



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

1 **OFFICE OF THE HEARING EXAMINER**

2 **CITY OF TACOMA**

3 **TIMOTHY R. GOSSELIN,**

4 **Appellant,**

5 **v.**

6 **CITY OF TACOMA,**

7 **Respondent.**

**HEX 2016-041
(LU16-0195)**

**SUMMARY JUDGMENT
ORDER**

8

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

- 17
- 18 1. Notice of Appeal by Applicant with Attachments and Exhibits 1-15.
 - 19 2. Appellant's Motion for Summary Judgment.
 - 20 3. Stipulation of the Parties.
 - 21 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.

- 1 5. City's Response to Appellant's Motion for Summary Judgment and Cross-Motion
2 for Summary Judgment.
- 3 6. Declaration of Rebecca Smith.
- 4 7. Declaration of Mark Lauzier.
- 5 8. Reply in Support of Appellant's Motion for Summary Judgment and Response in
6 Opposition to Respondent's Motion for Summary Judgment.

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

10 **Factual Background**

11 The parties have stipulated to the basic facts in the case and the following information is
12 taken from the Stipulation of the Parties filed in the case. The undisputed facts show that the
13 Appellant Gosselin owns property at 2733 S. Ash Street in Tacoma, Washington.² The
14 property consists of land approximately 125 feet by 115 feet improved with a single story
15 concrete block building. The premises were formerly used for a light industrial saw grinding
16 business. The land contains approximately 14,375 square feet and the building is
17 approximately 13,000 square feet in size. South Ash Street, at this location, is a dead end street
18 approximately 300 feet long, ending around 100 feet to the north of the building. Center Street
19 is the closest main thoroughfare and cross street, approximately 100 feet to the south of the
20 subject property. The site is situated among other similar structures and uses to the east and
21 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.

1 heavily wooded steep bluff.

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

6 Irving Park is located at 2502 S. Hosmer Street, in Tacoma at the intersection of South
7 25th Street and South Hosmer Street. Irving Park was established in 1946 when property owned
8 by the Tacoma School District was effectively transferred to the Metropolitan Park District of
9 Tacoma (Metro Parks). Irving Park is approximately 2.7 level acres. It is bounded on the east
10 by South Hosmer Street, on the north by South 25th Street, to the west by South Sprague
11 Avenue and the Sprague Avenue off-ramp from westbound Highway 16. To the south, the park
12 is bounded by vacant land that is a steep, heavily vegetated and wooded bluff that runs
13 downhill to Nalley Valley.

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

19 Tax rolls maintained by the Pierce County Assessor show that Irving Park consists of
20 parcel numbers 28950001280 and 28950001290.³ Metropolitan Park District of Tacoma is
21 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.

1 Metro Parks. *Stipulation of the Parties.*

2 The City of Tacoma submitted two declarations in support of their Response to
3 Appellant's Motion for Summary Judgment and Cross-Motion for Summary Judgment.⁴
4 Rebecca Smith, Director of Licensing and Regulation for the Washington State Liquor and
5 Cannabis Board (Board) indicates that she was the Marijuana Unit Manager for the Board in
6 2013. She states that in the Board's regulations, playgrounds were intended to have more
7 protection, in general, from marijuana businesses than parks. She further declares that not
8 adding metropolitan park districts to the ownership paradigm in the definition of "playgrounds"
9 was an oversight and not an intentional omission. Ms. Smith did acknowledge that the Board
10 specifically included ownership by a metropolitan park district to the definition of a "park"
11 because it had been brought to the Board's attention that, without this addition, parks might
12 have no protection in a jurisdiction like Tacoma where the metropolitan park district essentially
13 owns all public parks. She further asserts that the Board sees the metropolitan park district as
14 the functional equivalent of the city when it comes to ownership of a playground. *Smith*
15 *Declaration.*

16 Mark Lauzier signed a declaration as acting City Manager for the City of Tacoma. He
17 indicates that because the City of Tacoma has no parks department, Metro Parks fills that
18 function for the City. Metro Parks owns and operates public parks and provides recreational
19 services and opportunities to the public that would typically be provided by a city's parks
20 department. The City sees Metro Parks as the functional equivalent of the City's parks
21

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.

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

4 *Lauzier Declaration.*

5 **Analysis**

6 Summary judgment is a procedure available to avoid unnecessary trials or hearings on
7 formal issues that cannot be factually supported and could not lead to, or result in, a favorable
8 outcome to the opposing party. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975).

9 The summary judgment process is intended to eliminate a trial or hearing if only questions of
10 law remain for resolution and neither party contests facts necessary to reach a legal
11 determination. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990);
12 *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982). In this case, the material facts
13 pertinent to the City's decision on the requested variance are not in dispute and the matter is
14 appropriate for summary judgment.

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

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

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

6 Cities, towns, and counties or other municipalities may enact only
7 those laws and ordinances relating to controlled substances that are
8 consistent with this chapter... Local laws and ordinances that are
9 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.

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

13 Except as provided in (b) through (d) of this subsection, the state
14 liquor and cannabis board may not issue a license for any premises
15 within one thousand feet of the perimeter of the grounds of any
16 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.

17 *RCW 69.50.331(8)(a)*.

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

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

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

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

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

10 (10) The WSLCB shall not issue a new marijuana license if the
11 proposed licensed business is within one thousand feet of the
12 perimeter of the grounds of any of the following entities. The
13 distance shall be measured as the shortest straight line distance from
14 the property line of the proposed building/business location to the
15 property line of the entities listed below:

- 16 (a) Elementary or secondary school;
- 17 (b) Playground;
- 18 (c) Recreation center or facility;
- 19 (d) Child care center;
- 20 (e) Public park;
- 21 (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.

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

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

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

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

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

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

18 3. For purposes of this Section and the standards applicable to state-
19 licensed marijuana uses, the terms and definitions provided in WAC
20 314-55 shall generally apply unless the context clearly indicates
21 otherwise.

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

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

1 *TMC 13.06.565*. Given this statutory and regulatory framework, the City evaluated
2 Mr. Gosselin's request for a variance from the 1,000-foot buffer between the playground at
3 Irving Park and the proposed cannabis production/processing site. The City concluded that it
4 could not vary the 1,000-foot setback because Irving Park contains a playground and
5 playgrounds are one of the uses that are not subject to local buffer reduction under RCW
6 69.50.331 and WAC 314-55-050.

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

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

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

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

14 Unfortunately, the language used in WAC 314-55-010(24) to define the class of
15 protected playgrounds omits any reference to playgrounds owned by metropolitan park districts.
16 This appears to be an oversight and there is no evidence that such playgrounds were intended to
17 fall outside the protected class. However, a discrete list cannot be expanded through
18 "interpretation." As the court held in *State v. Delgado*, 148 Wn.2d, 723, 727, 63 P.3d 792
19 (2003), the court cannot add statutory language to correct an omission:

20 The statute expressly lists those qualifying prior convictions which
21 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)).