down at the playing shields, and all of the lights "have cutoff shields to prevent excess lighting beyond the field." PAE found that light readings taken 150 feet from the fields showed that there were only "fractional amounts of a foot candle at that point." In the hearing on August 20, 2014, Mr. Woodley, the representative for the School District, stated that the lights are "new, modern, dark sky lights and from an engineering point of view they do not spill beyond the footprint of the field itself. . . And so screening of the lights is questionable when it doesn't even move that far."

The PAE memo relies on the direction the lights were pointed and the cutoff shields to prevent light trespass, and Condition 3b relies on the same strategy by requiring that the lights be "oriented" properly and that "light fixtures shall be screened." Condition 3b does not require any additional buffering beyond the screening on the light fixtures; it does not mention or require vegetation, and there has not been any evidence to suggest the light screens have been modified. In fact the School District stated in its September 3, 2014, Memorandum that:

The lighting plan sheet photos submitted with the 2009 and this application show how the light levels for the fields would drop off almost completely once beyond the edge of the playing field. The field lights have performed in a manner consistent with the lighting plans. No changes are proposed for the existing field lighting. Tim Woodley, 1.

The School District also stated that "the screening remains as designed and installed according to the City's original Conditional Use approval for Rosemont Ridge Middle School." Tim Woodley, November 24, 2014, 2.

In the 2009 application, the Planning Commission and staff relied upon the applicant's photometric study, which showed that illumination would stop at, or before, the school boundary was reached. The 2009 approval found that adequate screening existed, and there is no condition of approval that establishes a buffer of vegetation of a certain height and width to prevent light trespass. If the light fixtures were screened effectively in 2009 to allow the athletic field lights to be on until 9:00 p.m., and the light screens have not changed, then the screens will be effective until 10:00 p.m.

Although opponents offered anecdotal statements about the efficacy of the light screens, no other photometric studies were submitted, and no other

engineers or lighting experts testified about the light screening. Therefore, the Council determines that the best evidence about the effectiveness of the lights is the 2009 photometric study. The Council also finds that there is substantial evidence in that study and the whole record to support the 2009 Planning Commission decision and find that a buffer of a certain width and height is not necessary. The Council finds that the direction of the lights and screening of the fixtures is sufficient to prevent light trespass; therefore, a buffer of a specific width and height is not required.

Neighbors stated that trees located along the southern fence had the lower limbs trimmed, resulting in impacts to the neighboring property. Throughout the oral and written testimony the neighbors explain that the trees are a noise and visual barrier necessary to reduce the current impact of the school. Kent Seida, August 19, 2014, 3, 4. Thus, "[t]he breaks in the buffering are [the neighbors'] concern" because "[t]he original buffer died in places and [was] not replaced." Kent Seida, November 20, 2014, 1. This hearing is not an enforcement hearing. This is an application to evaluate what, if anything, is required to limit light trespass to the neighboring property.

It is suggested by the neighbors that the trees were required by a previous approval or condition of approval, but it is not clear what condition is being referred to. Dave Seida, August 19, 2014, #2 & 7; Kent Seida, August 19, 2014, #2; Kent Seida, November 23, 2014, Item #1. It is clear that the references are not to Condition 3b, which is the condition being modified, because there is no reference to vegetative screening in Condition 3b. In addition, impact of noise and the removal of the visual barrier between the School and the neighboring property are not impacts of light trespass. The Council finds that the neighbors' testimony focuses on secondary effects of the lights being on, and those impacts cannot be considered because they are not relevant to the criteria for the requested modification.

However, the School District noted that "additional screening vegetation may be appropriate at the property line to help mitigate the perceived impact." Given that the School District agrees to provide additional screening, the Council finds that CDC 55.100(C)(1)(b) is met with the addition of the following sentence to Condition 3b, "A row of arborvitae shall be planted and maintained along the southern fence line beginning at Salamo Road and extending west along the fence line for 550 feet." This condition not only requires the arborvitae to be installed, but it requires that it be maintained, which addresses some of the neighbors' concerns.

The issue was also raised that if the School District cannot "keep simple screening promises how [can we] expect them not to abuse the lighting and noise." Dave and Kelly Seida, August 19, 2014, 2. The School District

responded by stating that the lights are on a "pre-programmed timer [that] automatically shuts lights off at 9 pm with no on-site over-ride feature." School District, September 3, 2014, 3.

- 3) The Council finds that the direction from which buffering is needed is not relevant because there is no required buffer under CDC 55.100(C)(1)(b). However, the neighbors indicated a desire to have the vegetative screening increased near their home and barn. Even though it is not required to prevent light trespass, the School District is willing to provide a vegetative buffer of arborvitae along the School's southern property line because that is where the neighboring home and barn are located.
- 4) The Council finds that it is not necessary to determine the direction, density, or type of viewer necessary for adequate buffering pursuant to CDC 55.100(C)(1)(c)-(e) because a buffer is not required to prevent light trespass.

D. CDC 55.100(C)(2): *On-site screening from view from adjoining properties of such things as service areas, storage areas, and parking lots shall be provided and the following factors will be considered in determining the adequacy of the type and extent of the screening:*

- a. *What needs to be screened?*
- b. *The direction from which it is needed.*
- c. *How dense the screen needs to be.*
- d. *Whether the viewer is stationary or mobile.*
- e. *Whether the screening needs to be year-round.*

The Council finds that the light poles themselves do not require additional screening in excess of what is required for the rest of the school because the light poles are not similar to a service area, storage area, or parking lot.

IX. ORDER

The City Council concludes that the application for modification to 2009 DR-09-05 condition of approval 3b to allow the athletic field lights to remain on until 10:00 p.m. meets all applicable approval criteria, and this conclusion is supported by substantial evidence contained within the whole record. Accordingly, based on the above Findings of Fact and conclusions of law, and the evidence in the whole record, the City Council reverses the decision of the Planning Commission, and approves MISC 14-04, subject to strict compliance with Condition of Approval 3b in the 2009 design review application, which is replaced with the following language:

All athletic field light fixtures shall be oriented and screened to comply with the "Illumination Summary" provided by PAE Consulting Engineers, Inc., on November 3, 2009. The School District shall test the athletic field lights and demonstrate compliance by December 31, 2014, and thereafter test the athletic field lights a minimum of one

time per year. In the event of a finding of noncompliance, the illumination cannot be used until compliance is demonstrated. A row of arborvitae shall be planted and maintained along the southern fence line beginning at Salamo Road and extending west along the fence line for 550 feet. The pole lighting must be turned off at 10 p.m., including game days.



MIKE JONES, COUNCILOR
WEST LINN CITY COUNCIL

12/9/2014
DATE

Mailed this 10th day of December, 2014.

Therefore, this decision becomes effective at 5 p.m., December 31, 2014.