

October 1, 2012

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION

SUBJECT: Development and Environmental Services File No. **L09CU010**

MONTESSORI CHILDREN'S HOUSE
Conditional Use Permit

Location: 5003 218th Avenue NE

Appellant: Salish Spring Neighborhood Association
represented by Elizabeth Martz
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Applicant: Montessori Children's House
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SUMMARY OF RECOMMENDATIONS/DECISIONS:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Remand

EXAMINER PROCEEDINGS:

Hearing Opened: September 11, 2012
Hearing Closed: September 21, 2012

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Hearing Examiner's Office. Having reviewed the record in this matter, the Examiner now makes and enters the following:

SETTING THE BASELINE: THE 1995 CUP

1. In January 1994, Linda Baker (the mother of the current owner, Jennifer Wheelhouse) applied to the Department of Development and Environmental Services (DDES) for a conditional use permit (CUP) to expand the then-existing daycare into a Montessori Children's House (the School) with up to 94 children. The School inhabits space off 218th Avenue NE (218th), just north of the intersection with State Route (SR) 202.
2. From the version of the L93CU011 file DDES provided, it appears that by the time of the November 1994 Mitigated Determination of Non-Significance (MDNS), the proposal had evolved into one involving 84 students, 46 daycare (defined as more than 5 hours per day) and 38 preschool. The MDNS noted that, with that configuration, the state would require an east bound left turn lane (for cars heading east on SR 202 who wished to turn left and north onto 218th). The MDNS gave the applicant the option to either construct the turn lane or "[r]educe the size of the development to limit the eastbound left turn turns to less than 10 peak-hour/peak-direction trips. This means limiting the daycare to 38 children per ITE trip generation guide and interpolation of volumes given in the Gibson Traffic Study" and, per the next paragraph, capping enrollment at 86, comprised of 38 daycare (defined as more than 5 hours per day) and 48 preschool students.
3. The June 1995 Preliminary Report to the Zoning Adjuster (Report) and the Adjuster's July 1995 Report and Decision (Decision) both repeated the first part of the above language, conditioning the CUP on the applicant reducing the "size of the development to limit the eastbound left turn turns to less than 10 peak-hour/peak-direction trips. This means limiting the daycare to 38 children." But neither the Report nor the Decision included in the final section of their respective documents (the Report's "Recommendation" and the Adjuster's "Decision") the remaining language from the MDNS referencing the 48 preschool children or limiting the total number of students to 86.¹
4. Reducing the total student number to 86 was an explicit basis for the School's MDNS. The "Request" the Preliminary Report to the Zoning Adjuster analyzed was "the expansion of the existing daycare to a maximum of 86." This "maximum of 86" was also the "Request" the Zoning Adjuster said was before him, a "Proposal" he described as remodeling and expanding "the existing daycare to a Montessori preschool/daycare in order to increase the enrollment from 12 to 86 children." Thus, there is no serious question that the 1995 CUP limited the School to a maximum of 86 students. It would

¹ In July 1995, the Zoning Adjuster amended the initial decision to clear up a minor typographic error about allowable square footage, an issue not relevant to the current dispute.

have been cleaner if the Adjuster had repeated the 86 number in his “Decision” section. But then again, the Decision did not even explicitly state that a “preschool” or “daycare” was being allowed. The Adjuster simply said that he was approving the “request.” And that request was for a preschool/daycare expansion to a maximum of 86 children.

5. Still, we find it entirely reasonable that the current School management (and possibly even Ms. Baker) would have been fuzzy on whether there was an enrollment cap beyond the 38 daycare student limit. Even if Ms. Wheelhouse had chosen not to initially accept her mother’s representation of the pertinent limits but had decided to read the Adjuster’s opinion herself (not exactly light reading or something one would expect to find on a desk at the School), it would have been sensible to turn to the “Decision” section to determine what was allowed. That is, for example, what DDES typically does in its electronic case notes when this office issues an opinion – DDES cuts and pastes our “Decision” section, not our entire opinion. And the “Decision” section would have called to her attention only the 38-student daycare limit. (As further evidence of the reasonableness of mis-reading the original CUP’s limits, DDES itself mis-defined the current proposal as a request to “expand the number of students from 38 [instead of 86] to 168.”) We find credible Ms. Wheelhouse’s testimony about the confusion on this point.
6. In addition, neither the Neighbors nor DDES nor the King County Department of Transportation (KCDOT) were aware of any party having complained to the County about School-created traffic. Nor had a County agency initiated any enforcement or other action against the School. We find credible Ms. Wheelhouse’s testimony that the School proactively approached the DDES regarding the requirements of the 1995 CUP and need for a new CUP, not the other way around. We ascribe no disobedience, disregard, or even negligence to the School’s unpermitted expansion beyond 86 students. Yet 86 is the allowed number.
7. Beyond student enrollment, the other baseline issue relates to allowable trips. During the current CUP review (discussed below), the School, DDES, and KCDOT treated 39 AM and PM peak hour trips as the “threshold” for the project. This was apparently arrived at by taking the 38 trips that was assumed to be the allowed under the 1995 CUP, and then crediting one additional trip due to the School purchasing an additional parcel along 218th.
8. That assumption is not correct; 38 AM/PM trips was not the “threshold.” As noted above, in the absence of constructing a left turn lane from eastbound SR 202 onto 218th, the 1995 CUP limited “the eastbound left turn turns to less than 10 peak-hour/peak-direction trips.” We read that as a limit of 10 cars, coming eastbound on SR 202 and turning left onto 218th during the PM peak hour. The “peak direction” would have been eastbound in the evening, and the concern about daycare versus regular students would apply only during the PM. Daycare students would typically be the only ones requiring transportation during the PM rush hour, the regular students having left before then. Prior to the School’s current effort to push regular students’ arrival time out of the AM peak hour, regular students would have arrived during the AM peak hour along with daycare students along with daycare students. Yet regular students were not called out. Thus the traffic limits for an 86-child student body applied only in the PM.

9. Therefore, adopting 38 as a “threshold” both overstates and understates the School’s grandfathered approval per the 1995 CUP. It overstates it in the PM, in that the School was limited to only 10 trips for School-related drivers turning left from SR 202 onto 218th Avenue (presumably parents coming from the direction of Redmond to pick up their children during the PM rush hour). But it understates it in the PM because no School-related drivers coming westbound on SR 202 and turning right onto 218th (nor, for that matter, any School-related drivers leaving the school on 218th and turning either direction onto SR 202) counted against the 1995 CUP limit. And it understates it completely in the AM because the 1995 CUP did not place any limits on the AM trips to and from the School; School-related drivers turning left from SR 202 onto 218th in the AM (presumably parents coming from the direction of Redmond to drop off their children during the AM rush hour) would not have been considered “peak direction.” Thus, 38 trips AM and PM trips (plus one for the associated residence) could potentially be an acceptable number (discussed below), but it is a number that has to be justified on its own accord and not simply as a carryover from the 1995 CUP.

THE CURRENT CUP

1. In November 2009, Ms. Baker applied to the Department of Development and Environmental Services (DDES) for the current CUP, L09CU010, to “increase the number of students under the CUP to 168,” noting that the School was “resubmitting for a new [CUP] in order to expand our enrollment potential & come into compliance with the current usage.”
2. As part of the review process, DDES received “numerous public comments” concerning increased traffic along 218th and SR 202, noting a special concern raised about those attempting to make a left turn from SR 202 onto 218th, the specific scenario called out in the 1994 and 1995 CUP-related decisions and reports.
3. Based on the initial proposal and on a 2008 traffic impact analysis conducted for the School by Bradly Lincoln, PE, of Gibson Traffic Consultants, in February 2009 Roman Pazooki of the Washington State Department of Transportation (WSDOT) expressed several traffic-related concerns. Gibson responded in October 2009. Mr. Pazooki was satisfied with that (and/or other responses/changes) such that he sent an undated statement concluding that WSDOT’s comments/concerns had been adequately addressed and that the revised project would not “create significant impacts to the State highway system.”
4. In an October 2010 email, Robert Eichelsdoerfer from the King County Department of Transportation (KCDOT) observed that a left turn lane from SR 202 north onto 218th was not warranted as a matter of Level of Service (LOS), but, “based on the additional traffic produced by 78 additional students,” was warranted per WSDOT’s manual. In a November 2010 memorandum, Kristen Langley of DDES repeated the above analysis and also noted that, per DDES staff’s field observations, there were “safety concerns that further support” this left turn lane construction, though the record is silent as to what this “further support” might have been, nor whether these concerns pre- or post-dated Mr. Pazooki’s statement of WSDOT’s satisfaction.

5. Gibson provided a 2011 traffic impact analysis, and the School proposed avoiding AM peak hour traffic problems by pushing its non-daycare AM arrivals later, out of the peak 7:45-8:45 AM hour and staggering class start times so students were not arriving *en masse*.
6. DDES granted the CUP in April 2012. The adjacent neighbors, the Salish Springs Neighborhood Association (“the Neighbors”) timely appealed.
7. We held a pre-hearing conference on the above-referenced appeal in June 2012, and a full hearing on September 11. Elizabeth Martz and Richard Melton represented the Neighbors; they, along with Susan Metters, Bob Schwartz, Sarah Frankum, Gareth Larsen, and Mark Baker, testified in opposition to the CUP or at least for greater conditions/restrictions. Duana Kolousková represented the School; Jennifer Wheelhouse, Jennifer Hildebrandt, and Bradly Lincoln testified in support of the CUP. Mark Mitchell represented DDES; he, along with KCDOT’s Robert Eichelsdoerfer, testified in support of the CUP. We kept the record open to allow the School the chance to object or respond to a late-filed Neighbor exhibit. The School indicated its non-objection on September 21, closing the record.

ANALYSIS OF THE NEIGHBOR’S APPEAL

1. A conditional use is not a regularly permitted use,² but instead is subject to conditions placed on the use to ensure compatibility with nearby land uses. KCC 21A.06.230. Yet a conditional use is not something like variance, where what is being requested has a strong presumption of invalidity. A conditional use is still a permitted use. *Id.* An examiner goal in reviewing a conditional use permit is to strike “an appropriate balance between the needs of the [applicant] and the concerns of the neighbors in the rural area.” *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 181, 61 P.3d 332 (2002). We are thus a bit like Goldilocks sampling the porridge, attempting to select a porridge that is neither too hot for the Neighbors nor too cold for the School, but instead is “just right.” And we all know how popular Goldilocks was with the bears.
2. KCC 21A.44.040 is the primary lens through which we review the Neighbors’ appeal. Two elements are particularly pertinent, whether the School can demonstrate that: “E. The conditional use is not in conflict with the health and safety of the community,” and “F. The conditional use is such that pedestrian and vehicular traffic associated with the use will not be hazardous or conflict with existing and anticipated traffic in the neighborhood.”³

² We adopted the terminology “regularly permitted” to distinguish other such allowed uses from conditionally allowed uses. Wash. Prac., Real Estate § 4.22 (2d ed.).

³ “D. Requested modifications to standards are limited to those which will mitigate impacts in a manner equal to or greater than the standards of this title,” appeared at first to be an issue, but a closer review of the record reveals no approved modification of any existing standard. There is a healthy dispute on whether the School is actually meeting the various applicable standards, but there is no particular standard that DDES has waived or would functionally be waived by allowing the expansion. Similarly “G. The conditional use will be supported by adequate public facilities or services and will not adversely affect public services to the surrounding area or conditions can be established to mitigate adverse impacts on such facilities,” appeared to be relevant, in the sense that a public road could perhaps qualify as a “public facility or service,” but given the specificity of (E) and (F), and the rule of statutory construction that a specific statutory provision trumps a general one, it is not clear what additional analysis (G) would call for.

3. The Neighbor's appeal focusses on traffic impact the current iteration of the School has, (and expansion authorized by the current CUP would have) on their community. Two of the concerns, involving School children walking along and across 218th and then parking along 218th during occasional School open-houses, are more tangential. The other two, traffic safety and traffic congestion, represent the heart of the appeal and the heart of the conditions DDES at least attempted to address in the CUP. We tackle each of these in turn.
 4. The Neighbors expressed concerns about the safety of School children walking (as a class, in a row) along and crossing 218th, and requested an additional restriction barring such crossing. We decline. We cannot "impose conditions on land use permits that related to the detailed conduct of the applicant's business rather than to zoning limitations on the use of land." *Woodinville Water Dist. v. King County*, 105 Wn. App. 897, 906, 21 P.3d 309 (2001). More fundamentally, we lack an objective standard or expertise by which to judge such concerns. Is having children hold a rope with teachers at each end sufficient? How does the age of the children impact that equation? How do sidewalks or the lack of sidewalks, and road slopes, speeds or sight distances, play in? Such concerns would be better addressed either directly between the Neighbors and School or, if that fails, with resort to the State's Department of Early Learning, who licenses the School (<http://www.del.wa.gov/laws/rules/licensing.aspx>) and undoubtedly has a far better bead on "best practices" in that particular arena than we do.
 5. The Neighbors expressed concern with the School's occasional use of 218th to park cars for large open houses. Ms. Wheelhouse testified, without rebuttal, that the School holds about three such events a year. No one identified any legal parking restrictions on 218th. Three events would only be one more event than the School would be allowed even if it had no permit for anything. KCC 21A.32.110(B). At some level of repetition the cumulative burden on the neighborhood from such large-scale events might rise to the point of becoming a factor in a CUP analysis. But at something like a quarterly event, it is not.
 6. Traffic safety was a major appeal thrust, and is relevant in two respects to KCC 21A.44.040's criteria, whether the School has demonstrated (E) that its use "is not in conflict" with the community's safety and (F) that the "vehicular traffic associated with the use will not be hazardous." The Neighbors explained how, without dedicated turning lanes, drivers on SR 202 attempting to go around cars waiting to turn onto 218th may find themselves in trouble or in a ditch. One Neighbor recounted a car within the last month trying to speed around a turning driver going into the ditch. Others discussed drivers well-exceeding the posted 55 mph speed limit. Another discussed how cars nudge past each other into the intersection to get a sufficient sight-line. Submitted photos of recent skid marks on SR 202 as it intersects 218th further emphasize that the Neighbors' safety concerns are legitimate and supported by evidence.
 7. The Neighbors provided a helpful reproduction of WSDOT's accident totals, and contrasted the accident history from 2004-2006 with the history from 2007-2011 (with 2011 being only a partial total). The analysis shows an increase in the annual accident rate. However, 2007, with seven accidents, is a major outlier, at least three more
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accidents than in any other of the dozen years reported. If, for example, one were to shift 2007 into the earlier group and compare 2005-2007 with 2008-2010, one would show a trend of *decreasing* accidents (4.0 versus 2.33 per year).

8. Still, as discussed below in relation to traffic congestion, there is no real doubt that traffic on SR 202 in the vicinity of 218th has increased significantly. For example, per the Traffic Data Group's count, trips on SR 202 during the AM peak hours increased from 1566 in 2008 to 2654 in 2011, an increase of almost 70 percent. Gibson analyzed the collision history of the intersection in terms of accidents per million entering vehicles and found that, for the most recent period, the 218th/SR-202 stretch had a lower collision rate than either the state rate for the similar roadway classification or the general County rate (0.50 v. 0.85 v. 2.06). And there is no hint that Gibson may be "cooking" the numbers given that, per the Neighbors' exhibit, Gibson actually calculated a *higher* accident-per-year figure for the 218th/SR-202 area than the State did for the equivalent period.
9. Neighbors expressed reasonable skepticism that some of the accidents near the intersection may not be logged as State-reported accidents. But such under-reporting doubtless occurs at the other sites being compared. The Neighbors did offer a plausible explanation for how accidents at this site may have a lower-than-average reporting: that cars may skid off the road and require only a tow, which they might not report.
10. As described below in relation to traffic congestion, we are not convinced that DDES applied the correct CUP analysis and thus that the School has made the traffic safety-related demonstration required by KCC 21A.44.040(E)-(F). As discussed below we remand the traffic safety (as well as traffic congestion) issue to DDES.
11. Traffic congestion was the Neighbors' other major appeal thrust. To obtain a CUP, the School must demonstrate that the "vehicular traffic associated with the use will not... conflict with existing and anticipated traffic in the neighborhood." KCC 21A.44.040(F). Again, there is no real doubt that traffic on SR 202 in the vicinity of 218th has increased significantly, perhaps (as noted above) almost 70 percent in the last three years. As to cars turning left at the 218th/SR 202 intersection, Traffic Data Gathering's data shows a 64 percent increase in cars making a left turn from SR 202 onto 218th during the AM Peak (36 versus 59) from 2008 to 2011. During the PM peak hour, those making a left turn from 218th onto SR 202 increased 109 percent (from 11 to 23) during this same period. And the Neighbors have pointed to specific, recent local developments that may be expected to increase this in the near future.
12. Beyond mere numbers, the Neighbors explained the increase in general traffic in the context of the mechanics of how traffic can back up. For example, a person waiting to turn from 218th onto SR 202 may need to wait for a backup on SR 202 to clear. With the School's entrance to 218th close to the SR 202 intersection, cars can become gridlocked. As with traffic safety, the Neighbors' testimony went far beyond generalized fears.
13. The School is responsible only for mitigating or preventing the traffic congestion that it is causing, not for solving the area's existing, worsening condition. But there is no question that the School, even in expanding from the allowed 86 to the current 107 students, not to mention the proposed expansion from 107 to 168 students, is adding to the 218th/SR 202 intersection congestion. The School's traffic and the general traffic are not unrelated. As

traffic on SR 202 has gotten worse (since the 1995 CUP), the marginal impact of each School-related car attempting to enter onto or come from SR 202 has increased (*i.e.* if it takes a School-related car longer now, on average, to maneuver the intersection than in 1995, then a non-School car will have to wait, on average, longer behind that car now than it would have had to wait in 1995).

14. The problem is quantifying the School's contribution to the problem, figuring out what to do about it, and applying the correct legal lens.
15. One major problem with determining the traffic impact of the proposed School expansion is, in the School's favor, that the majority of the Neighbors' testimony about traffic impacts were for snapshots in time that pre-dated the School's recent move to stagger class start times that push more arrivals out of the AM peak hour. Jennifer Hildebrandt, who oversees day-day operations, testified that on the day of the hearing, two students were signed in before 7:45 AM, nineteen students between 7:45 and 8:45, and eighty signed in after 8:45. The School appears to be successfully pushing the bulk of its arrivals out of the AM peak. Thus, much of the Neighbors' testimony was not directly tied to current School operations.
16. The second major problem with determining the traffic impact of the proposed School use is, and this one cuts both ways, that DDES appears to have based its traffic congestion analysis on the premise that the 1995 CUP vested 38 (now 39) peak hour trips. As analyzed in some detail above, that is an incorrect premise; 38 AM/PM trips was not the "threshold." If the School wishes to operate at above the 86 student limit of the 1995 CUP, the actually-allowed trip numbers today and in the future have to be justified on their own accord. The 38/39 number may be a good interim target for the School to experiment with, but the results of that experiment will need to be analyzed later, to determine whether such vehicular traffic will be "hazardous or conflict with existing and anticipated traffic in the neighborhood." KCC 21A.44.040(F). Given that DDES started from the wrong premise, we are not convinced that DDES has actually performed the necessary analysis.
17. The third major problem with determining the traffic impact of the proposed School use is, in the Neighbors' favor, that what the School is monitoring this fall is the traffic impact of 107 students, the School's current enrollment, not the situation once the School operates at the 168-student limit being requested. It is not clear what traffic data this fall will actually tell us about the viability of 168 students, a 57 percent increase from the current number. The School has shown diligence to mitigate traffic impacts, but it is in the context of a 107-student (not 168-student) operation.
18. The fourth major problem with determining the traffic impact of the proposed School use is, in the Neighbors' favor, that DDES appears to have applied the generally applicable standards related to traffic congestion. For example DDES repeatedly stated that there was not a "significantly adverse" traffic impact with the proposed use, and pointed to KCC 14.80.030 and an agreement with WSDOT, both of which require that a traffic must be at Level of Service (LOS) "F" (and thus failing) to be considered a "significant adverse impacts." Gibson's testimony established that the current (and likely expanded) use will not reduce the intersection to LOS "F."

19. Such an analysis almost has to be incorrect, as such an analysis would seem to apply to *any* proposed use. If a regularly permitted use in the RA zone, such as a subdivision, was likely to create an LOS “F” condition, DDES presumably would not allow it to proceed until it had remedied that LOS “F” problem. If all KCC 21A.44.040(F)’s criteria that the “vehicular traffic associated with the use will not be hazardous or conflict with existing and anticipated traffic in the neighborhood” means is “follow the usual law,” then KCC 21A.44.040(F) is functionally useless. And basic principles of statutory construction counsel against interpreting a statute that renders any portion meaningless or superfluous. *Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 601, 278 P.3d 157 (2012). More generally, the “very nature of a [CUP] type of land use decision is that of a use allowed at the discretion of local government, subject to those conditions that are deemed appropriate by local decision makers,” and there is a “*broad range of discretion* counties have in determining whether to grant a particular application and the conditions that are appropriate *in each case.*” *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 181, 61 P.3d 332 (2002) (emphasis added).
20. KCC 21A.44.040 presumably means something, some thumb on the scale in favor of a neighborhood that should distinguish DDES’s conditional use analysis from its regularly-permitted use analysis. The Council’s choice of the term “conflict” (in terms of not being either “in conflict with the health and safety of the community” or in “conflict with existing and anticipated traffic in the neighborhood”) at least implies a lower threshold for when an impact is too much than the threshold that would apply to a regularly-permitted use. DDES appears to have analyzed the traffic problem against an incomplete standard. We thus give DDES’s analysis of School created traffic congestion (as well as traffic safety) a grade of “incomplete.” We now turn to rectifying that problem.
21. The County placed a three-year, AM/PM peak count monitoring requirement on the School. KCDOT agreed that there was no magic to three years, but explained that three years was the consistently-applied rule of thumb for such monitoring scenarios. The Neighbors have requested ten years of monitoring and review every three years. The School has tacitly accepted three years of monitoring, but argues against more. We view the issue in somewhat more complex terms.
22. First, there was an underlying edge to the some of the Neighbors’ arguments that the School should be forced to submit to additional monitoring or other conditions because they had a practice of willful violation or at least “total disregard.” We categorically reject those arguments. Not only was the School’s reading of the 1995 CUP a reasonable, if ultimately legally incorrect, interpretation, but the evidence shows that the School unilaterally approached DDES, not that Code Enforcement dragged it into the permitting process. And Jennifer Hildebrandt, who oversees day-day operations, described the School’s significant efforts to shift arrival times to avoid the AM peak and to monitor and enforce parents’ compliance with that shift, and she committed to keep counting cars and advising parents “as long as it takes” to achieve compliance.
23. Conversely, we also cannot accept the School’s argument that if the Neighbors perceived a violation, they should complain to Code Enforcement. As described above, DDES approved the current student level (107, a 21-student increase from the previously approved 86) based on an incorrect assumption that the School was vested to 38/39 peak hour trips, and apparently based on the same traffic analysis that would apply to a

regularly-approved use, not a conditional use. And the current student enrollment number (107) is a significantly lower number than a fully-approved CUP would allow (168). The School has stated that it may not even reach the 168-student limit for many years, meaning that assessment of the actual impact of a 168-student body would not occur during the two additional years of monitoring.

24. Moreover, Code Enforcement is equipped to handle certain alleged violations, like zoning, grading, wetland, or building violations. But, as the evaluation of the 1995 and 2009 CUP applications show, assessing the traffic safety and congestion factors requires expert, resource-intensive analysis. KCDOT has the expertise, but as the public record resoundingly tells us, no longer has the resources. While the rest of the County's budget has stabilized, KCDOT's has dramatically not, with the Executive planning to lay off an additional sixty KCDOT workers and leave KCDOT at only two-thirds of its 2010 workforce level.⁴ Without a funding source, or some way to hold the agencies' feet to the fire, we are not convinced that KCC 21A.44.040(F)'s standard will be met or upheld.
25. Our appellate court has specifically countenanced an examiner seeking to "ensure the validity of the traffic study for its intended purpose – that being to mitigate traffic impacts that had already happened during the period of unregulated growth as well as the additional impacts that could be expected to occur as a result of the expansion." *Woodinville Water Dist. v. King County*, 105 Wn. App. 897, 909, 21 P.3d 309 (2001). The most efficient way we see to do that here is to remand to the agency, provisionally allowing the School to operate at the current or perhaps even elevated number of students and show that it can make it work, with DDES eventually considering the new information, applying the correct standard, and issuing a revised CUP decision. That interim solution seems consistent with the very core of a conditional use: a "conditional use is best viewed as a probationary use and legal only upon meeting certain extra standards." Peter Salsich, Jr. & Timothy Trynieck, *Land Use Regulation: A Legal Analysis and Practical Application of Land Use Law*, 225 (ABA 2003).
26. As set forth below, this office will remand to DDES, and will require an amended decision in 2014. In the interim, we encourage DDES to consult with its attorneys on what that KCC 21A.44.040(E)-(F) language should mean that may be different (in terms of traffic safety and congestion analyses) than the normal traffic analyses it would perform for a regularly-permitted use, apply that in the next round, and to be able to clearly articulate how its 2014 decision meshes with KCC 21A.44.040(E)-(F).
27. Before entering the specific terms of our decision, we make a few observations. The following four paragraphs are neither findings of fact, nor conclusions of law, nor a commitment to a future course of action. They are designed merely to manage expectations.
28. The School is not responsible for mitigating other sources of increased traffic or the generally worsening nature of traffic on SR 202, nor for things like the lack of sidewalks or other improvements on 218th, but only for problems the School creates. Much of what the Neighbors have requested are, and will continue to be, simply beyond the bounds of what the School can be required to provide.

⁴ Bob Young, *Constantine Wants \$20 Car Fee in Unincorporated Areas to Fix Roads*, Seattle Times, Sept. 24, 2012, http://seattletimes.com/html/localnews/2019248174_constantinedudget25m.html (last accessed Sept. 24, 2012).

29. The School's efforts to push students and teachers out of the AM peak hour, by staggering class schedules, mandating arrival times, and stationing someone in the driveway to monitor student/teacher compliance, have been substantial. It shows the School is a good neighbor, with a generally compliant attitude backed by a credible plan to meet a target. The School is entitled to at least a trial period to show that they can make it work. But in some sense the School's efforts are a double edged sword: the School is already picking off the low hanging fruit. It may be that, despite its substantial efforts, there is simply no way to enroll 168 students (or even any number above the vested 86) without being "hazardous or [in] conflict with existing and anticipated traffic in the neighborhood." This may not be the most suitable, long-run environment for a large school.
30. Whatever monitoring is performed will, by definition, measure neighborhood impacts from the number of then-currently enrolled students. For example, this fall's monitoring, in light of the School's efforts to push arrivals out of the AM peak hour, will tell a lot about School-related traffic impacts at 107 students. But it will not necessarily provide sufficient data about how those efforts would translate in a 168-student environment.
31. Finally, our suggestion at the Pre-Hearing Conference and in the Pre-Hearing Order regarding mediation⁵ was not boiler-plate, but was based on the specifics of this case. The hearing, and our evaluation as part of this decision, has only increased our perception that a mediated resolution will further everyone's interests better than whatever DDES or we command. Undoubtedly there are some conditions we impose below that will be more burdensome to the School, but less beneficial to the Neighbors, than some alternative arrangement the parties could have worked out between themselves. DDES can issue another decision, the Neighbors can again appeal, and we can hold another hearing and issue another imperfect ruling. But the parties may be significantly further ahead if they come up with their own solution.

DECISION:

The Neighbors' appeal is granted in part, and we remand back to DDES its April 16, 2012, Notice and Decision, with the following provisions:

1. In between now and the point in 2014 that DDES issues a revised CUP decision, the School is allowed to increase its student enrollment from the 86 student limit approved by the 1995 CUP, L93CU011, to no more than 168 students. The School shall maintain written records documenting daily student and staff levels at the School, including daycare and regular students. Such information shall be made available to DDES upon ten days written request.

⁵ We stated that "Mediation is available thru the Pilot Project of the Land Use and Environmental Mediation Standing Committee of the Washington State Bar Association's Alternative Dispute Resolution and Environmental and Land Use Law sections, <http://wsba-adr.org/group/landusemediationgroup>; the Seattle Federal Executive Board's Alternative Dispute Resolution Consortium, <http://www.seattlefeb.us/ADRindex.html>; and the Inter-Local Conflict Resolution Group, <http://www.kingcounty.gov/employees/adr.aspx>. We have had involvement with all three of the above entities, and note their web addresses for informational purposes only. There are other mediation providers, perhaps some pro bono and certainly many fee-for-service, that might be good options."

2. Outdoor play areas shall be completely enclosed by a solid wall or fence, with no openings except for gates and have a minimum height of six feet.
3. Outdoor play equipment shall maintain a minimum distance of twenty feet from property lines adjoining residential zones.
4. Existing landscaping shall be retained on the site to ensure compliance with the landscaping requirements in KCC 21A.16 for a commercial use.
5. Traffic, access and circulation shall be consistent with the following stipulations, conditions, and mitigations:
 - a. The School's use shall not "conflict with the health and safety of the community," nor "be hazardous or conflict with existing and anticipated traffic in the neighborhood."
 - b. From now through 2014, this means the School will be allowed 39 AM and PM peak hour trips. Teacher trips are not exempt from the 39 AM and PM peak hour limit. If there is concern that teacher trips will cause the AM and/or PM peak hour trip limit to be exceeded, arrival times shall either be prior to or after the AM and PM peak hour.
 - c. The School shall stagger the start and end times for the different levels of students to mitigate the school's traffic impacts. The School shall put in place a monitoring system to assure that the interim limit of 39 AM and PM peak hour trips is not exceeded, and to gather any additional data the School believes is necessary to meet its burden of demonstrating that its current or proposed use is not in "conflict with the health and safety of the community," or "hazardous or [in] conflict with existing and anticipated traffic in the neighborhood." For fall enrollment, the School shall take AM and PM peak hour counts by October 31 in both 2012 and 2013. This work can be completed by an independent traffic counting firm. King County Traffic Engineering (KCDOT) may perform their own counts to concur with the independent traffic counting firm's results. Additional counts may be required during the school year to assure the school is in compliance with the AM and PM peak thresholds.
 - d. The School will install a stop sign for cars leaving their driveway and entering onto 218th Avenue NE.
6. By January 31, 2014, the School will submit to the Neighbors (or at least to their representative, Elizabeth Martz, or her successor) and to DDES the results of their monitoring, an assessment of traffic safety/congestion as it relates to potential conflicts with the health and safety of the community and existing and anticipated traffic in the neighborhood, and any plan or proposal for student enrollment and/or traffic mitigation. Any person may submit comments or a response to DDES by February 28, 2014. If at any point the parties (or at least the School and Neighbors) agree to seek mediation, the deadlines in this paragraph are hereby extended during the course of the mediation proceedings.

7. After DDES receives the information in the above paragraph, DDES will issue a revised CUP decision, with the normal appeal procedures and timelines attaching.

ORDERED October 1, 2012.


 David W. Spohr
 Interim Deputy King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

The Examiner's decision on appeal shall be final and conclusive unless proceedings for review of the decision are properly commenced in King County Superior Court within 21 days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE SEPTEMBER 11, 2012, PUBLIC HEARING ON DDES FILE NO. L09CU010.

David W. Spohr was the Hearing Examiner in this matter. Robert Eichelsdoerfer and Mark Mitchell participated in the hearing on behalf of the department; Elizabeth Martz, Richard Melton, Susan Metters, Bob Schwartz, Sarah Frankum, Gareth Larsen, and Mark Baker on behalf of the Appellants; Jennifer Hildebrand, Jennifer Wheelhouse, Brad Lincoln, and Duana Koluoskova on behalf of the Applicant.

The following exhibits were offered and entered into the record:

Department Exhibit no. 1	DDES file no. L09CU010
Department Exhibit no. 2	DDES file no. L12AP002
Department Exhibit no. 3	DDES report and decision on CUP application L09CU010
Department Exhibit no. 4	Notice and statement of appeal of DDES CUP decision
Department Exhibit no. 5	DDES staff report to Hearing Examiner for September 11, 2012 hearing
Appellant Exhibit no. 1	Comparison of 1995 and 2012 data relating to: enrollment, peak hour trips, and school program hours
Appellant Exhibit no. 2	Sketch of intersection of SR 202 and 218th Avenue NE
Appellant Exhibit no. 3	Traffic Data Gathering turning movements diagram January 8, 2008, 6:45 to 8:45 a.m.
Appellant Exhibit no. 4	Traffic Data Gathering turning movements diagram April 14, 2011, 7:00 to 9:00 a.m.
Appellant Exhibit no. 5	Traffic Data Gathering turning movements diagram January 8, 2008, 4:15 to 6:15 p.m.

Appellant Exhibit no. 6	Traffic Data Gathering turning movements diagram April 12, 2011, 4:00 to 6:00 p.m.
Appellant Exhibit no. 7	Traffic Data Gathering intersection turning movements reduction sheet, April 14, 2011, 7:45 to 8:45 a.m.
Appellant Exhibit no. 8	Listing of accident data collected by Gibson and WSDOT for 2004 through 2011
Appellant Exhibit no. 9	Listing of accident data collected by WSDOT for 1999-2003, 2005-2011
Appellant Exhibit no. 10	Letter from Applicant to Hearing Examiner dated August 6, 2012 (duplicate of Applicant exhibit no. 3)
Appellant Exhibit no. 11	Letter from Applicant to area neighbors
Appellant Exhibit no. 12	Page one of Applicant's appeal response (Applicant exhibit no. 4)
Appellant Exhibit no. 13	Excerpt from DDES CUP decision for file no. L93CU011
Appellant Exhibit no. 14	Excerpt from DDES CUP decision for file no. L93CU011
Appellant Exhibit no. 15	DDES screening transmittal for instant application
Appellant Exhibit no. 16	Photograph of subject intersection
Appellant Exhibit no. 17	Photograph of subject intersection
Appellant Exhibit no. 18	Photograph of automobile in ditch on SR 202
Appellant Exhibit no. 19	Photograph of automobile in ditch on SR 202
Appellant Exhibit no. 20	First page of three page email string, most recent email sent May 1, 2012
Appellant Exhibit no. 21	Second page of three page email string, most recent email sent May 1, 2012
Appellant Exhibit no. 22	Third page of three page email string, most recent email sent May 1, 2012
Appellant Exhibit no. 23	Printout of DDES Mission Statement as listed on DDES's webpage on September 10, 2012
Appellant Exhibit no. 24	List of vehicles counted on SR 202 on September 11, 2012
Appellant Exhibit no. 25	DVD in support of exhibit no. 23
Appellant Exhibit no. 26	Statement of Jeanne Brown
Appellant Exhibit no. 27	Photographs of subject intersection
Appellant Exhibit no. 28	Email from Robert Eichelsdoerfer to Mark Mitchell dated April 4, 2012
Appellant Exhibit no. 29	Page two of King County Hearing Examiner's Pre-hearing Order
Applicant Exhibit no. 1	Email from Duana Kolouskova to King County Hearing Examiner transmitting Applicant's pre-hearing filings dated August 7, 2012
Applicant Exhibit no. 2	Memorandum in response to appeal and witness list
Applicant Exhibit no. 3	Letter to Hearing Examiner dated August 6, 2012
Applicant Exhibit no. 4	Gibson Traffic Consultants appeal response, August 2012
Applicant Exhibit no. 5	Curriculum Vitae of Bradly Lincoln, Professional Engineer, Gibson Traffic Consultants
Applicant Exhibit no. 6	Letter from Chris Ricketts, DDES to Pat Long, Department of Early Learning, regarding certificate of occupancy for the 2012 through 2013 school year
Applicant Exhibit no. 7	King County Fire Marshal's Office permit no. E11E1278
Applicant Exhibit no. 8	King County Fire Marshal's Office permit no. E09E1401
Applicant Exhibit no. 9	DDES Certificate of Occupancy, building permit no. B98C0038
Applicant Exhibit no. 10	DDES Certificate of Occupancy, building permit no. B95C0129

Applicant Exhibit no. 11 Cover letter to Traffic Memorandum, submitted to DDES on
January 23, 2012

Applicant Exhibit no. 12 Gibson Traffic Consultants Traffic Memorandum dated
January 16, 2012

DWS/gao