City of Tacoma
Hearing Examiner

February 22, 2017

Timothy R. Gosselin
3511 N. Union Ave
Tacoma, WA 98407
(First Class & Electronic Mail Delivery)

Jeff H. Capell, Deputy City Attorney
City of Tacoma
Office of the City Attorney
747 Market Street Room 1120
Tacoma, WA 98402
(Interoffice & Electronic Mail Delivery)

Re: *Timothy R. Gosselin v. City of Tacoma*
HEX 2016-041 (LU16-0195)

Dear Parties,

In reference to the above entitled matter, please find enclosed a copy of the Tacoma Hearing Examiner's Summary Judgment Order entered on February 22, 2017.

Sincerely,

Louisa Legg
Office Administrator

Enclosure (1) – SJ Order

cc: Peter Huffman, Director, Planning & Development Services Department, City of Tacoma
Lisa Spadoni, Principal Planner, Planning & Development Services Department, City of Tacoma

OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

TIMOTHY R. GOSSELIN, **Appellant,** **v.** **CITY OF TACOMA,** **Respondent.**	**HEX 2016-041** **(LU16-0195)** **SUMMARY JUDGMENT ORDER**

Timothy R. Gosselin is challenging the decision of the City of Tacoma Director of Planning and Development Services (Director) denying his variance application for a marijuana production or processing business located within 1,000 feet of Irving Park. Mr. Gosselin filed a motion seeking summary judgment on the issue of whether a variance can be granted for such a business when it is located near a park and playground. In response to the Gosselin motion, the City made a cross-motion for summary judgment seeking a ruling upholding its position that a variance is not available based on the subject building's proximity to a playground. In considering the motions, the Hearing Examiner reviewed the following submissions:

1. Notice of Appeal by Applicant with Attachments and Exhibits 1-15.
2. Appellant's Motion for Summary Judgment.
3. Stipulation of the Parties.
4. Declaration of Appellant Timothy Gosselin with Ex. 1, Attachments 2-15 and Ex. 2.[1]

[1] The materials submitted do not include a full copy of Ex. 1 or Attachment 1.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768

5. City's Response to Appellant's Motion for Summary Judgment and Cross-Motion for Summary Judgment.

6. Declaration of Rebecca Smith.

7. Declaration of Mark Lauzier.

8. Reply in Support of Appellant's Motion for Summary Judgment and Response in Opposition to Respondent's Motion for Summary Judgment.

This matter was decided on the record submitted without oral argument. Based upon the records and files in the case, the exhibits, and the legal arguments briefed by the parties, the Hearing Examiner enters the following decision.

Factual Background

The parties have stipulated to the basic facts in the case and the following information is taken from the Stipulation of the Parties filed in the case. The undisputed facts show that the Appellant Gosselin owns property at 2733 S. Ash Street in Tacoma, Washington.[2] The property consists of land approximately 125 feet by 115 feet improved with a single story concrete block building. The premises were formerly used for a light industrial saw grinding business. The land contains approximately 14,375 square feet and the building is approximately 13,000 square feet in size. South Ash Street, at this location, is a dead end street approximately 300 feet long, ending around 100 feet to the north of the building. Center Street is the closest main thoroughfare and cross street, approximately 100 feet to the south of the subject property. The site is situated among other similar structures and uses to the east and west. The Atlas/Bradken Foundry is immediately across Center Street to the south. The site is completely buffered from view of nearby residential areas and Irving Park to the north by a

[2] Mr. Gosselin is acting as a trustee of Gosselin Law Office, 401k, which apparently holds title to the property. *Gosselin Declaration.*

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768

heavily wooded steep bluff.

The site is zoned M-1 STGPD-ST-M/IC, Light Industrial. The zoning allows warehousing, storage, vehicle service and repair, and other light industrial uses. *Tacoma Municipal Code (TMC) 13.06.400.B.1*; *TMC 13.06.400.B.4.* Marijuana production and processing is allowed within this zone, if applicable criteria are met. *TMC 13.06.400.B.5.*

Irving Park is located at 2502 S. Hosmer Street, in Tacoma at the intersection of South 25th Street and South Hosmer Street. Irving Park was established in 1946 when property owned by the Tacoma School District was effectively transferred to the Metropolitan Park District of Tacoma (Metro Parks). Irving Park is approximately 2.7 level acres. It is bounded on the east by South Hosmer Street, on the north by South 25th Street, to the west by South Sprague Avenue and the Sprague Avenue off-ramp from westbound Highway 16. To the south, the park is bounded by vacant land that is a steep, heavily vegetated and wooded bluff that runs downhill to Nalley Valley.

Irving Park has a basketball court, children's playground equipment that includes slides, swings, and climbing apparatus, picnic tables, other bench-type seating, and an open grassy area where sports such as soccer and softball can be played. Irving Park is northwest of the subject property. The nearest point of Irving Park is approximately 500 to 525 feet from the nearest point of the subject property.

Tax rolls maintained by the Pierce County Assessor show that Irving Park consists of parcel numbers 28950001280 and 28950001290.[3] Metropolitan Park District of Tacoma is identified as the taxpayer for both parcels. Irving Park is owned and managed by the

[3] The Stipulation contains a typographical error on the parcel numbers. The correct numbers are referenced in the text above.

Metro Parks. *Stipulation of the Parties.*

The City of Tacoma submitted two declarations in support of their Response to Appellant's Motion for Summary Judgment and Cross-Motion for Summary Judgment.[4] Rebecca Smith, Director of Licensing and Regulation for the Washington State Liquor and Cannabis Board (Board) indicates that she was the Marijuana Unit Manager for the Board in 2013. She states that in the Board's regulations, playgrounds were intended to have more protection, in general, from marijuana businesses than parks. She further declares that not adding metropolitan park districts to the ownership paradigm in the definition of "playgrounds" was an oversight and not an intentional omission. Ms. Smith did acknowledge that the Board specifically included ownership by a metropolitan park district to the definition of a "park" because it had been brought to the Board's attention that, without this addition, parks might have no protection in a jurisdiction like Tacoma where the metropolitan park district essentially owns all public parks. She further asserts that the Board sees the metropolitan park district as the functional equivalent of the city when it comes to ownership of a playground. *Smith Declaration.*

Mark Lauzier signed a declaration as acting City Manager for the City of Tacoma. He indicates that because the City of Tacoma has no parks department, Metro Parks fills that function for the City. Metro Parks owns and operates public parks and provides recreational services and opportunities to the public that would typically be provided by a city's parks department. The City sees Metro Parks as the functional equivalent of the City's parks

[4] The Appellant objects to the City's cross-motion for summary judgment and the associated declarations. The material submitted is helpful in understanding the City's position and will be considered on that basis. The facts contained in the declarations do not raise disputed issues of material fact necessary for resolution of the legal issue in controversy. Therefore, no further discovery or rebuttal is warranted.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768

department. To the extent the language of the Board's regulations fails to provide protection to playgrounds owned by a metropolitan park district, similar to the protection provided to playgrounds owned by a city, Tacoma will be seeking amendment of the Board's regulations. *Lauzier Declaration.*

Analysis

Summary judgment is a procedure available to avoid unnecessary trials or hearings on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *LaPlante v. State,* 85 Wn.2d 154, 158, 531 P.2d 299 (1975). The summary judgment process is intended to eliminate a trial or hearing if only questions of law remain for resolution and neither party contests facts necessary to reach a legal determination. *Marincovich v. Tarabochia,* 114 Wn.2d 271, 274, 787 P.2d 562 (1990); *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982). In this case, the material facts pertinent to the City's decision on the requested variance are not in dispute and the matter is appropriate for summary judgment.

The parties have stated the legal issue on summary judgment in slightly different terms, but the ultimate inquiry is whether Irving Park falls within the protection afforded playgrounds under RCW 69.50.331(8)(a) and (8)(b), WAC 314-55-050(10), and TMC 13.06.565. The Appellant contends Irving Park is not a playground within the governing definitions because it is not owned by a city. The City argues that Irving Park should be considered a playground under the definitions contained in WAC 314-55-010(24) because Metro Parks is the functional equivalent of the City. In addition, the City insists excluding Irving Park's facilities from the

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768

definition of a protected playground would be inconsistent with the intent of the Legislature and the Washington State Liquor and Cannabis Board.

The Revised Code of Washington contains a statement regarding the scope of a local government's ability to enact laws and ordinances relating to controlled substances, including cannabis:

> Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to controlled substances that are consistent with this chapter… Local laws and ordinances that are inconsistent with the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of the city, town, county or municipality.

RCW 69.50.608. This general state preemption of drug related laws limits the City of Tacoma's authority to pass ordinances inconsistent with state statutes. The State of Washington has addressed the permissible locations for cannabis related activities as follows:

> Except as provided in (b) through (d) of this subsection, the state liquor and cannabis board may not issue a license for any premises within one thousand feet of the perimeter of the grounds of any elementary or secondary school, playground, recreation center or facility, child care center, public park, public transit center, or library, or any game arcade admission to which is not restricted to persons aged twenty-one years or older.

RCW 69.50.331(8)(a).

Local jurisdictions are allowed to reduce the 1,000-foot buffer for certain types of facilities, but buffers for schools and playgrounds cannot be decreased:

> (b) A city, county, or town may permit the licensing of premises within one thousand feet but not less than one hundred feet of the facilities described in (a) of this subsection, *except elementary*

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768

> *schools, secondary schools, and playgrounds,* by enacting an ordinance authorizing such distance reduction, provided that such distance reduction will not negatively impact the jurisdiction's civil regulatory enforcement, criminal law enforcement interests, public safety, or public health.

RCW 69.50.331(8)(b)(emphasis added).

The Washington State Liquor and Cannabis Board adopted administrative regulations addressing the buffer requirements for cannabis related facilities and providing definitions for relevant terms. The setback requirements provide:

> (10) The WSLCB shall not issue a new marijuana license if the proposed licensed business is within one thousand feet of the perimeter of the grounds of any of the following entities. The distance shall be measured as the shortest straight line distance from the property line of the proposed building/business location to the property line of the entities listed below:
>
> (a) Elementary or secondary school;
>
> (b) Playground;
>
> (c) Recreation center or facility;
>
> (d) Child care center;
>
> (e) Public park;
>
> (f) Public transit center;
>
> (g) Library; or
>
> (h) Any game arcade (where admission is not restricted to persons age twenty-one or older).
>
> (11) A city or county may by local ordinance permit the licensing of marijuana businesses within one thousand feet but not less than one hundred feet of the facilities listed in subsection (10) of this section except elementary and secondary schools, and playgrounds.
>
> . . . .

WAC 314-55-050.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768

The Board also adopted definitions, including a definition of playground that focuses on the nature of the space and ownership:

> (24) "Playground" means a public outdoor recreation area for children, usually equipped with swings, slides, and other playground equipment, owned and/or managed by a city, county, state or federal government.

WAC 314-55-010(24). The Board also defined a public park based on property characteristics and ownership.

> (25) "Public park" means an area of land for the enjoyment of the public, having facilities for rest and/or recreation, such as a baseball diamond or basketball court, owned and/or managed by a city, county, state, federal government, or metropolitan park district. Public park does not include trails.

WAC 314-55-010(25). Unlike the definition of playground, the public park definition specifically addresses ownership by a metropolitan park district.

The City of Tacoma adopted an ordinance addressing the location of cannabis businesses that incorporates the definitions found in WAC 314-55-010:

> 3. For purposes of this Section and the standards applicable to state-licensed marijuana uses, the terms and definitions provided in WAC 314-55 shall generally apply unless the context clearly indicates otherwise.

TMC 13.06.565.B.3. The City of Tacoma location requirements for cannabis related businesses parallel the state buffer zones by stating:

> a. As provided in RCW 69.50.331 and WAC 314-55-050, marijuana uses shall not be allowed to locate within 1,000 feet of elementary schools, secondary schools, or playgrounds. For purposes of this standard these uses are as defined in WAC 314-55.

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768

TMC 13.06.565. Given this statutory and regulatory framework, the City evaluated Mr. Gosselin's request for a variance from the 1,000-foot buffer between the playground at Irving Park and the proposed cannabis production/processing site. The City concluded that it could not vary the 1,000-foot setback because Irving Park contains a playground and playgrounds are one of the uses that are not subject to local buffer reduction under RCW 69.50.331 and WAC 314-55-050.

Mr. Gosselin points out that the definition of a playground in the administrative regulations, which have been incorporated by reference in the TMC, does not explicitly include playgrounds owned by a metropolitan park district. The facilities at Irving Park comply with that portion of the playground definition describing the physical characteristics of a playground. However, the fact that Metro Parks holds title to the park property puts the facility outside the parameters of the playground definition's requirement addressing ownership. The language of the regulation contains a list of entities that must own a playground to fall within the definition. The list does not contain metropolitan park districts. Mr. Gosselin argues that the plain language of the regulation governs and that Irving Park does not qualify as a playground for purposes of WAC 314-55-010(24) and by extension TMC 13.06.565, because it is not owned by one of the identified entities.

The City maintains that the clear intent of the state statutes and regulations is to provide enhanced protection to playgrounds and that omitting playgrounds owned by metropolitan park districts from the extra buffer protection for schools and playgrounds is inconsistent with the intent and purpose of state law. The City has submitted a sworn declaration from Rebecca

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768

Smith, Director of Licensing and Regulation for the State of Washington Liquor and Cannabis Board indicating that the Board had no intent to omit playgrounds owned by metropolitan parks from the definition of playgrounds with 1,000-foot buffer protection.[5] She further indicates that failure to include playgrounds owned by a metropolitan park district in the regulation was an omission the Board will be moving to correct.

The Planning and Development Services Director's decision concluded that it would be an absurd result to interpret WAC 314-55-010(24) to exclude playgrounds owned by Metro Parks from the 1,000-foot buffer protection. To do so would leave playgrounds in parks within the City of Tacoma with reduced, rather than enhanced, protection from cannabis uses. The Director's concern over lack of buffer protection is valid given the fact that Metro Parks owns the vast majority of public playgrounds in the City of Tacoma. Leaving a large segment of playgrounds in public parks without increased buffer protection, based on ownership alone, makes no sense to the City.

Unfortunately, the language used in WAC 314-55-010(24) to define the class of protected playgrounds omits any reference to playgrounds owned by metropolitan park districts. This appears to be an oversight and there is no evidence that such playgrounds were intended to fall outside the protected class. However, a discrete list cannot be expanded through "interpretation." As the court held in *State v. Delgado*, 148 Wn.2d, 723, 727, 63 P.3d 792 (2003), the court cannot add statutory language to correct an omission:

> The statute expressly lists those qualifying prior convictions which expose an offender to a sentence of life without parole as a two-

[5] Use of an individual's comments regarding intent cannot be used to establish the intent of the larger body, like the Legislature. The court in *Scott v. Cascade Structures,* 100 Wn.2d 537, 544, 673 P.2d 179 (1983) ruled: "We have consistently held that the comments of individual legislators cannot be used to establish the intent of the entire legislative body." (citing *Woodson v. State*, 95 Wn.2d 257, 264, 623 P.2d 683 (1980)).

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768

> strike persistent offender. The statute ends with the limiting language 'of an offense listed in (b)(i) of this subsection.' Statutory rape is not listed. We conclude this list of predicate strike offenses is exclusive, and we can find no basis to add any offenses not listed.

E.g., *Dot Foods Inc. v. Dep't of Revenue,* 166 Wn.2d 912, 920, 215 P.3d 185 (2009)(To achieve such an interpretation, we have to import additional language into the statute that the Legislature did not use. We cannot add words or clauses to a statute when the Legislature has chosen not to include such language); *State v. J.P.,* 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (cannot add words or clauses to an unambiguous statute). The *Delgado* court went on to observe that the courts have long refrained from inserting language in statutes, even to correct a legislative error. *Delgado*, 148 Wn.2d at 730.

The City is asking that the regulation defining playgrounds be interpreted to expand coverage to entities that are not contained in the adopted regulation. The tenants of statutory construction do not allow the addition of language to a duly adopted regulation, no matter what the subjective intent of the legislative or administrative body might have been. In this case, the plain language of the regulation defining playground contains a list of covered owners that does not include metropolitan park districts. Statutory interpretation does not support adding a new entity to the existing list.

The City further argues that Metro Parks should fall within the definition of a city owned playground under WAC 314-55-010(24) because Metro Parks is the functional equivalent of a city. While it is true that Metro Parks operates much like the parks department of a city, there is no legal support for actually considering Metro Parks a city. Metro Parks has

a much more limited scope of functions than a municipality and simply cannot be equated to the term "city."

The evidence strongly suggests that playgrounds owned by metropolitan park districts should be included within the definition of playgrounds receiving added protection from cannabis businesses. The appropriate remedy for the oversight that led to this dilemma is to amend the definition of playgrounds to include playgrounds owned by metropolitan park districts. The Liquor and Cannabis Board can undertake this amendment, and apparently plans to do so. The City of Tacoma can also modify its own ordinance to extend 1,000-foot buffers to playgrounds owned by metropolitan park districts, rather than relying on the state regulation's definition. In either case, under the currently operative language, playgrounds owned by metropolitan park districts are not within the class of playgrounds that must be protected by a 1,000-foot buffer.

The Director rejected the variance application filed by Mr. Gosselin because he was of the opinion that playgrounds owned by Metro Parks should be covered by the definition of playground in WAC 314-55-010(24). Given the ruling in this decision that the definition of playground in WAC 314-55-010(24) does not extend to playgrounds owned by metropolitan park districts, the merits of the variance application should be considered. This case is properly remanded for consideration of the merits of Mr. Gosselin's variance application under the facts and circumstances specific to his site. Irving Park is not a playground given protection by the terms of WAC 314-55-010(24). However, Irving Park remains a public park under the definitions of WAC 314-55-010(25), and the variance requested should be considered

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768

substantively on remand.

Based upon the undisputed facts and the analysis above, the Hearing Examiner enters the following:

ORDER

Mr. Gosselin's Motion for Summary Judgment on the issue of whether Irving Park is a protected playground under the terms of currently governing laws, regulations, and ordinances is GRANTED. Irving Park is a public park, but not a playground, under currently governing regulations. Accordingly, the City's Cross-Motion for Summary Judgment is DENIED. This case is remanded to Planning and Development Services for further consideration of the substance of Mr. Gosselin's variance request.

DATED this 22nd day of February, 2017.

Phyllis K. Macleod

PHYLLIS K. MACLEOD, Hearing Examiner

ORIGINAL

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768

NOTICE

RECONSIDERATION/APPEAL OF EXAMINER'S DECISION

RECONSIDERATION TO THE OFFICE OF THE HEARING EXAMINER:

Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise provided by law, may file a motion with the Office of the Hearing Examiner requesting reconsideration of a decision or recommendation entered by the Examiner. A motion for reconsideration must be in writing and must set forth the alleged errors of procedure, fact, or law and must be filed in the Office of the Hearing Examiner within l4 calendar days of the issuance of the Examiner's decision/recommendation, not counting the day of issuance of the decision/recommendation. If the last day for filing the motion for reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next working day. The requirements set forth herein regarding the time limits for filing of motions for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set forth the alleged errors shall be dismissed by the Examiner. It shall be within the sole discretion of the Examiner to determine whether an opportunity shall be given to other parties for response to a motion for reconsideration. The Examiner, after a review of the matter, shall take such further action as he/she deems appropriate, which may include the issuance of a revised decision/recommendation. (*Tacoma Municipal Code* 1.23.140)

NOTICE

APPEAL TO SUPERIOR COURT OF EXAMINER'S DECISION:

Pursuant to the Official Code of the City of Tacoma, Section 1.23.160, the Hearing Examiner's decision is appealable to the Superior Court for the State of Washington. Any court action to set aside, enjoin, review, or otherwise challenge the decision of the Hearing Examiner shall be commenced within 21 days of the entering of the decision by the Examiner, unless otherwise provided by statute.