Court of Appeals No. 48016-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARK AVOLIO, JOHN BAKER, MAUREEN DeARMOND, and ANDY MERKO,

Appellants,

v.

CEDARS GOLF, LLC,

Respondent.

BRIEF OF RESPONDENT

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INTRODUCTION

Defendant/Respondent own Lots 1 & 8 in The Cedars Phase II subdivision in Battle Ground, Washington. Plaintiff/Appellants own lots in the same and an adjacent subdivision. Defendant subdivided Lots 1 & 8 through the proper procedures in the City of Battle Ground over the objections of Plaintiffs. That determination by the City of Battle Ground was appealed to and affirmed by the Clark County Superior Court, but not appealed to this court. Instead, Plaintiffs filed this action, seeking to enjoin the subdivision of the Lots 1 & 8, Phase II. The Superior Court granted summary judgment in Defendant's favor, ruling that Plaintiffs' claims were barred by the doctrine of collateral estoppel. Plaintiffs appeal that decision here.

COUNTERSTATEMENT OF ASSIGNMENTS OF ERROR

1. The trial court did not err in granting Defendant's Motion for Summary Judgment, because Plaintiffs' claim is barred by res judicata and/or collateral estoppel. Alternatively, the trial court did not err in granting Defendant's Motion for Summary Judgment, because Plaintiffs' claim is barred because LUPA provides the exclusive means to appeal the City of Battle Ground's land use decision, regarding the subdivision.

2. The trial court did not err in denying Plaintiffs' Motion for Summary Judgment for the same reasons it did not err in granting

Defendant's Motion for Summary Judgment. However, if the court were to reach this assignment of error, it should remand for the trial court to address the merits of Plaintiffs' Motion.

3. The trial court did not err in denying Plaintiffs' Motion for Reconsideration.

COUNTERSTATEMENT OF THE CASE

The dispute between these parties began in 2014, when Defendant, Cedars Golf, LLC ("CG") submitted an application to the City of Battle Ground requesting approval to take two actions: (1) alter The Cedars Phase II subdivision plat; and (2) subdivide lots 1 and 8 of The Cedars Phase II ("The Lots").

A. Subdivision Application before the Battle Ground Hearings Examiner

A hearing was held before a City of Battle Ground Hearing Examiner on June 25, 2014. (CP 252) (App. 4). All of the Plaintiffs participated in the local review of CG's land use application, personally or through legal counsel. Specifically, Plaintiffs Avolio, DeArmond, and Merko, were represented by attorney Mark Stoker who submitted multiple letters and a copy of The Cedars Declaration of Covenants, Conditions, and Restrictions dated February 23, 1973, Clark County Auditor's File No. G27415 ("CC&Rs") to the Hearing Examiner, arguing the proposed subdivision violated one or more provisions of the CC&Rs. (CP 101-146).

Plaintiffs Baker, DeArmond, and Merko also submitted emails and/or letters to the City of Battle Ground in opposition to CG's application and expressly requested to be a party of record and notified of all decisions and appeal rights relating to CG's application. (CP 101-146). Attorney Stoker and Plaintiff DeArmond both provided oral testimony before the Hearing Examiner at June 25, 2014 hearing of the local appeal. (CP 255-56) (App. 7-8).

The Hearing Examiner considered all of the testimony and approved the application. The Hearing Examiner's list of disputed issues starts with: "Whether the proposed development will conflict with Conditions Covenants and Restrictions ('CC&Rs') applicable to the site." (CP 253) (Hearing Examiner Final Order, p. 2). The Hearings Examiner found the proposed subdivision to be consistent with the CC&Rs based on extensive findings, as follow:

> The examiner finds that the plat alteration application complies with RCW 58.17.215.
>
> a. The applicant is requesting alteration of the plat to remove the "townhomes" designation on Lots 1 and 8. Lots 1 and 8 of Cedars Phase II are the only portion of the subdivision proposed to be altered. Therefore RCW 58.17.215 only requires the signature of the majority of persons with an ownership interest in Lots 1 and 8 of Cedars Phase II. The further division of these platted lots is not a "plat alteration" subject to RCW 58.17.215.
>
> b. The proposed subdivision will not result in violation of a covenant applicable to The Cedars Phase II

subdivision. As discussed in Exhibit 31, the CC&Rs for "The Cedars" dated February 23. 1973 were never adopted by The Cedars Phase II subdivision. There is no substantial evidence to the contrary.

i. The CC&Rs authorize "the Declarant," the original developer of The Cedars, to annex certain additional properties without the consent of the members. See Article VII, Section 4 and Article I Section 3 of the CC&Rs. However such annexation must occur within seven years from the date of the CC&Rs. The CC&Rs were executed on March 2, 1973. The Cedars Phase II subdivision was platted June 6, 1980, more than seven years after the CC&Rs were signed. Therefore the Declarant had no authority to unilaterally include The Cedars Phase II subdivision in the CC&Rs.

ii. The CC&Rs require a two-thirds majority vote to annex additional property into the CC&Rs. See Article VII, Section 4 of the CC&Rs. There is no evidence that a vote to include The Cedars Phase II subdivision ever occurred.

iii. The Cedars Phase II subdivision plat did not adopt or incorporate by reference all of the CC&Rs applicable to The Cedars Phase I. The second plat note on the face of The Cedars Phase II subdivision plat is titled "Nature Trails." The text of the plat note discusses the ownership and use of the nature trails within The Cedars Phase II subdivision site. By its terms, The Cedars Phase II subdivision plat note only incorporates those portions of The Cedars Phase I CC&Rs regulating the use and enjoyment of trails. There is no evidence that The Cedars Phase II subdivision plat was intended to adopt and incorporate all of The Cedars Phase I CC&Rs.

(CP 257) (Hearing Examiner Final Order, p. 6) (App. 9).

The Hearing Examiner's decision approved a plat alteration to remove the "Townhouse" designation from The Lots and approved the subdivision of The Lots. (CP 262) (Hearing Examiner Final Order, p. 11) (App. 14). The practical effect of the approval is to reduce the allowed development of the lots from the 42 townhomes that could have been built prior to the approval, to only allowing 13 single-family homes after the approval. *Id.*

B. Land Use Petition before the Superior Court

Plaintiff Avolio appealed the Hearing Examiner's approval to Clark County Superior Court (Case No. 14-2-02337-9), pursuant to the Land Use Petition Act ("LUPA") at RCW 36.70c, *et seq.*[1] Plaintiff Avolio, CG, and the City of Battle Ground were all parties to that proceeding and represented by counsel. (CP 151) (App. 21).The parties thoroughly briefed the issue of the applicability of the CC&Rs in that matter. In fact, the only issue raised by Mr. Avolio in that proceeding was the applicability of the CC&Rs and the corresponding effect of RCW 58.17.215. (CP 90) (Petitioner's Opening Brief, Case No. 14-2-02337-9, p. 1).

[1] The Petition for Appeal was filed by Stephen Leatham, an attorney in the same firm as Mark Stoker, which was the attorney that represented Plaintiffs Avolio, DeArmond, and Merko in the Battle Ground land use review.

The parties appeared before and presented argument to The Honorable Gregory Gonzales of the Clark County Superior Court. Judge Gonzales affirmed the decision of the City of Battle Ground. In so holding, the Court made the following findings of fact and conclusions of law:

> 2. With regards to Petitioners' claim that the Hearing Examiner's approval violated CC&Rs applicable to Cedars Phase II, the Court makes the following findings:
>
> ***
>
> C) The Hearing Examiner correctly found the CC&Rs of February 23, 1973 are not applicable to Cedars Phase II, and the record contains no substantial evidence to the contrary;
>
> D) The Hearing Examiner correctly found the subdivision of lots 1 and 8 of Cedars Phase II does not violate the CC&Rs of February 23, 1973. (CP 152)

Judgment was entered on March 20, 2015, and no appeal was made. (CP 151-54) (Judgment Affirming Decision of the Battle Ground Hearing Examiner, Case No. 14-2-02337-9) (App. 21-24).

C. A Second Action Before Superior Court

On May 5, 2015, Plaintiffs filed this action against CG for declaratory relief and injunction. (CP 1-36) (Complaint). The relief prayed for is a declaration that CG may not subdivide The Lots and an injunction against subdividing The Lots. (CP 6) (Complaint, p. 6).

CG moved for summary judgment against Plaintiffs' claims, asserting that (1) the trial court lacked jurisdiction to hear this claim, because it was barred by LUPA, and (2) alternatively, that the claims were barred by res judicata as to Plaintiff Avolio and collateral estoppel as to each of the other Plaintiffs. (CP 165).

Plaintiffs then moved for summary judgment, arguing, as they do here, that the CC&Rs forbid subdivision of Lots 1 & 8, and that the determination of the Hearing Examiner and the Superior Court do not have preclusive effect, because interpretation of the CC&Rs was outside of the City of Battle Ground's jurisdiction (and therefore also outside of the Superior Court's jurisdiction on review). (CP 182).

There was a hearing on the cross-motions for summary judgment before Judge Lewis of the Clark County Superior Court on August 20, 2015. (App. 25). At the hearing, both parties presented their arguments. During the hearing, the court presented the following question to Mr. Erikson, Plaintiffs' counsel:

> THE COURT: I guess what I keep coming back to, isn't that what your clients asked the hearing examiner to do?
>
> They didn't come in and say, ["]By the way, hearing examiner, don't -- don't enforce these restrictive covenants, whatever you do here, because you don't have authority to do that.["] They came in and said, ["]We want you to deny this application, because there's a restrictive covenant that prohibits -- prohibits subdivision, and we want you to

enforce it.["] So they didn't have any problem with the idea that if he ruled for them, he had the authority to enforce the covenant. It's only after he said, No. I'm not going to do it, that all of a sudden he didn't have the authority.

MR. ERIKSON: You're correct.

THE COURT: So –

MR. ERIKSON: That's what prior counsel did.

THE COURT: Isn't that what collateral estoppel is all about --

MR. ERIKSON: No. Collateral --

THE COURT: -- that having had an opportunity to deal with the issue, and -- and having lost, you can't now come back and take another bite at the apple?

MR. ERIKSON: No. Because we take a position that collateral estoppel only applies to decisions within jurisdiction. (RP 15:3-16:6) (App. 29).

Later in the hearing, Judge Lewis ruled on the merits, granting Defendant's motion on the grounds of res judicata and collateral estoppel.

THE COURT: All right. Well, thank you both.

I would indicate that I appreciated both counsel very thoroughly presenting their case in writing, and their responses and replies, and giving me the documents in reference to the other case that was involved. So I had the opportunity, before I came in, to look over the issues and the cases.

And so I appreciated that. That -- that really assisted in my analysis and in understanding your arguments.

And it's true, in most cases, I would think, that a hearing examiner, in ruling on whether a -- an application for a

division of property, as in this case, is bound -- able to consider certain things and not to consider others.

And if they go outside what they're able to consider in making their decision, then courts are not necessarily bound by the fact that they did that.

And I think they do -- I mean, I don't mean to be rude, then. But I've read some fairly lengthy decisions by hearing examiners that talk about a lot of things that aren't right on point for what they have to decide, whether or not the publishing land use decision is allowable under the law or not.

So the fact that they say it, and the fact that even -- that parties may bring things up in the course of it, that's part of the summary that goes on, summary about what people say, and what they say in their letters, and that sort of thing.

And I guess that's -- that's interesting for purposes of the record. But it doesn't always provide a basis for a legal decision related to the land use action.

However, in this case, the application to subdivide the property was dealt with under RC -- among other things; there were other issues -- but was dealt with around RCW 58.17.215, and as counsel has provided the statute.

And that indicates that in that sort of situation, where you have a -- an application for a subdivision of property -- and just quoting from the statute – ["] if the subdivision is subject to restrictive covenants, which were filed at the time of the approval of subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all the parties agreeing to terminate or alter the covenants.["]

So in that particular situation, the Court has to make certain findings in order to allow things to proceed.

And so in this case, the record is clear. And there's no real dispute.

Down below, the plaintiffs in this case, represented by counsel, participated in the proceeding, submitted materials to the hearing examiner, and told the hearing examiner that, ["]It's our position that you should make the factual determination that this property that is seeking to be subdivided is subject to restrictive covenants. And that the application would result in a violation of those covenants. And therefore, you should deny the application, because it doesn't have the signature of all these parties.["]

So the plaintiffs in this case asked the hearing examiner to make certain findings -- factual findings: One, that the subdivision that we're talking about was subject to restrictive covenants. They wanted to find that as a fact.

And two, that the application for the alteration would result in a violation of the covenant.

And three, that the application was defective as a result of not having the signature.

And as a result of making those factual findings, they wanted the hearing examiner to deny the land use decision.

The people on the other side said, ["]We want you to make factual decisions, too, about the statute. We want you to find that the -- that the subdivision is not subject to the restrictive covenants.["]

And that even if it were subject to the restrictive covenants, that the alteration, in this particular case, would not result in a violation, and that sufficient signatures from the people who are affected.

So the hearing examiner had, at the request of both parties, to make a factual decision in order to apply the law, a law which they're required to apply in this circumstance.

It wasn't some lark that the hearing examiner went off on. Both sides said, ["]You need to make certain factual decisions. We're going to give you the information on how to make them. And we're going to argue the law to you.

And we want you to decide. Because you have to decide in order to decide whether this should be permitted or denied.["]

The hearing examiner took all of that information from plaintiffs and defendant, and then made a decision, which was adverse to the plaintiffs, and favorable to the defendant.

After that was done, three of the plaintiffs decided not to pursue appeal of that land use decision.

One of them did decide to appeal and went before the Superior Court, arguing not that the hearing examiner did not have the jurisdiction, or did not have the authority to make these factual legal decisions concerning the decision they had to make under [RCW] 58.17.215, but that they'd made them incorrectly. That they, in fact, had made improper factual and legal finding.

And the Superior Court, after fully hearing that issue, decided that they didn't make a mistake. That, in fact, they had decided correctly.

And then Mr. Avolio, I believe it was, decided not to appeal further the LUPA decision.

So the question is, being that's the undisputed record, whether that posture of the case means that the plaintiffs are now barred, by legal doctrine from raising, in essence, the same issue again.

And I don't think that I would find as a --that -- it's essentially the same issue. They want findings that the subdivision is subject to the restrictive covenants; that the application for alteration would result in a violation; and that the application was improperly granted as a result, and therefore, should not be allowed to proceed.

And they are precluded from doing that. Mr. Avolio, I think, is precluded from doing it on both the basis of res judicata and collateral estoppel. Not to mention that they're

> in privity with each other in the sense that the term, Privity, is used in the law. They may have aligning interests.
>
> But on the other hand, almost everybody in the subdivision might have aligning interests.
>
> And so if I were to follow that logic, anybody who came in who had absolutely nothing to do with the process up to this point, but decided to come in and challenge what was going on would be in privity to everybody else. And that's simply not the way the term, Privity, is used.
>
> However, as to the other three plaintiffs, they are collaterally estopped from raising the same issues. They had a full opportunity to litigate those issues before a person with authority to make a decision, who did make a decision. And now they wish to raise the same issues again.
>
> So I'm granting the defendant's motion, and denying the plaintiffs' cross-motion. (RP 27:14-33:15) (App. 32-34).

That ruling was incorporated into the Order on Defendant's Motion for Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgment (CP 371-73) (App. 1-3), which is at issue in this appeal.

Additionally, pursuant to RCW 4.84.370 and RAP 18.1, Defendant requests that if the court affirms, that the court award it its reasonable attorneys' fees on appeal. When Defendant prevails at this court, it will have prevailed before the City of Battle Ground, LUPA, the Superior Court (twice), and the Court of Appeals on a land use decision.

ARGUMENT

STANDARD OF REVIEW

Appellate courts review summary judgment decisions de novo, engaging in the same inquiry as the trial court, to determine if the moving party is entitled to summary judgment as a matter of law and if there is a genuine issue of material fact requiring a trial. *Michak v. Transnation Title Ins. Co.*, 145 Wn.2d 788, 794-95, 64 P.3d 22 (2003).

ASSIGNMENT OF ERROR No. 1

A. LUPA was the exclusive means of challenging the subdivision.

First, this court should affirm the trial court's dismissal of Plaintiffs' claims because the trial court did not have jurisdiction over this case, pursuant to LUPA.[2]

LUPA is the "'*exclusive* means of judicial review of land use decisions' with certain exceptions." *James v. County of Kitsap*, 154 Wn.2d 574, 586, 115 P.3d 286 (2005) (quoting RCW 36.70C.030(1) (emphasis in *James*)). A "land use decision" is defined as "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals." RCW 36.70C.020(1). Judicial review under LUPA is commenced by filing

[2] The trial court ruled on the basis of collateral estoppel and res judicata. (RP 32-34) (App. 33-34). CG addresses this basis for affirmance on other grounds first, because it is jurisdictional.

a land use petition in superior court within 21 days of the issuance of the land use decision. RCW 36.70C.040(3). A land use petition is barred unless it is timely filed and served. RCW 36.70C.040(2).

The Hearing Examiner approval to subdivide The Lots was a land use decision and is not subject to judicial review excepts through the LUPA process. Here, RCW 58.17.215[3] required the Hearing Examiner to determine whether CG's proposed plat alteration and subdivision comply with the CC&Rs. The Hearing Examiner determined that they did. (CP 257). That decision was a land use decision and is not subject to challenge except through LUPA.

Plaintiffs do not claim that any exceptions to LUPA apply to this case. Instead, they argue that their claim for equitable relief is not a land use decision, and therefore, not subject to LUPA. In support of this

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[3] RCW 58.17.215 provides, in part (emphasis added):

> "When any person is interested in the alteration of any subdivision or the altering of any portion thereof, except as provided in RCW 58.17.040(6), that person shall submit an application to request the alteration to the legislative authority of the city, town, or county where the subdivision is located. The application shall contain the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered. If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof."

argument, Defendants rely on *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013). However, *Lakey* does not help their cause. In *Lakey*, the Supreme Court determined that a claim by homeowners for inverse condemnation against the City of Kirkland was not governed by LUPA. In *Lakey*, the homeowners sought compensation for the taking of their land by the City of Kirkland for the purpose of building a larger electrical substation. The approval to build the larger substation required a variance from applicable zoning requirements. *Id.* at 914. "The homeowners [were] seeking compensation. They [did] not seek a judicial review or reversal of the height, setback or buffer variances." *Id.* at 926. In *Lakey*, the Supreme Court determined that the homeowners' claims were not covered by LUPA, because the City of Kirkland hearings' officer did not have authority to hear condemnation claims. *Id.* at 927-28.

This case is precisely the opposite of *Lakey*. Here, the Battle Ground Hearing Examiner did have authority to determine whether the CC&Rs required approval of the owners. In fact, the Hearing Examiner necessarily had to make that determination under RCW 58.17.215. Moreover, the only claims being made in Plaintiffs Complaint relate to the subdivision of the Lots—which was also the exclusive subject matter of the LUPA action. Plaintiffs, here, are not making a claim for "monetary damages or compensation" or any other exception to RCW 36.70C.030.

Thus, unlike the plaintiffs/homeowners in *Lakey*, Plaintiffs' claims are governed by LUPA and LUPA provided the exclusive procedure for adjudication of these land use issues.

Plaintiffs further assert that LUPA does not apply (and that the prior decisions of the Hearing Examiner and Judge Gonzales do not have preclusive effect) because, according to Plaintiffs, interpretation of the CC&Rs was outside of the jurisdiction of the Hearing Examiner (and thus outside the jurisdiction of the Superior Court in reviewing that decision). Plaintiffs are incorrect, because, as discussed above, the Hearing Examiner had direct authority to decide the issue under RCW 58.17.215, thereby bringing the issue within the purview of the Superior Court on appeal. Likewise, the impact of a restrictive covenant is within the Superior Court's jurisdiction to decide and analyze under pursuant to RCW 36.70C.130, and the Superior Court could have granted relief to Plaintiff Avolio in the prior proceeding had it determined that the Hearing Examiner's decision was "outside the authority or jurisdiction" of the City of Battle Ground. RCW 36.70C.130(1)(e).

As demonstrated above, part of the application process associated with subdividing property includes obtaining signatures, where necessary, of all parties to a restrictive covenant, where a petition to subdivide will result in a violation of such covenant. It is axiomatic that, if a Hearing

Examiner must review a party's agreement to waive and/or abandon a restrictive covenant as it may apply to a particular piece of property which is sought to be subdivided, the Hearing Examiner must also have authority to consider the threshold question of whether the restrictive covenant applies to the property. *See, e.g., Lane v. Skamania County*, 164 Wn. App. 490, 493, 265 P.3d 156 (2011) (discussing LUPA appeal "seeking to enforce [a] restrictive covenant").

Here, the Hearing Examiner had the authority to and did, in fact, consider Plaintiffs' argument that the CC&Rs prohibited CG's petition to subdivide the Lots. The Hearing Examiner (and subsequently the Superior Court) found the CC&Rs simply did not apply. The Hearing Examiner had jurisdiction to decide the issue and Plaintiffs' arguments to the contrary fail as a matter of law.

Pursuant to RCW 36.70C.130, the Superior Court may grant relief from a local land use decision where, among other things, "the land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise" and "the land use decision is a clearly erroneous application of the law to the facts[.]" RCW 36.70C.130(1)(b),(d).

As indicated above, a land use Hearing Examiner has jurisdiction to consider the application of a restrictive covenant under RCW

58.17.215. Here, the Hearing Examiner invoked this jurisdiction and held the CC&Rs do not apply. The Superior Court then had the power to review that decision and determine whether it was erroneous, both as a matter of law as well as in the application of the law to facts. RCW 36.70C.130(1)(b),(d). Thus, the superior court had jurisdiction to consider the application of the CC&Rs. In fact, the very definition of a "land use decision" under LUPA includes "an interpretative or declaratory decision regarding the application to a specific property of...rules regulating the improvement, development, modification, maintenance, or use of real property[.]" RCW 36.70C.020(2)(b) (emphasis added); *see also* CP 190 (Plaintiffs' Cross-Motion for Summary Judgment, p. 9). The CC&Rs are just that, "rules regulating the improvement, development, modification, maintenance, or use of real property." *Id.* Thus, the Superior Court had jurisdiction to, and did in fact, consider the application of the CC&Rs to the Lots. Both the Superior Court and the Hearing Examiner determined that the CC&Rs do not apply.

B. Issue preclusion bars Plaintiffs' claim.

Alternatively, this court should affirm the trial court's dismissal of Plaintiffs' claims on the basis stated by Judge Lewis—that they are barred by collateral estoppel.

The doctrine of collateral estoppel or issue preclusion prohibits re-litigating the same legal issues that were previously decided in a prior proceeding. For issue preclusion to apply, the following criteria must be met:

(a) The issue to be decided must be identical to the issue presented in a prior proceeding;

(b) The prior proceeding ended with a judgment on the merits;

(c) The party against whom issue preclusion is asserted was a party to and/or in privity with a party to the earlier proceeding; and

(d) Application of the doctrine of issue preclusion will not work an injustice on the party against whom it is applied.

Christensen v. Grant County Hospital District No. 1, 152 Wn.2d 299, 308, 96 P.3d 957 (2004).

In this case, the trial court correctly determined that all four of the elements of issue preclusion were met.

1. Plaintiffs' issue is identical to that presented in prior proceedings.

The sole issue presented by Plaintiffs' Complaint is whether the CC&Rs prohibit subdividing The Lots. As discussed above, the exact issue was presented to and decided by both Judge Gonzales in Clark County Superior Court Case No. 14-2-02337-9 and the Hearing Examiner in the City of Battle Ground land use review. In fact, Plaintiffs

acknowledged that at the hearing on the cross-motions for summary judgment (RP 15:3-16:6).

Not only were the CC&Rs directly addressed by the Battle Ground land use review process, as well as the appeal before the Superior Court, but state law requires analysis of the applicability of any CC&Rs as part of the application for a proposed subdivision per RCW 58.17.215. Pursuant to RCW 58.17.215:

> ...If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof.

Thus, not only did Plaintiffs present the same arguments in a prior proceeding, but the Hearing Examiner did and had to consider them as part of CG's application process.

Ultimately the Hearing Examiner sided with CG and found the CC&Rs did not apply and prohibit and/or prevent CG from its planned subdivision of lots and plat alteration. Plaintiff Avolio appealed the Hearing Examiner's decision, which Judge Gonzales affirmed. All of the

other Plaintiffs, despite participating in and receiving notice of the Hearing Examiner's decision, did not. Thus, all but Avolio failed to appeal and properly exhaust their administrative remedies in the LUPA process. As to Mr. Avolio, he properly preserved his appeal rights, however, he ultimately lost the appeal to the Superior Court and now seeks to have this court re-decide the exact same issue through this separate action, rather than by appealing the prior judgment.

No new arguments are presented in this proceeding, as acknowledged by Plaintiffs' counsel at the hearing on the cross motions for summary judgment. Thus, the issue in the prior proceeding is identical to that which is presented here, and the first element of collateral estoppel is satisfied.

2. The prior proceeding ended with a judgment on the merits.

Both Judge Gonzales and the Hearing Examiner rendered a judgment on the merits of the issues presented by Plaintiffs.

3. The Plaintiffs were all parties to earlier proceedings.

Each of the Plaintiffs participated in the Battle Ground land use review. Each submitted written testimony, was notified of the decision of the Hearing Examiner, and had the opportunity to appeal that decision under LUPA. More specifically, Mr. Stoker, an attorney who represented all of the Plaintiffs except Mr. Baker, submitted extensive written and oral testimony that addressed the very same issue that Plaintiffs present in this case. Likewise, all of the Plaintiffs, including Mr. Baker, were mailed notice of the public hearing on CG's application, and had the right to

present testimony at the hearing. Attorney Stoker and Plaintiff DeArmond presented live testimony at the hearing. (CP 255-56).

Then, Plaintiff Avolio appealed the Hearing Examiner's decision to the Clark County Superior Court. That any of the Plaintiffs declined to avail themselves of their appeal rights under LUPA does **not** mean that they were not parties to the City of Battle Ground land use proceedings or that they did not have a chance to fully litigate this issue there. Put another way, a party may not collaterally attack an unfavorable decision by filing a new proceeding, rather than appealing the unfavorable ruling.

4. Dismissal of Plaintiffs' claim will not work an injustice.

Plaintiffs all had ample opportunity to air this issue, both before a Hearing Examiner and the Clark County Superior Court. Denial of another chance to argue the same issue works no injustice. In fact, affirmance of the summary judgment in CG's favor would be in line with the sound public policy of ensuring the finality of land use decisions, as described in detail above.

Finally, dismissal of the claim for declaratory judgment works no injustice with regard to what can be built on The Lots. Prior to the subdivision approval, The Lots could only have been developed as 42 Townhouses, and the result of the subdivision approval is to limit construction to 13 single-family homes on The Lots.

Plaintiffs rely on *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 96 P.3d 957 (2004) and cases cited by the Supreme Court in the *Christensen* opinion to assert that collateral estoppel may not be

applied here. As the *Christensen* court observed, the injustice component is concerned with procedural fairness. Where the relief sought in an administrative proceeding is disparate from another proceeding, the aggrieved party may not have had the opportunity or necessity to litigate the issue fully in the administrative proceeding. For example, in *State v. Williams*, 132 Wn.2d 248, 937 P.2d 1052 (1997), discussed by the court in *Christensen*, the court determined that it was unjust to preclude a criminal defendant from re-litigating an issue from a Department of Social and Health Services proceeding, because the threat of a criminal conviction was much greater than the threat of repayment of welfare benefits. The court distinguished *Williams* from Christensen's claims for wrongful termination, because Christensen requested similar damages before the administrative agency and was engaged in the process. Similarly, here, Plaintiffs request exactly the same remedy that they did before the Hearing Examiner and present the same arguments.

The *Christensen* court also addressed the competence of the administrative body, concluding that "PERC's expertise in labor relations" qualified it to decided Christensen's case. *Christensen*, 152 Wn.2d at 319. Again, this case is similar, in that the administrative body was qualified to decide the issue and the Superior Court reviewing that determination was also qualified to do so, as discussed above. This determination, requiring reading of limitations on use of land and reviewing plat maps, is precisely

within the expertise of the City of Battle Ground in a land use determination.[4]

C. Claim preclusion or res judicata bars Plaintiffs' claim.

Plaintiffs' claims are also barred by the doctrine of res judicata (claim preclusion). The doctrine of res judicata bars a plaintiff from re-litigating claims that were or could have been litigated in a prior action. *Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665, 680, 319 P.3d 868 (2014). "In this way, res judicata promotes judicial economy, efficiency, and fairness to litigants." *Storti v. Univ. of Wash.*, 181 Wn.2d 28, 40, 330 P.3d 159 (2014).

The threshold requirement for res judicata to apply is a final judgment on the merits in a prior proceeding. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004). Once that threshold is met, the doctrine bars a subsequent action where the court finds that the (1) persons and parties; (2) causes of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made, are identical. *Id.; Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005).

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[4] Moreover, the City of Battle Ground was a party to the Superior Court appeal and briefed the issue in the prior action.

The persons and parties involved in the prior lawsuit need not be identical, but at least in privity with those whose claims were adjudicated in the prior proceeding. *Rufener v. Scott*, 46 Wn.2d 240, 243, 280 P.2d 253 (1955) ("[a] right, a question or a fact, put in issue and determined by a court of competent jurisdiction as a ground of recovery, cannot again be disputed in a subsequent suit between the same parties or their privies.") And whether the subject matter of the two actions is the same does not necessarily turn on whether the facts are identical in both cases. *Christensen*, 151 Wn.2d at 866. Instead, Washington courts tend to look at the nature of the cause of action and relief requested. *Id.* Where the cause of action and the relief requested are the same or substantially similar, the element of "same subject matter" will be satisfied. *Id.*

1. The parties in the prior land use action are the same.

Each of the Plaintiffs in this case participated in the prior land use action. Mr. Avolio furthermore participated in the appeal of the Hearing Examiner's decision, which in turn resulted in a court judgment. Those Plaintiffs who did not join Mr. Avolio in his appeal certainly had the right to join, and in any event, their arguments and rights were in privity with Mr. Avolio's position in the appeal, as demonstrated by their comments from the public record of the land use decision. Thus, the first element of res judicata is satisfied.

2. Plaintiffs' cause of action is identical to that in the prior land use action.

To determine whether two causes of action are the same, Washington courts will "consider whether (1) prosecution of the later action would impair the rights established in the earlier action, (2) the evidence in both actions is substantially the same, (3) infringement of the same right is alleged in both actions, and (4) the actions arise out of the same nucleus of facts." *Richert v. Tacoma Power Utility*, 179 Wn. App. 694, 705, 319 P.3d 882 (2014). In this case, all four criteria are met. Prosecution of Plaintiffs' claims here will substantially impair CG's right to subdivide the Lots. The evidence in both actions is likewise substantially the same, with Plaintiffs in both actions relying heavily on the alleged language in the CC&Rs. Likewise, Plaintiffs have alleged in both actions an infringement of their right to enforcement of the CC&Rs with respect to CG's plan to subdivide the subject lots. Finally, both actions arise out of the same nucleus of facts, namely, CG's petition to subdivide the Lots, and Plaintiffs' argument the CC&Rs prohibit further subdivision. Thus, the second element of res judicata is met.

3. Plaintiffs claim is based on identical subject matter to that in the prior land use action.

The nature of the cause of action in both the current and prior proceeding was whether the CC&Rs prohibit the subdivision of the Lots. As described above, the same evidence, arguments, and relief was all

requested by Plaintiffs in the prior land use action. Thus the subject matter is the same.

4. Defendant is the same.

The final element of the doctrine of res judicata is that the "quality of the persons for or against whom the claim is made" be identical. In this case, there is no dispute that defendant CG was the party against whom plaintiffs fought against in the land use hearing. It was CG's petition for subdivision of the Lots that generated the prior land use decision. Thus, there is sameness of the parties on both sides of this case, such that the doctrine of res judicata bars Plaintiffs' claims here.

D. Plaintiffs' claims should be barred because they invited any error by the Hearing Examiner and the Superior Court in deciding the issue in the LUPA proceeding.

Another doctrine, familiar to appellate courts, should also preclude this appeal. That is the doctrine of invited error. "A party cannot properly seek review of an alleged error which the party invited." *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984). Here, in briefing the issues related to the CC&Rs before the City of Battle Ground and before Judge Gonzales, Plaintiffs invited the Hearing Examiner and the Superior Court to address those issues. Moreover, had the Superior Court determined that the Hearing Examiner's decision was outside of its jurisdiction or authority, it could have granted relief on that basis in the LUPA appeal. *See* RCW 36.70C.130(1)(e). Thus, LUPA provided ample

opportunity for relief to Plaintiffs, and failure to avail themselves of that relief caused any error by the Superior Court in reviewing the case in the LUPA proceeding.

ASSIGNMENT OF ERROR No. 2

The trial court did not err in denying Plaintiffs' Cross-Motion for Summary Judgment. The trial court did not reach the substance of Plaintiffs' Cross-Motion, because it decided the case based on principles of preclusion. Accordingly, if this court were to reach the Second Assignment of Error, it should remand for the Superior Court to evaluate Plaintiffs' Cross-Motion in the first instance. However, if the court decides to reach the merits, it should affirm the Superior Court's granting Defendant's summary judgments because the record demonstrates that the CC&Rs do not apply to the Lots. Even if this Court does not so find, it should at minimum hold that issues of fact exist regarding CG's affirmative defenses of waiver and laches which preclude a grant of summary judgment for the Plaintiffs.

A. Summary judgment is appropriate on Plaintiffs' claim because there are questions of fact to be determined.

The courts' primary objective in interpreting restrictive covenants, like contracts, is to determine the intent of the parties to the agreement. *White v. Wilheim*, 34 Wn. App. 763, 767, 665 P.2d 407 (1983). Courts determine the drafter's intent by examining the clear and unambiguous

language of the covenant, giving consideration to the instrument in its entirety. *Baumen v. Turpen*, 139 Wn. App. 78, 88-89, 160 P.3d 1050 (2007). When the meaning of a particular covenant is unclear, the surrounding circumstances that tend to reflect the intent of the drafter and the purpose of a covenant they be examined. *Id.* at 89.

While the interpretation of a restrictive covenant is a question of law, the drafter's intent is a question of fact, and extrinsic evidence of intent is admissible if relevant to interpreting the restrictive covenant. *Id.* "Evidence of the 'surrounding circumstances of the original parties' is admissible 'to determine the meaning of the specific words and terms used in the covenants.'" *Id.* (quoting *Hollis v. Garwall*, 137 Wn.2d 683, 692, 974 P.2d 836 (1999)). In *Hollis*, the Supreme Court discussed two different types of restrictive covenants, those which run with the land, and those which the court will apply as a matter of equity. *Id.* at 691. In general, Washington courts do not distinguish much between these two types of covenants. *Id.* However, according to the court:

> Where enforceability of a covenant is based, in part, on actual or constructive notice of a restriction, rather than on an incorporation of the restriction in a deed, the covenant is generally considered an equitable restriction. STOEBUCK, supra § 3.10. ***The elements which are necessary for finding an equitable restriction in the subdivision setting are: (1) a promise in writing, which is enforceable between the original parties; (2) which touches and concerns the land or which the parties intend to bind successors; and (3)

> which is sought to be enforced by an original party or a successor, against an original party or successor in possession; (4) who has notice of the covenant.

Id. (emphasis added).

As to the first element, the *Hollis* court noted that a written promise a covenant will be enforceable typically takes the form of a recording of the covenant, which is then referenced in a subsequent deed during conveyance of the subject property. *Id.* The court also acknowledged that the plat may set forth an agreement to abide by a particular covenant. *Id.*

Relying on the standards set forth in *Hollis*, it is clear that the CC&Rs were never intended to apply to Phase II, or at a minimum, that a question of fact remains as to this issue.

While Plaintiffs are correct that the plat map for Phase II references the CC&Rs, such reference is limited to the preservation of "nature trails." (CP 236; *see also* CP 68 and CP 92 (Plaintiffs' discussion of this notation in the prior proceedings)). The CC&Rs themselves do not reference "nature trails," which highlights the ambiguity of whether the CC&Rs were intended to apply at all to Phase II, as opposed to only designated nature trails.[5] Based upon the holding in *Hollis*, further examination of the circumstances surrounding the recording of the

[5] Plaintiffs acknowledge this ambiguity in their Opening Brief, p. 5.

CC&Rs is warranted to determine the intent of the original drafter. An examination of the extrinsic evidence surrounding the recording and subsequent application of the CC&Rs demonstrates that a question of fact remains as to whether the original drafter intended the CC&Rs to apply to Phase II.

For example, the declarants for Phase I and Phase II are entirely different. The Phase I declarant is listed as Camelot Construction Company. (CP 8). The declarant for Phase II is Cedar Pacific Properties, Inc. (CP 345). According to the CC&Rs, only Camelot Construction may unilaterally annex Phase II within the first seven years of recording of the CC&Rs. There is no evidence Camelot did so. Likewise, there is no evidence Cedar Pacific Properties tried to annex Phase II with the remainder of the Cedar phases.[6] In contrast, the declarant for Phase IV did annex its property with the rest of the Cedars, thereby expressly subjecting the lots in Phase IV to the CC&Rs. (CP 310-12).

Additionally, Article V, Section 1 of the CC&Rs states that "[n]o lot as platted shall be resubdivided into separate building sites." (CP 14). The term "lot" is defined as "the designated lot area designated by number

[6] And even were they to try, the CC&Rs suggest that only Camelot Construction (or its successor) held such power. There is no evidence in the record to suggest that Cedar Pacific Properties ever became the assign or successor in interest to Camelot Construction.

as shown upon any recorded subdivision map of the Properties with the exception of the Common Area, plus any Towne House erected on Towne House areas on the Properties." (CP 9). "Properties" means "that certain real property hereinbefore described, together with such additional land within the area described on Exhibit 'C' attached as may be annexed by the Declarant or assignees without the consent of the members within seven (7) years of the date of this instrument." (CP 9) (emphasis added). Thus, while the definition of "Properties" encompasses all of the property shown in Exhibit C, any restrictions as to use of such property is limited to only those portions which meet the definition of "lot" as defined under the CC&Rs. At the time the CC&Rs were recorded, the only platted numerical lots which existed were those in Cedars Phase I.

Thus, the plain reading of the CC&Rs, as originally drafted, is that only the lots is Phase I are implicated by the CC&Rs' "land use" restrictions. Any new lots which the declarant (or its successor) wished to subject to Article V, Section 1 were required to be annexed within the next seven years following when the CC&Rs were recorded. If that was not done, a two-thirds vote of the Cedars Homeowners Association would be required to properly annex the new property. There is no evidence that either the automatic annexation process or the two-thirds vote occurred.

Unlike Phase II, the declarants in both Phases III and IV sought to properly annex their properties with Phase I, thereby subjecting the lots in those phases to the CC&Rs. This was the proper process under the CC&Rs. Later phases such as Phases II, III, and IV could only be subject to the CC&Rs via the process for annexation. Reading the CC&Rs any other way would render the subsequent declarations filed for Phases III and IV meaningless.

Thus, Phase II is not subject to the CC&Rs, as determined by the City of Battle Ground and the Superior Court, and this Court should affirm the grant of Defendant's Summary Judgment. At minimum, questions of fact surround that issue, and this court should not reverse the trial court's denial of Plaintiffs' Motion for Summary Judgment.

B. There are also questions of fact surrounding CG's Affirmative Defenses, precluding summary judgment in Plaintiffs' favor.

To the extent this court finds that the CC&Rs apply to Phase II, a question of fact still remains as to whether the CC&Rs have been so repeatedly violated that they should otherwise be considered abandoned. In *Mountain Park Homeowners Ass 'n v. Tydings*, the Washington Supreme Court held as follows:

> A number of equitable defenses are available to preclude enforcement of a covenant: merger, release, unclean hands,

> acquiescence, abandonment, laches, estoppel, and changed neighborhood conditions.
>
> ***
>
> [I]f a covenant which applies to an entire tract has been habitually and substantially violated so as to create an impression that it has been abandoned, equity will not enforce the covenant.

125 Wn.2d 337, 341-42, 883 P.2d 1383 (1994)(emphasis added).

Even if the court were to determine that the CC&Rs do govern Phase II, which they do not, the CC&Rs have been repeatedly violated such that the law of equity prohibits their enforcement here. For example, despite Article V, Section 1 prohibition of both subdivision and multi-family construction, both have taken place with respect to lots contained in Phases I and III of the Cedars. In fact, from the time the Lots in Phase II were originally platted for townhome construction they were in violation of the CC&Rs. Nothing has been done by the Cedars Homeowners Association to change this designation or otherwise enforce the CC&Rs prohibition against multi-family construction in Phases I or II. The HOA's tolerance for repeated and long-standing violations of the CC&Rs indicates that the CC&Rs have been abandoned and the court should prohibit enforcement and affirm the trial court's denial of summary judgment. At a minimum, a question of fact remains as to this issue, which

prohibits Plaintiffs from winning summary judgment at this stage, requiring this Court to remand the case back to the trial court.

ASSIGNMENT OF ERROR No. 3

Rulings on Motions for Reconsideration are reviewed for manifest abuse of discretion. *Lund v. Benham*, 109 Wn. App. 263, 266, 34 P.3d 902 (2001), *review denied*, 146 Wn.2d 1018 (2002). For the reasons discussed above, the trial court did not err in denying Plaintiffs' Motion for Reconsideration.

REQUEST FOR ATTORNEYS' FEES

Additionally, pursuant to RCW 4.84.370 and RAP 18.1, Defendant requests that if the court affirms, that the court award it its reasonable attorneys' fees on appeal. When Defendant prevails at the this court, it will have prevailed before the City of Battle Ground, the Superior Court (twice), and the Court of Appeals, on the same land use decision. RCW 4.84.370 provides:

> Appeal of land use decisions—Fees and costs.
>
> (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or

> decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:
>
> (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and
>
> (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.
>
> (2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

Plaintiffs will likely argue that RCW 4.84.370 does not apply to this proceeding because this case is not directly lineally connected to the original land use decision. However, Plaintiffs' own failure to appeal the prior judicial determination on this issue should not serve to protect them from the consequence of continuing to litigate (and lose) a land use decision, thus the policy behind RCW 4.84.370 is served only by awarding CG its attorneys' fees, if it prevails.

Additionally, pursuant to RAP 18.9(a), the court should award CG its attorney fees because this appeal is frivolous. An appeal is frivolous "if there are no debatable issues upon with reasonable minds might differ, and if is so totally devoid of merit that there was no reasonable possibility of reversal." *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980).

This case is clearly barred by LUPA and principles of estoppel. Moreover, the merits of Plaintiffs' Motion have already been decided finally in another action.

Bringing this claim as a separate suit, as opposed to making the same claims as an appeal of the LUPA ruling, is likely an attempt to avoid RCW 4.84.370 and the appeal is a blatant attempt to delay the development of the Lots. Given Plaintiffs' counsel's admission that the prior action involved the same issue, there can be no doubt that issue preclusion applies (as well as the other theories upon which Plaintiffs' claims are barred). Accordingly, the court should award CG its reasonable attorney fees on appeal.

CONCLUSION

For the reasons discussed above, this court should affirm the decision of the Superior Court.

DATED: January 25, 2016.

Respectfully submitted,

/s/ Damien R. Hall
Damien R. Hall, WSBA NO. 47688
Amy Heverly, WSBA No. 49345
BALL JANIK LLP
101 SW Main Street, Ste. 1100
Portland, OR 97204

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 25, 2016 I filed the foregoing *BRIEF OF RESPONDENT* by mailing a copy to:

Washington Supreme Court Clerk
Court of Appeals Division II
950 Broadway
Ste 300, MS TB-06
Tacoma, WA 98402-4454

I further certify that on January 25, 2016, I served a copy of the foregoing *BRIEF OF RESPONDENT* by mailing a copy to the following party:

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Attorneys for Appellants

DATED: January 25, 2016

BALL JANIK, LLP

/s/ Damien R. Hall
Damien R. Hall, WSBA #47688
Amy Heverly, WSBA #49345
Attorneys for Respondents

INDEX TO APPENDIX

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

MARK AVOLIO; JOHN BAKER; MAUREEN DeARMOND; and ANDREW MERKO,

Plaintiffs,

v.

CEDARS GOLF, LLC,

Defendant.

Case No. 15-2-01546-3

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

EXPARTE

This matter came before the Court on defendant's Motion for Summary Judgment and plaintiffs' cross-motion for summary judgment. The Court has reviewed and considered the following:

- Defendant's Motion/Memorandum of Law in Support of Summary Judgment;
- Declaration of Damien Hall in Support of Defendant's Motion for Summary Judgment, along with all accompanying exhibits;
- Plaintiffs' Response to Defendant's Motion for Summary Judgment;
- Declaration of Kris Eklove In Opposition to Defendant's Motion, along with all accompanying exhibits;
- Defendant's Reply Memorandum in Support of Motion for Summary Judgment;

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Portland, Oregon 97204-3211

- Plaintiffs' Cross-Motion for Summary Judgment;
- Declaration of Kris Eklove in Support of Plaintiffs' Cross-Motion for Summary Judgment, along with all accompanying exhibits;
- Declaration of Nin J. Beseda, PLS in Support of Plaintiffs' Cross-Motion for Summary Judgment, along with all accompanying exhibits;
- Defendant's Memorandum of Law in Response to Plaintiffs' Cross-Motion for Summary Judgment
- Declaration of Adele Ridenour in Support of Defendant's Response to Plaintiffs' Cross-Motions for Summary Judgment, along with all accompanying exhibits;
- Declaration of William Saunders in Support of Defendant's Response to Plaintiffs' Cross-Motions for Summary Judgment, along with all accompanying exhibits;
- Plaintiffs' Reply Memorandum in Support of Plaintiffs' Cross-Motion for Summary Judgment
- Declaration of Kris Eklove in Reply to Defendant's Response, along with all accompanying exhibits; and
- Plaintiffs' Statement of Additional Authority

The court heard oral argument by the parties on August 20, 2015. After considering the above written submissions of the parties and oral argument of respective counsel for the parties in this case, the Court hereby ORDERS as follows:

1. Defendant's Motion for Summary Judgment is hereby GRANTED and Plaintiffs' claims shall be dismissed in their entirety with prejudice; and

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2. Plaintiffs' Cross-Motion for Summary Judgment is hereby DENIED.

Dated: 9/3/15

Hon. Robert A. Lewis

Presented by:

Adele J. Ridenour, WSBA No. 35939
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101 SW Main Street, Suite 1100
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Approved as to form,
Notice of Presentation waived:

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BEFORE THE LAND USE HEARING EXAMINER
FOR THE CITY OF BATTLE GROUND, WASHINGTON

Regarding an application by Haertl Development Co. for approval of a plat alteration and preliminary plat to divide 6.94-acres into 13 lots in the R3 zone on either side of NE 149th Ave. north of 181st St. in the City of Battle Ground	) FINAL ORDER)) SUB: 01-14 & ALT: 01-14) (Cedars Lots 1 & 8)

A. SUMMARY

1. The applicant, Haertl Development Company, requests approval to divide the roughly 6.94-acre site consisting of Lot 1 (119202334) and Lot 8 (119202348) of the Cedars Phase II subdivision (the "site") into 13 residential lots and four (4) environmental tracts. (SUB: 01-14). The Cedars Phase II subdivision was platted in 1980 through Clark County. The plat identifies the original intent for these two parcels as multi-family development (42 townhouses). The two parcels are separated by NE 149th Avenue, which is a developed public roadway with utilities (water, sewer, storm, power, gas, and phone). These two lots border "The Cedars on Salmon Creek" golf course to the west of Lot 8 and to the east of Lot 1 and to the south of both lots. The site and the abutting golf course are located in the City of Battle Ground and zoned R3 (Residential, 3 units per acre maximum density). Properties to the north are located in unincorporated Clark County and zoned R1-20 (Single-Family Residential, 20,000 square foot minimum lot size).

a. The site is currently vacant. The applicant proposes to construct a new single-family detached dwelling on each of the proposed lots. All proposed lots will comply with the minimum dimensional standards for the R3 zone.

b. The site contains two seasonal streams and associated wetlands. The applicant proposed to create four open space tracts to protect the streams, wetlands and associated buffers. Salmon Creek is located west of the site. The riparian and habitat buffers associated with Salmon Creek extend onto the site. No development is proposed within the riparian and habitat buffers or the open space tracts.

c. The applicant will collect stormwater runoff from impervious areas on the site and convey it to underground facilities within the proposed private streets and to rain garden facilities within the public right-of-way for treatment and detention. The applicant will discharge treated stormwater to on-site streams.

d. Clark Public Utilities will supply domestic water and the City of Battle Ground will supply sanitary sewer service to the site.

e. The applicant will extend three new private streets, NE 150th Court north of existing NE 181st Street, and NE 182nd Circle and NE 183rd Circle east of existing NE 149th Avenue, to provide access to the proposed lots. NE 149th Avenue and NE 181st Street are designated "Local A" streets, which require a 30-foot paved width with sidewalks, landscape strips, and street lights on both sides of these streets. The applicant requested approval of Road Modifications to waive these improvements and

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retain the existing 28-foot paved width street with the existing cross-slope without sidewalks, landscaping strips or streetlights. The applicant also requested a road modification to reduce the required sight distance for the proposed NE 183rd Circle/NE 149th Avenue intersection.

2. The applicant also requests approval of Plat Alteration to eliminate the note on the face of the Cedars P.U.D that calls out the Townhouse areas on Lots 1 & 8, given this subdivision request is to create single-family lots. (ALT:01-14).

3. The applicant requests approval of a boundary line adjustment with the golf course property south of the site to retain existing golf cart paths within the golf course property.

3. The City issued a Determination of Nonsignificance ("DNS") for the subdivision pursuant to the State Environmental Policy Act ("SEPA"). The City issued the DNS on April 23, 2014. The comment period expired on May 8, 2014. The SEPA determination was not appealed and is now final.

4. City of Battle Ground Hearing Examiner Joe Turner (the "examiner") conducted a public hearing to receive testimony and evidence about the application. City staff recommended the examiner approve the preliminary plat subject to conditions. See the Staff Report to the Hearing Examiner dated June 13, 2014. The applicant accepted those findings and conditions, as modified at the hearing, without exceptions. Five persons testified in opposition and with questions and concerns about the application. Disputed issues or concerns in the case include the following:

a. Whether the proposed development will conflict with Conditions Covenants and Restrictions ("CC&Rs") applicable to the site;

b. Whether the proposed development will have prohibited impacts on wetlands, shorelines, or riparian areas;

c. Whether the proposed development will impact threatened or endangered species;

d. Whether the federal Migratory Bird Treaty Act (the "MBTA") is an applicable approval criteria;

e. Whether the City can require the applicant to conduct an archaeological evaluation of the site;

f. Whether the development will have prohibited impacts on existing views;

g. Whether the development includes flag lots;

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h. Whether the development complies with the compatibility requirements of BGMC 17.106.040.B;

i. Whether fill on the site will impact the proposed development; and

j. Whether the proposed road modification to reduce the paved width of NE 149th Street from 30 feet to 28 feet complies with the applicable approval criteria.

5. Based on the findings provided or incorporated herein, the examiner approves the preliminary plat subject to the conditions at the end of this final order.

B. HEARING AND RECORD HIGHLIGHTS

1. The examiner received testimony at a public hearing about this application on June 25, 2014. All exhibits and records of testimony are filed at the City of Battle Ground. At the beginning of the hearing, the examiner described how the hearing would be conducted and how interested persons could participate. The examiner disclaimed any *ex parte* contacts, bias or conflicts of interest. The following is a summary by the examiner of selected testimony and evidence offered at the public hearing.

2. City planner Sam Crummett summarized the Staff Report and the history of the site. He noted that Clark County approved Phase 2 of "The Cedars" Planned Unit Development ("PUD") in 1980. Lots 1 and 8 of that development were designated for townhouse development. The City of Battle Ground subsequently annexed Lots 1 and 8 and rezoned them R3. With this application the applicant requests approval of a plat alteration to eliminate the townhouse development note on the face of the original plat and to subdivide Lots 1 and 8 into 13 lots for single-family homes and four open space tracts. He corrected a typographical error at page 29 of the Staff Report.

a. He noted that RCW 58.17.215 only requires the signature of the owners of the lots affected by the plat alteration application. The proposed development will not affect other lots within the Cedars Phase II development. Lots 1 and 8 are clearly separate lots. Therefore the owners of the remaining lots in the Cedars Phase II development are not required to sign the plat alteration application.

b. The applicant cannot remove trees within the wetlands and habitat areas on the site or the associated buffers, unless the trees are deemed hazardous.

3. City associate civil engineer Ryan Jeynes noted that NE 149th Avenue and NE 181st Street are designated "Local A" streets, which require a 30-foot paved width with sidewalks, landscape strips, and street lights on both sides of these streets. The applicant requested approval of Road Modifications to waive these improvements and retain the existing 28-foot paved width street without sidewalks, landscaping strips or streetlights. The applicant also requested a road modification to reduce the required sight distance for the proposed NE 183rd Circle/NE 149th Avenue intersection. He recommended the examiner approve the road modifications to allow the existing pavement width and cross-slope and to delete the streetlight requirement. He also recommended the examiner

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approve the sight distance modification. He recommended the examiner deny the remaining road modification request and require the applicant construct sidewalks and landscape strips on the streets abutting the site.

4. Professional engineer Chris Robertson and project manager Bill Saunders appeared on behalf of the applicant.

a. Mr. Robertson accepted the findings and conditions in the Staff Report, as modified, without objections or corrections.

i. He argued that SEPA only regulates large-scale views. It does not require consideration of existing views from individual homes. In addition, the proposed development will not create unobstructed views of the golf course clubhouse from the existing homes north of the site. The applicant will retain the existing trees within Tract C, which will continue to screen the clubhouse.

ii. The applicant's wildlife consultant, the Resource Company, performed a wildlife and habitat assessment of the site and did not note the presence of pileated woodpeckers or other threatened or endangered species on the site. The threatened and endangered fish species noted in the Staff Report are in Salmon Creek, which is not located on the site.

iii. The applicant will not remove trees within the open space tracts. Trees on the site were marked to facilitate the tree survey, not to designate trees that will be removed.

b. Mr. Saunders testified that The Cedars Phases II, III and Cedars East developments never adopted the CC&Rs that apply to The Cedars Phase I as expressly required by the text of the CC&Rs. Article VII, Section 4 of the CC&Rs allows the developer to annex additional lots into the homeowners associated covered by the CC&Rs within seven years from the date of the CC&Rs. However Cedars Phase II was platted more than seven years after the date of the CC&Rs. Therefore the CC&Rs are not binding on Lots 1 and 8 of Cedars Phase II. This development will only affect Lots 1 and 8 of Cedars Phase II. Therefore only the owners of Lots 1 and 8 of Cedars Phase II are required to sign the plat alteration application.

5. Attorney Mark Stoker appeared on behalf of the owners of the five remaining lots in The Cedars Phase II development and summarized his written testimony, Exhibit 36.

a. He argued that the proposed subdivision of Lots 1 and 8 of The Cedars Phase II will alter the Cedars Phase II plat. Therefore RCW 58.17.215 requires the applicant submit a plat alteration application signed by the majority of the owners of the lots within the Cedars Phase II PUD. A plat alteration application would serve no purpose if it only required the signature(s) of the owner(s) of the lot(s) being divided. This subdivision will alter the entire Cedars PUD. In the alternative, this subdivision is altering the Phase II portion of the larger Cedars PUD.

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b. In addition, the proposed subdivision will violate the CC&Rs of the Cedars PUD. Therefore RCW 58.17.215 requires that all parties subject to the covenants sign the plat alteration application.

6. Janet Hoppe-White testified that she did not receive the Staff Report until Monday June 23, 2014, three days before the hearing. Therefore she requested the examiner hold the record open to allow the public additional time to review and comment on the application.

a. She argued that the examiner should deny the applicant's road modification request to reduce the paved width of NE 149th Street from 30 feet to 28 feet. All traffic from this site and the six existing lots north of the site will use this road. School buses also travel on this road. Many people walk and bicycle on this road for recreation. However vertical and horizontal curves on this road limit sight distance, creating a hazard. On-street parking is allowed on both sides of this street, which will further reduce sight distance. The two feet of additional pavement required by the City standard for this street would allow drivers additional maneuvering room to avoid pedestrians, bicycles and the doors of cars parked on this street. The City Council considered these issues when it adopted the 30-foot paved width standard. It would be inappropriate to change the standard adopted by the City. She submitted photos illustrating the existing conditions on NE 149th Street. Exhibit 37.

7. Maureen DeArmond testified that she has seen and heard pileated woodpeckers on the site. She argued that the Staff Report contains conflicting statements. Page 20 of the Staff Report states that there are no threatened or endangered species on the site but it goes on to note that there are threatened and endangered fish species in Salmon Creek.

8. Carol Opatrny, president of the Cedars I homeowners association, argued that the CC&Rs for the Cedars PUD were adopted in 1973 and apply to all five phases of the Cedars PUD, Cedars I through IV and Cedars East. Any changes to the CC&Rs require an affirmative vote by 75-percent of the members.

9. Mark Gawecki argued that the proposed development will impact existing views from existing homes north of the site. The proposed development will replace the existing trees on the site with large homes. He testified that he has seen pileated woodpeckers on the site.

10. At the end of the hearing the examiner held open the public record for one week, until July 2, 2014, to allow all parties an opportunity to submit additional written testimony and evidence regarding the application. The examiner held the record open for a second week to allow the all parties an opportunity to respond to the new testimony and for the applicant to submit a closing argument. The record in this case closed on July 9, 2014.

C. DISCUSSION

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1. City staff recommended approval of the applications, based on the affirmative findings and subject to conditions of approval in the Staff Report, as modified at the hearing. The applicant accepted those findings and conditions, as modified, without exceptions.

2. The examiner concludes that the affirmative findings in the Staff Report show that the proposed preliminary plat does or can comply with the applicable standards of the Battle Ground Municipal Code and Revised Code of Washington, provided that the applicant complies with recommended conditions of approval as modified herein. The examiner adopts the affirmative findings in the Staff Report, as modified, as his own, except to the extent they are inconsistent with the following findings.

3. The examiner finds that the plat alteration application complies with RCW 58.17.215.

a. The applicant is requesting alteration of the plat to remove the "townhomes" designation on Lots 1 and 8. Lots 1 and 8 of Cedars Phase II are the only portion of the subdivision proposed to be altered. Therefore RCW 58.17.215 only requires the signature of the majority of persons with an ownership interest in Lots 1 and 8 of Cedars Phase II. The further division of these platted lots is not a "plat alteration" subject to RCW 58.17.215.

b. The proposed subdivision will not result in violation of a covenant applicable to The Cedars Phase II subdivision. As discussed in Exhibit 31, the CC&Rs for "The Cedars" dated February 23, 1973 were never adopted by The Cedars Phase II subdivision. There is no substantial evidence to the contrary.

i. The CC&Rs authorize "the Declarant," the original developer of The Cedars, to annex certain additional properties without the consent of the members. See Article VII, Section 4 and Article I Section 3 of the CC&Rs. However such annexation must occur within seven years form the date of the CC&Rs. The CC&Rs were executed on March 2, 1973. The Cedars Phase II subdivision was platted June 6, 1980, more than seven years after the CC&Rs were signed. Therefore the Declarant had no authority to unilaterally include The Cedars Phase II subdivision in the CC&Rs.

ii. The CC&Rs require a two-thirds majority vote to annex additional property into the CC&Rs. See Article VII, Section 4 of the CC&Rs. There is no evidence that a vote to include The Cedars Phase II subdivision ever occurred.

iii. The Cedars Phase II subdivision plat did not adopt or incorporate by reference all of the CC&Rs applicable to The Cedars Phase I. The second plat note on the face of The Cedars Phase II subdivision plat is titled "Nature Trails." The text of the plat note discusses the ownership and use of the nature trails within The Cedars Phase II subdivision site. By its terms, The Cedars Phase II subdivision plat note only incorporates those portions of The Cedars Phase I CC&Rs regulating the use and enjoyment of trails. There is no evidence that The Cedars Phase II subdivision plat was intended to adopt and incorporate all of The Cedars Phase I CC&Rs.

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4. Clearing and development on this site will eliminate habitat for wildlife, including habitat for migratory birds. But the Code does not prohibit such an effect. To the contrary, it is an inevitable consequence of concentrating new development in the urban area. None of the animals observed on this site is listed as endangered or threatened. They are commonly observed in the urban area. Their presence is less likely after the site is developed, but that is to be expected. There is no substantial evidence that any endangered or threatened species exist on the site.

a. Salmon Creek, which contains threatened and endangered fish species, is located offsite.

b. The pileated woodpecker is not listed as an endangered or threatened species in Washington. State law protects identified nests or dens of pileated woodpeckers. However there are no mapped nests or dens or evidence of such, on the site.

c. The MBTA is not an applicable approval criteria. The examiner cannot rely on a treaty to deny or condition approval of the application, because a treaty is not part of the local development regulations. Although the removal of trees may affect wildlife habitat including habitat for migratory birds, the Code does not prohibit such impacts.

5. The applicant will preserve the most valuable habitat areas on the site, the buffer areas adjacent to streams and wetlands and within the riparian habitat setback areas abutting Salmon Creek. No tree removal, clearing, or development is proposed within these open space tracts, beyond that which may be minimally necessary to construct road frontage improvements or to remove hazardous trees, if any. The applicant will dedicate the open space tracts to the City, which will be responsible for their maintenance and preservation.

a. The fact that in 2005 Clark County limited development on this site to two single-family lots is irrelevant. The current City shoreline and habitat regulations differ from the County regulations that were in effect in 2005. The applicant is protecting the wetlands, shoreline, and riparian areas on this site consistent with the requirements of the current BGMC.

6. According to the Washington State Department of Archaeology and Historic Preservation ("DAHP"), this site is mapped as the "[h]ighest potential for containing archaeological resources as depicted on the Statewide Archaeological Predictive Model." In addition, "There are multiple archaeological sites within 3,500 feet on landforms similar to that of the proposed subdivision." Exhibit 39. Unfortunately the DAHP did not submit its comments until after the SEPA comment period. The City's SEPA determination was not appealed and is now final. Therefore the City cannot impose additional SEPA conditions at this time. The City does not have an archaeological ordinance and therefore it has no authority to require archaeological review on this site outside of the SEPA process. However state law strictly regulates impacts to historic and

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cultural resources. Therefore it is in the applicant's best interest to conduct an archaeological survey as requested by the DAHP prior to undertaking any ground disturbing activities on the site.

7. There is no dispute that the proposed development will impact existing views from and the privacy of adjacent residences. What are now forested lots will be developed with 13 new homes. But the BGMC does not prohibit development from having an impact on views and privacy. The intensity of the proposed development is consistent with the current zoning of the site. In addition, these lots were originally approved for townhouse development, which would have an equal, if not greater, impact on views and the privacy of adjacent residents.

a. The SEPA checklist does require consideration of views. However SEPA only prohibits impacts that are significantly adverse. In addition, "The law does not require that all adverse impacts be eliminated; if it did, no change in land use would ever be possible." *Maranatha Mining, Inc. v. Pierce County*, 59 Wn.App. 795, 804, 801 P.2d 985 (Wash. App., 1990). The City considered the issue of views in its SEPA determination and concluded that this development will not have a significant adverse environmental impact. That determination was not appealed and is now final.

b. The applicant and future home builders may choose to retain additional trees on the north boundary of proposed Lots 5 and 6. The Plan Sheet C2.0 shows the maximum potential buildable area on these lots based on the minimum setback requirements of the Code. Therefore the potential building envelope for proposed Lot 6 extends to within five feet of the north boundary of this lot. However a future builder may choose to design and locate a home on this lot in a way that will preserve additional trees.

7. It could be argued that proposed Lot 6 is a "flag lot" as defined by the Code.

a. BGMC 17.103.414 provides:

> "Flag lot" means a tract or lot of land of uneven dimensions in which the portion fronting on a public street is less than the required minimum width for construction of a building or structure on that lot.

b. However BGMC 16.110.010 provides:

> "Flag lot" means a tract or lot of land of uniform dimensions in which the portion fronting on a street is less than the required minimum width for construction of a building or structure on that lot but leads from the access point to a lot with proper dimensions for building.

c. The "flag pole" access to Lot 6 is not part of the lot. The access is provided via a private street, proposed NE 183rd Circle, located in a separate tract. However both definitions of "flag lot" refer to a "tract or lot..." The width of the tract is

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"[l]ess than the required minimum width for construction of a building or structure..." and the tract, "[l]eads from the access point to a lot with proper dimensions for building." Therefore it could be argued that Lot 6 is a flag lot as defined by the Code.

d. However the examiner finds that it is unnecessary to determine whether proposed Lot 6 is a flag lot. Although flag lots are discouraged, they are not prohibited. BGMC 16.125.110. In this case the topography of the site (the relatively narrow width of the site east of 149th Avenue and the location of the stream and buffer) makes standard design or more frontage impossible or impractical. The lot access, NE 183rd Circle, is less than 200 feet long, and no abutting flag lots are proposed. Therefore Lot 6 can be developed as a flag lot.

e. Proposed NE 183rd Circle complies with the addressing standards of BGMC 12.112.050.H, which provides:

> Roads running east and west ending in a cul-de-sac or which cannot be extended shall be designated as "circles" and identified with the number of the nearest preceding east-west block line or street.

Proposed NE 183rd Circle is a road running east and west which cannot be extended. Therefore it is properly designated as a "circle." The fact that it does not end in a cul-de-sac is irrelevant.

8. The examiner finds that proposed lots 5 and 6 do not comply with the compatibility requirements of BGMC 17.106.040.B.[1]

a. BGMC 17.106.040.B provides:

> Development Compatibility and Continuity. Development within residential districts shall be designed to the following standards to assure compatibility and continuity between developments:
>
> The provisions of this subsection shall apply only to developments with a density equivalent to that of an R3 zone or greater. Residential developments shall be designed with the following transition design elements:
>
> 1. Where directly abutting residential uses, new developments shall not exceed an average minimum lot size differential of twenty-five percent;
>
> 2. Where adjacent properties are undeveloped or developed with lot sizes substantially greater than what is permitted by the

[1] The remaining lots on the site are not "directly abutting residential uses." The remaining lots abut the golf course or public roads. Therefore BGMC 17.106.040.B does not apply to those lots.

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0-000000260

> zone, the minimum average lot size allowed in the zone shall be used to determine what the average minimum lot size of the abutting property is for the purposes of compliance with this subsection.

b. The examiner finds, based on the plain meaning of the words in the Code, that BGMC 17.106.040.B(1) requires that perimeter lots of a new subdivision cannot be more than 25-percent larger or smaller ("differential") than abutting residential lots. Where the adjacent lots are undeveloped or developed with lot sizes substantially greater than what is permitted by the zoning of the adjacent lots, perimeter lots of a new subdivision cannot be more than 25-percent larger or smaller than the minimum average lot size allowed by the zoning of the adjacent lots. This interpretation is consistent with the stated purpose of this Code section, "to assure compatibility and continuity between developments" by providing a transition in lot sizes between existing and proposed developments.

c. In this case the adjacent property, Lot 2 of Cedars Phase II, is zoned R1-20 (Clark County zoning), which requires a minimum lot size of 20,000 square feet and a maximum lot size of 30,000 square feet. The examiner finds that Lot 2 of Cedars Phase II, with a lot size of 26,130 square feet, is not "substantially greater" than what is permitted by the R1-20 zone. This lot is 30-percent larger than the minimum lot size allowed in the R1-20 zone, but it is 20-percent smaller than the maximum lot size allowed. Therefore the applicant must modify the preliminary plat to provide a minimum 19,597 square foot lot abutting Lot 2 of Cedars Phase II.[2] A condition of approval is warranted to that effect.

9. Neighbors testified that fill was recently added to portions of proposed Lot 8. Exhibit 25. However the applicant's geotechnical engineer reviewed the site on December 5, 2013 and January 3, 2014 and did not note any areas of fill. See Exhibit 14. The geotechnical engineer dug several test pits on the site, including in the area of proposed Lot 8. The test pits extend up to 15 feet below ground surface. See Section 4.2 and Figure 2 of Exhibit 14. Spoils from these excavations may account for the "fill" observed by neighboring residents. The applicant and future home developers can deal with any areas of fill if encountered during construction. As noted in the geotechnical report, "vegetation, organic material, unsuitable fill, and deleterious material that may be encountered should be cleared from areas identified for structures and site grading. It is feasible to remove any unsuitable fill that may be present in areas where construction is proposed. The City can ensure compliance with this requirement through the building permit and engineering review processes.

10. The examiner finds that the proposed road modification request to reduce the paved width of NE 149th Street from 30 feet to 28 feet complies with the applicable approval criteria, based on the findings in the Staff Report. The examiner incorporates and adopts those findings as his own. The examiner finds that the existing 28-foot paved width will not create a hazard, based on the expert testimony of the engineers for the City

[2] Twenty five percent of 26,130 = 19,597 square feet.

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and the applicant. There is no substantial evidence to the contrary. Opponents' unsupported opinions are not sufficient to overcome the expert testimony of the engineers. Therefore the road modification request should be approved.

a. NE 149th Street is currently developed with a 28-foot paved width. There is no evidence that this narrower roadway width created a hazard.

b. The applicant will construct sidewalks on both sides of the section of NE 149th Street abutting the site, which will improve the safety of pedestrians using this section of the roadway.

c. On-street parking may reduce the width of the travel lane. However that is allowed and expected by the Local A street design. The narrower pavement width and on-street parking may increase safety by encouraging drivers to slow down.

D. CONCLUSION

Based on the above findings and discussion, the examiner concludes that SUB: 01-14 and ALT:01-14 (Cedars Lots 1 & 8 Subdivision) should be approved, because it does or can comply with the applicable standards of the Battle Ground Municipal Code and the Revised Code of the State of Washington, subject to conditions of approval necessary to ensure the final plat and resulting development will comply with the Code.

E. DECISION

Based on the findings, discussion, and conclusions provided or incorporated herein and the public record in this case, the examiner hereby approves SUB: 01-14 and ALT:01-14 (Cedars Lots 1 & 8 Subdivision), subject to the following conditions of approval:

Conditions of Approval

A. **Prior to Engineering Plan Approval:**

1. Submit final engineering plans, for review and approval by staff, pertaining to transportation, sewer, water, grading, erosion control, stormwater, driveways, street lighting, and landscaping prepared and stamped by a registered engineer in the state of Washington.

2. Submit final engineering plans:

   a. Showing NE 149th Avenue having parking on both sides of street.

   b. Containing a combined landscaping and driveway plan.

   c. Containing a signing and striping plan.

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d. Showing sidewalks along NE 149th Avenue.

e. Showing traffic calming measures on NE 149th Avenue

f. Showing private streets (NE 150th Court, NE 182nd Circle, NE 183rd Circle) meeting the applicable requirements in BGMC 12.116.140 based on the number of lots/units being served.

g. Showing Sight Distance Triangles, at the intersections of NE 149th Avenue and NE 181st Street with NE 150th Court, NE 182nd Circle, and NE 183rd Circle, meeting the design criteria of BGMC 12.116.220.

h. Showing driveways that meet the requirements of BGMC 12.116.243

i. Showing each residential lot having its own water service

j. Showing each residential lot having its own sanitary lateral.

k. Showing minimum 20-foot sewer easement over sewer mainlines not located in public right-of-way.

l. Showing and labeling all existing and proposed fire hydrants.

m. Showing an adequate number of fire hydrants

n. Showing stormwater facility/s meeting the requirements of BGMC 18.250.

o. Showing grading and erosion control in conformance with applicable city standards and standard construction details.

3. Submit a hydrology report that addresses all requirements found in BGMC 18.250.

4. If not already completed, submit a pavement deflection testing report on the adequacy of the existing pavement in NE 149th Avenue.

5. Submit proof of engineering plan approval by Clark Public Utilities for the water improvements.

6. Submit a construction cost estimate for required public improvements for review and approval by the City Engineering Department.

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7. Following the City Engineer's acceptance and approval of the construction cost estimate, pay the required engineering plan review and construction inspection fee which is two (2) percent of the estimated costs of construction. If no public improvements are constructed, the fee will be generated by time spent by staff to review plans

B. **Prior to Final Plat Approval:**

1. Construct all required public improvements and gain engineering acceptance or provide appropriate bonding.

2. Submit a final plat:

   a. That shows easements for public utilities not located in the right-of-way.

   b. With the following note: "No fences are allowed in the sight distance triangle."

   c. With the following note: "All utilities are to be located outside of the sidewalk section and to be underground where possible."

   d. With the following note: "The City of Battle Ground has no responsibility to improve or maintain the private streets contained within, or private streets providing access to, the property designed in this development."

   e. With a note describing the maintenance responsibilities of each lot owner for the private streets.

   f. That shows where any control monuments have been placed.

   g. Showing separate tracts for wetland areas and associated buffers.

   h. With a note: "All new structures shall conform to the setbacks and building heights of the R3 zoning district."

   i. With a note: "All houses shall conform to the neighborhood design standards as listed in BGMC 17.106.040."

   j. With a note: Preliminary plat approvals shall be valid for a period defined in BGMC Section 17.200.130 or as amended by current state law.

   k. With a note: Building permits and all impact fees will be required for each structure to be built. Impact fees will be calculated and shall be paid at the time of permit issuance.

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l. With a note: If any cultural resources are discovered in the course of undertaking the development activity, the State of Office of Historic Preservation and Archaeology and the City of Battle Ground Planning Department must be notified.

m. That shows lot(s) abutting Lot 2 of Cedars Phase II with lot sizes within 25-percent of the 26,130 square foot size of Lot 2 of Cedars Phase II.

3. Submit a private maintenance agreement for private streets.

4. Submit a two-year stormwater maintenance contract for review and/or approval.

5. Submit a covenant running with the land, for inspection of private on-site stormwater facilities, for review by the City of Battle Ground Engineering Department and provide recorded covenant after approval.

6. After staff review, submit a recorded conservation covenant for all affected Lots that contain either riparian habitat areas or shorelines.

7. Submit recorded sewer easement after they have been reviewed by City Engineering Staff.

8. Finalize the BLA:

   a. Note all buffers and easements on the adjusted lots
   b. Submit lot computation data and legal descriptions for the proposed adjusted lots for the City to review.
   c. Said boundary line adjustments shall be submitted to Clark County for recording including, but not limited to the following documents: "Statutory Warranty Deed, New Legal Descriptions for each lot and a reference to the "Record of Survey" and a Record of Survey for the adjusted Parcels.
   d. Submit a copy of the recorded boundary line adjustment to the City of Battle Ground Community Development Department within 30 calendar days of the recording date.

C. **Prior to Engineering Acceptance:**

1. Construct all public improvements, if applicable, and go on a walkthrough with City of Battle Ground Engineering Staff and correct any deficiencies as determined by City staff.

2. A letter shall be provided by the applicant showing that fire flow requirements per BGMC 15.105.180 and 15.105.190 can be met.

3. Submit to the City of Battle Ground a two-year/20-percent maintenance bond for all completed and accepted public improvements.

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4. Submit maintenance covenant per requirements of BGMC 18.250.310(B)(2).

5. Submit complete sets of as-built drawings for all required public improvements for streets and roads, stormwater drainage and control, sanitary sewer and water services, as applicable prior to the issuance of the occupancy permit for review and approval by the Engineering Department. Upon acceptance by the Engineering Department, submit prior to the issuance of the occupancy permit, one (1) Mylar set, one (1) full size paper set, two (2) 11x17 paper sets of As-Built record drawings and one (1) 3.5-inch disk (s) or compact disc version of the as-built drawings in AutoCAD and TIF formats.

D. **Prior to Construction:**

1. Receive signed and approved engineering plans from the City of Battle Ground.

2. Submit a surety bond meeting the requirements of BGMC 12.118.110.

3. Erect and conduct erosion control measures consistent with the approved Erosion Control Plan and City of Battle Ground erosion control standards.

4. Submit evidence that an individual on-site has successfully completed formal training in erosion and sediment control by a recognized organization acceptable to the City.

5. Conduct a pre-construction conference with City engineering and planning staff. Contact the Planning Customer Service Clerk at (360) 342-5047 to schedule an appointment.

E. **Prior to Creation of Impervious Surface:**

1. Except roofs, the stormwater treatment and control facilities shall be installed in accordance with the approved final engineered plans and in accordance with the City of Battle Ground stormwater regulations.

F. **Prior to Building Permit Occupancy:**

1. Install permanent physical demarcation between the abutting houses and wetland and habitat buffers.

APPEAL

This Final order may be appealable to the Washington Superior Court per RCW 36.70C within 21 calendar days after the issuance of the decision.

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DATED this 22nd day of July 2014.

Joe Turner, AICP
City of Battle Ground Land Use Hearing Examiner

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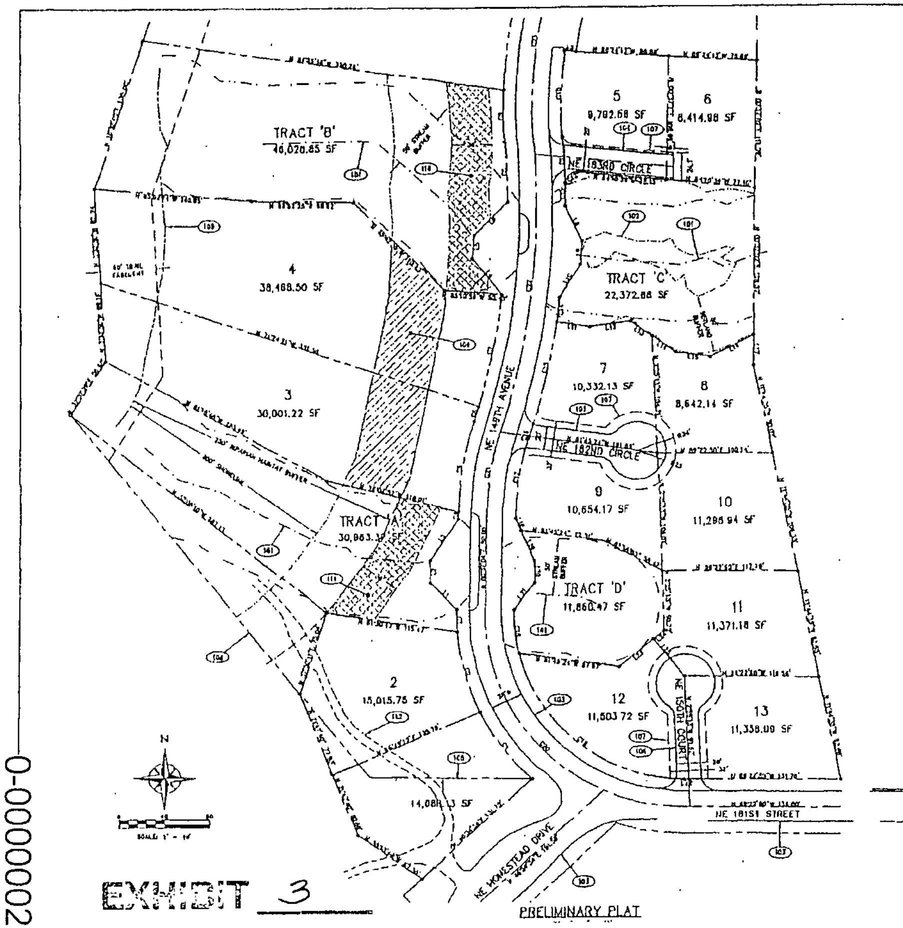

PRELIMINARY PLAT NOTES

(100) ORDINARY HIGH WATER MARK (OHWM) FOR SALMON CREEK AS DELINEATED ON AUGUST 17, 2013 BY THE RESOURCE COMPANY, INC.

(101) SEASONAL STREAM CONTRIBUTING TO SALMON CREEK AS DELINEATED ON AUGUST 17, 2013 BY STAFF FROM THE RESOURCE COMPANY.

(102) CLASS IV WETLAND AS DELINEATED ON AUGUST 17, 2013 BY STAFF FROM THE RESOURCE COMPANY.

(103) EXISTING PUBLIC STREET.

(104) PROPOSED PRIVATE STREET TO SERVE LOTS 5 AND 6. SEE PLAN FOR DIMENSIONS.

(105) PROPOSED PRIVATE STREET TO SERVE LOTS 7, 8, 9, AND 10. SEE PLAN FOR DIMENSIONS.

(106) PROPOSED PRIVATE STREET TO SERVE LOTS 11, 12, AND 13. SEE PLAN FOR DIMENSIONS.

(107) PROPOSED ACCESS EASEMENT. SEE PLAN FOR DIMENSIONS.

(108) EXISTING PROPERTY LINE TO BE RELOCATED IN BOUNDARY LINE ADJUSTMENT PROCESS. PROPOSED BOUNDARIES SHOWN AND DIMENSIONED.

(109) RIPARIAN BUFFER REDUCTION AREA = 10,311.87 SQUARE FEET

(110) RIPARIAN BUFFER ADDITION AREA = 5,868.82 SQUARE FEET

(111) RIPARIAN BUFFER ADDITION AREA = 4,816.83 SQUARE FEET

(112) EXISTING GOLF CART PATH TO BE RELOCATED OUTSIDE LIMITS OF PROPOSED LOTS 1 AND 2.

ADDITIONAL NOTES

ALL LOTS (1 THROUGH 13) ARE PREPARED IN ACCORDANCE WITH CITY OF BATTLE GROUND MUNICIPAL CODE FOR SINGLE-FAMILY DETACHED HOMES IN AN R3 ZONE.

TRACTS 'A', 'B', 'C', AND 'D' WILL BE DEDICATED TO THE CITY OF BATTLE GROUND FOR OWNERSHIP AND PROTECTION OF NATURAL AREAS.

THERE ARE NO CHANGES TO THE EXISTING PUBLIC RIGHTS-OF-WAY.

ALL PAVEMENT DIMENSIONS SHOWN ARE FROM FACE OF CURB/EDGE OF PAVEMENT.

ACCESS EASEMENTS SHALL GRANT ACCESS TO SPECIFIED LOTS AS WELL AS TO THE CITY OF BATTLE GROUND FOR STORMWATER FACILITY INSPECTION PURPOSES. THE ACCESS EASEMENT FOR NE 182ND CIRCLE SHALL ALSO GRANT ACCESS TO THE CITY OF BATTLE GROUND FOR OPERATION AND MAINTENANCE OF THE PROPOSED PUBLIC SANITARY SEWER LINE.

MAINTENANCE AGREEMENTS WILL BE PREPARED FOR EACH PRIVATE STREET THAT WILL COVER THE AREA WITHIN THE ACCESS EASEMENT AS SHOWN AND RUN WITH THE LAND OF EACH LOT THAT TAKES ACCESS OFF THAT ROADWAY.

LINE TABLE

LINE #	LENGTH	BEARING
L1	37.66'	N46° 57' 13"W
L2	20.00'	N00° 31' 50"E
L3	44.94'	N33° 13' 47"E
L4	11.23'	N38° 47' 54"W
L5	20.00'	N03° 15' 17"E
L6	11.23'	N45° 15' 41"E
L7	10.03'	N88° 21' 13"W
L8	33.86'	N24° 51' 01"W
L9	30.00'	N03° 33' 36"E
L10	33.61'	N32° 38' 10"E
L11	29.03'	N01° 10' 30"W
L12	34.17'	N42° 41' 33"E
L13	23.08'	N31° 18' 48"W
L14	25.43'	N51° 10' 48"W
L15	21.78'	N41° 43' 31"W
L16	42.87'	N03° 43' 43"E
L17	27.04'	N05° 37' 02"E
L18	51.01'	N32° 30' 54"W
L19	24.78'	N32° 30' 06"W
L20	36.00'	N80° 37' 10"E
L21	27.80'	N38° 16' 41"E
L22	4.95'	N05° 21' 40"W
L23	34.09'	N50° 34' 12"E
L24	12.30'	N50° 34' 12"E
L25	41.68'	N34° 01' 48"W

CURVE TABLE

CURVE #	LENGTH	RADIUS	DELTA
C1	75.35'	200.00'	21° 35' 38"
C2	74.64'	200.00'	21° 20' 12"
C3	19.42'	202.00'	05° 37' 12"
C4	5.70'	361.00'	01° 08' 37"
C5	85.37'	281.00'	16° 58' 06"
C6	11.47'	421.97'	01° 18' 27"
C7	101.09'	621.97'	09° 18' 48"
C8	52.67'	621.97'	04° 43' 36"
C9	16.00'	391.67'	04° 31' 40"
C10	75.00'	349.47'	12° 18' 45"
C11	41.39'	674.15'	03° 30' 18"
C12	11.64'	10.00'	67° 17' 57"
C13	18.85'	674.53'	01° 39' 28"
C14	23.20'	674.53'	01° 53' 29"
C15	104.46'	674.53'	08° 52' 00"
C16	1.04'	674.53'	00° 05' 53"
C17	75.07'	334.47'	12° 14' 35"
C18	38.18'	150.00'	14° 37' 52"
C19	194.44'	140.00'	79° 33' 06"
C20	271.98'	175.00'	89° 02' 40"
C21	78.51'	260.11'	17° 16' 41"
C22	230.06'	519.43'	25° 50' 27"
C23	211.56'	371.86'	32° 35' 44"

EXHIBIT
5

ROBERTSON
ENGINEERING, PLLC

CEDARS LOTS 1 & 8 SUBDIVISION
BATTLE GROUND, WASHINGTON

PRELIMINARY PLAT

C1.3

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3/23/15 cc'd B. Wolfe, S. Leatham
Saunders, Haedl

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mo

The Honorable Gregory M. Gonzales

FILED
MAR 20 2015
9:41 am
Scott G. Weber, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

In the Matter of the Appeal of Mark and Cindy Avolio, Of the Hearing Examiner's July 22, 2014 Final Order and Approval of the Cedars Lots 1 and 8 Subdivision (SUB: 01-14) (ALT: 01-14)	Case No. 14-2-02337-9 **JUDGMENT AFFIRMING DECISION OF THE BATTLE GROUND HEARINGS EXAMINER** **(Land Use Petition)**

JUDGMENT

This matter was tried without a jury, the Honorable Gregory M. Gonzales presiding. The initial hearing was held on February 17, 2015. Petitioners Mark and Cindy Avolio appeared through their attorney of record, Stephen G. Leatham. Respondent, City of Battle Ground, appeared through its attorney of record Brian H. Wolfe. Respondent Cedars Golf LLC appeared through its attorney of record Damien R. Hall.

The Court received the evidence and testimony offered by the parties, considered the pleadings filed in the action and heard the oral argument of the parties' counsel. On March 6, 2015, the Court rendered an oral decision in favor of the Respondents with respect to all claims and presented oral findings of fact and conclusion of law supporting that decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Today's Date 3/23/15

1. With regards to Petitioners' claim that the Hearings Examiner erroneously interpreted RCW 58.17.215, the Court makes the following findings of fact:

   A) The Hearings Examiner correctly found alteration of Cedars Phase II was limited to the removal of the "Townhouse" designation from lots 1 and 8.

   B) The Hearings Examiner correctly found Lots 1 and 8 are the only portion of Cedars Phase II being altered.

   C) The Hearings Examiner correctly found RCW 58.17.215 only requires approval of a majority of the property owners in the portion of Cedars Phase II being altered, not a majority of all property owners in Cedars Phase II.

   D) The Hearings Examiner correctly concluded the City of Battle Ground application process met the requirements of RCW 58.7.215 because an alteration application was signed by the owners of lots 1 and 8.

2. With regards to Petitioners' claim that the Hearings Examiner's approval violated CC&Rs applicable to Cedars Phase II, the Court makes the following findings:

   A) The Hearings Examiner correctly found the CC&Rs of February 23, 1973 apply to Cedars Phase I and the record contains no substantial evidence to the contrary.

   B) The Hearings Examiner correctly found Cedars Phase II was not annexed into the CC&Rs of February 23, 1973, and the record contains no substantial evidence to the contrary.

   C) The Hearings Examiner correctly found the CC&Rs of February 23, 1973 are not applicable to Cedars Phase II, and the record contains no substantial evidence to the contrary;

   D) The Hearings Examiner correctly found the subdivision of lots 1 and 8 of Cedars Phase II does not violate the CC&Rs of February 23, 1973.

3. The Court made the following conclusions of law:

A) The Petitioners carry the burden to demonstrate any violation of the standards at RCW 36.70C.130. *Ellensburg Cement Products, Inc. v. Kittitas County* 171 Wn. App. 691 (2012), affirmed 179 Wn.2d 737 (2014).

B) The review of the Court for errors of law is *de novo*, with due deference to the facts and findings based on the expertise of the Hearings Examiner in matters of local land use.

C) The decision of the Hearings Examiner is supported by evidence that is substantial when viewed in light of the whole record before the court.

D) The decision of the Hearings Examiner was not an erroneous interpretation of the law.

E) The decision of the Hearings Examiner was not a clearly erroneous application of the law to the facts, and the Court could not conclude with a definite and firm conviction that the Hearings Examiner made any mistake.

FINAL JUDGMENT

Consistent with its oral decision and findings of fact and conclusions of March 6, 2015, the Court enters final judgment on this matter as follows:

A) On all issues raised the appeal of Mark and Cindy Avolio is denied and the ruling of the Battle Ground Hearings Examiner is affirmed.

[*Signature page to follow.*]

DATED: March 20, 2014

The Honorable Gregory M. Gonzales

By: _____

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

MARK AVOLIO; JOHN BAKER; MAUREEN DeARMOND; and ANDREW MERKO,	)	
	)	No. 15-2-01546-3
Plaintiffs,	)	
	)	Court of Appeals
vs.	)	No. 48016-6-II
	)	
CEDARS GOLF, LLC,	)	
	)	
Defendant.	)	
	)	

VERBATIM REPORT OF PROCEEDINGS FROM CD

MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

HELD BEFORE THE HONORABLE

ROBERT LEWIS

* * *

August 20, 2105

Clark County Courthouse

Vancouver, Washington

SINEAD R. WILDER, RPR, CSR, CCR
Court Reporter

Avolio, et al. v. Cedars Golf

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EXHIBITS

(None)

VANCOUVER, WASHINGTON, THURSDAY, AUGUST 20, 2105

1:32 p.m.

* * *

P-R-O-C-E-E-D-I-N-G

THE COURT: This is the matter of Mark Avolio and others versus Cedars Golf, LLC, 15-2-01546-3, on today on Cross-Motion for Summary Judgment.

And I've received and reviewed motions from both sides with accompanying affidavits and declarations, responses and replies. So I've read all of that material and consulted the file.

So you each have 15 minutes to present your statement. I think, normally, we'd start with the plaintiff. But if you want to start the other way, it doesn't make any difference to me. You both have motions. So --

MR. ERIKSON: Well, we crossed. Does that matter?

THE COURT: It doesn't make any difference to me.

MS. RIDENOUR: I guess --

THE COURT: Go ahead.

MS. RIDENOUR: -- Your Honor, from my perspective -- Adele Ridenour here on behalf of

Defendant Cedars Golf, LLC.

From our perspective, Your Honor, our motion, if you are inclined to grant it on the issue in claim perfusion, would prohibit plaintiffs' cross-motion.

And obviously, if your finding's in our favor, there's no need to deal with the issues of whether or not the CC&Rs actually apply, if you find that the prior land use decision had preclusive effect.

So I'm -- I'm happy --

THE COURT: What I want to do is, I'm giving you each 15 minutes to argue your motion, and against the other motion. So you can divide your time any time you -- way you want.

But don't expect you're going to get 15 minutes for your motion and then 15 minutes for the other motion. That's not --

MS. RIDENOUR: Understood.

THE COURT: -- what I'm --

MS. RIDENOUR: Understood, Your Honor. I just wanted to lay out the procedural framework in terms of decision-making.

So --

THE COURT: Go ahead.

MS. RIDENOUR: -- I'm happy to go first. But if counsel would like to go first ...

All right. So here on defendant's motion for summary --

THE COURT: Both identify yourselves --

MS. RIDENOUR: Sorry.

THE COURT: -- for the record.

MR. HALL: Yeah. Damien Hall with Ball Janik, also here on behalf of Cedars Golf, LLC.

I'm here to provide any factual insight into the prior review, as I argued it in front of Judge Gonzalez.

THE COURT: Okay. Go ahead.

MS. RIDENOUR: All right. Thank you, Your Honor.

As set forth in defendant's motion for summary judgment, we have argued that the claims at issue in this matter are barred by two doctrines, the doctrines of issue preclusion and claim preclusion.

As I see it, Your Honor, the elements of issue preclusion and claim preclusion in this case are not much disputed.

What is disputed is plaintiff has argued that the prior land use decision does -- did not have jurisdiction to decide the issue of whether the CC&Rs

apply to the lots in this case.

We disagree, Your Honor. The hearings examiner had direct jurisdiction to consider the issue of the application of the CC&Rs under RC 8 -- RCW 58.17.215.

Judge Gonzalez, located directly next-door, then reviewed that decision under the LUPA Act.

He also had jurisdiction to decide the issue, not only because it was a land use decision, and under LUPA he has the right to review it, both for errors of fact and errors of law; he has the right to review the decision as a land use decision. CC&Rs are encompassed within the definition of a land use decision.

The exact rule states: A land use decision means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals.

On and included in subsection B is an interpretive or declaratory decision regarding the application to a specific property of zoning, or other ordinances or rules regulating the improvement, development, modification, maintenance or use of real property.

THE COURT: Are you saying, in the city of Battle Ground, that if a person -- let's say there's no request for a permit or anything like that. If one property owner in a development wants to sue the other property owner for encroachment of restricted covenant, they have to go to a hearings examiner first?

MS. RIDENOUR: No, no, no, Your Honor. I'm saying that, in this specific case, the subdivision of lots is something that the land use hearing examiner had authority to review, and as part of that review can consider restrictive covenants.

Within the LUPA Act, the Superior Court then has the right to review that decision. Inclusive within the definition of what is considered a land use decision is the interpretation and determination of the CC&Rs.

Which is what happened in this case. The hearings examiner found they did not apply to phase two, lots one and eight. The Superior Court then affirmed that decision.

And we're asking Your Honor to find that that decision has preclusive effect here on the claims as alleged by the plaintiffs.

We cited to Your Honor the case of Lane

versus Skamania. That was an unpublished opinion, later then cited in a published opinion.

THE COURT: I won't consider it --

MS. RIDENOUR: Okay.

THE COURT: -- and you shouldn't argue it further.

MS. RIDENOUR: I will -- I will just -- its published opinion, however, did talk about the facts of that opinion.

And the only reason that I cited it at all, Your Honor, is to highlight to you -- for your consideration that hearings examiners and Superior Courts have considered restrictive covenants in the context of a land use case.

On the other side, counsel has -- for the plaintiffs has not provided any case law that suggests that a hearings examiner and a Superior Court, when left with the decision of whether or not lots can be subdivided, can consider restrictive -- cannot consider restrictive covenants and apply them.

We don't have a case that says they can't consider it. In fact, the statute says they can and must.

If Your Honor finds that our motion for a claim and issue preclusion does not go forward, then

we're left --
THE COURT: They don't have to -- they don't have to review it in all situations, do they? It's just in the situation where the statute says that because of -- the proposal that's being made to the City involves a covenant that's going to be violated, that sort of thing, that a certain number of people deal with it.
MS. RIDENOUR: That is -- that is --
THE COURT: If it's not that situation, then, normally, a hearing examiner wouldn't consider whether covenants and restrictions were involved.
MS. RIDENOUR: That is correct, Your Honor. We're not talking about removing parties' abilities to enforce any kind of restrictive covenant. This is a very specific one. One that would be implicated in a subdivision of lots.
If Your Honor finds that our motion for summary judgment should be denied, then we get to plaintiff's motion -- cross-motion for summary judgment on whether the CC&Rs apply.
We would submit, Your Honor, that the CCRs -- CC&Rs are ambiguous. The interpretation of a covenant is just like a contract. We look to the parties' intent.

In this case, when the CC&Rs were recorded, there was only one plat that was actually numerically platted, and that was phase one.
According to the definition of CC&Rs -- excuse me.
According to the definition of, Lot, under the 73 CC&Rs, lot has to be a numerically platted lot. That was only in phase one at the time.
We had other -- according to the CC&Rs, there is a process by which other properties can be annexed into the CC&Rs, which was done for phases three and four. That is the Exhibit 2, I believe, to the Kris Eklove declaration.
And then Exhibit B to my declaration is for the phase four annex. That was the successor in interest to the original declarant.
For phase two, we don't have the same annex or declaration submitting these lots to the restrictive covenants.
There's been -- under the CC&Rs, after seven years from when they're recorded, if -- that's the length of time the declarant had to automatically annex those properties.
After seven years you go to a vote of the homeowner's association. And you have to receive a

two-thirds majority.
There's no evidence that that has happened in this case, and, therefore, they do not apply.
Alternatively, if you find that they do apply, then we get to our last argument, Your Honor, which is that they've been repeatedly violated. And therefore, based on the doctrines of equity, you should not apply them and enforce them against my clients here.
The two areas in which they have been repeatedly violated are the multifamily construction exclusion. Under article five, it talks about single-residence-only construction. However, townhomes have been built in phase one, as well as lots resubdivided in phase three.
And phase two, in fact, from the day it's been platted, has -- the lots vary -- at issue in this case have been platted as for townhouse area -- townhomes. Which again, is contrary to article five.
So unless Your Honor has further questions --
THE COURT: Well, that wouldn't be something I'd decide on summary judgment, other than to say that there's a factual dispute that needs to be resolved.
I couldn't -- couldn't find for your client

on that issue here.
MS. RIDENOUR: Correct, Your Honor. We're just asking you to find that a question of fact would remain as to that issue.
THE COURT: I guess my only -- the question was some reference to the fact that if plaintiff here were in privity with one another for res judicata purposes, although they had the same lawyer, how else would they be in privity with one another?
MS. RIDENOUR: Their interests were aligned below. In addition, the three remaining plaintiffs other than Mr. Avolio didn't appeal. So they didn't -- they failed to exhaust their administrative remedies in that sense.
Their interests are aligned. Their relief that they're requesting, which is basically that the subdivision request -- plat not go through, is the same relief that they requested below.
It's the same claims, the same issues, the same facts.
And then, therefore, Your Honor --
THE COURT: I understood that for collateral estoppel.
But for res judicata, in order to find privity for the -- with Mr. Avolio, who is the one --

only one who appealed, if I remember correctly, wouldn't I have to find they had some legal relationship other than that they had the same attorney?

MS. RIDENOUR: The standard, Your Honor, for res judicata is that the persons and parties involved in the prior lawsuit need not be identical, but at least in privity, as Your Honor stated.

And a right -- a question or a fact put in issue and determined by a court of competent jurisdiction as ground for recovery cannot be disputed in a subsequent suit between the same parties or those that are in privity with them.

And Your Honor, we -- we believe that they are in privity, based on -- the arguments that they were making to the hearings examiner, the evidence that they were presenting trying to prohibit the subdivision of these lots, it's the same arguments that they could have also made in a LUPA appeal, and chose not to.

So we argue, Your Honor, that they are in privity. It's the same arguments that they were making below, Mr. Avolio then tried to make on appeal.

THE COURT: Okay.

Next.

MR. ERIKSON: Your Honor, we start with the rule that municipal corporations cannot exercise powers except those expressly granted or necessarily implied. And that would do something novel and actually look at the statute.

I have highlighted the areas of interest.

The first paragraph of 58.17.215 is not any sort of delegation at all. It is a submittal requirement. It says, The application shall contain. That's the burden that falls to the applicant.

The second paragraph talks about notice

The third paragraph does include a delegation. It says, The legislative body shall determine the public use and interest.

Well, that's the same delegation that -- for the subdivision at, generally, 58.17.110.

So one thing we know is it hasn't been expressly delegated that the examiner should interpret restrictive covenants.

But in addition, we know that there is -- there's no necessary implication, because the express delegation is public use and interest, not private use and interest. A restrictive covenant is a private -- uniquely private covenant.

In fact, in Viking Properties v. Holm, the

City had no authority to enforce -- enforce or invalidate con -- restrictive covenants.

THE COURT: I guess what I keep coming back to, isn't that what your clients asked the hearing examiner to do?

They didn't come in and say, By the way, hearing examiner, don't -- don't enforce these restrictive covenants, whatever you do here, because you don't have authority to do that.

They came in and said, We want you to deny this application, because there's a restrictive covenant that prohibits -- prohibits subdivision, and we want you to enforce it.

So they didn't have any problem with the idea that if he ruled for them, he had the authority to enforce the covenant. It's only after he said, No. I'm not going to do it, that all of a sudden he didn't have the authority.

MR. ERIKSON: You're correct.

THE COURT: So --

MR. ERIKSON: That's what prior counsel did.

THE COURT: Isn't that what collateral estoppel is all about --

MR. ERIKSON: No. Collateral --

THE COURT: -- that having had an

opportunity to deal with the issue, and -- and having lost, you can't now come back and take another bite at the apple?

MR. ERIKSON: No. Because we take a position that collateral estoppel only applies to decisions within jurisdiction.

And support for that is in Asche, where -- the case involved a height restriction. The hearings examiner said, Well, height restriction's not violated.

Then the neighbors sued. And they had many nuisance claims. But the one that remained was per se nuisance. Which, of course, depends on violation of the ordinance.

The Court said, Well, okay. That -- that depended on violation of the ordinances. You had to go through LUPA there.

But they also ruled that where the case doesn't involve validity of the ordinance, then it's not precluded by LUPA.

I think I've cited to that in the materials. I'd like to cite it again. I'm not going to be able to.

Moving on, then, to talk about jurisdiction. The jurisdiction of the examiner is laid out in the

code -- in the Battle Ground municipal code. And it's zoning, comprehensive plan. It's subdivision. It's variances and other applications for land use approval.

Our courts in -- in Chausee have said that, Whether a particular piece of property is subject to a land ordinance is the sole jurisdiction of the examiner.

Superior Court on Appeal is also limited under Durland to actions defined by LUPA as land use decision.

Of course, LUPA defines land use decisions as application for project permits, interpretations, enforcements. Doesn't talk about, obviously, restrictive covenants.

LUPA only replaces the writ of certiorari for appeal of land use decisions. It doesn't replace anything else. That's the express languages of subsection 030.

And in Chausee, the hearings examiner -- excuse me. The Superior Court properly determined that the hearing examiner and County counsel are without jurisdiction to (unintelligible) equitable issues.

Well, we're here today not only for a --

well, we might be here a little bit longer than today for declaratory judgment. And we're also seeking a permanent injunction.

Oh. Yes. The quote that I wanted to give you earlier from Asche v. Bloomquist is that, Claims that do not depend on the validity of a land use decision are not barred.

As to covenant interpretation, what's important here is that there are only two outcomes.

Remember the map -- I think you've got one attached to the Beseda declaration. It included a -- a large area that was Exhibit A, and a small portion that was left out for C. So they're almost coextensive.

I think it's -- it's not ambiguous, because A clearly defines what's included under the covenant. If it's not ambiguous, then decisions should be entered.

If, on the other hand, Exhibit C somehow makes it ambiguous, somehow denies phase two, it also denies all the other phases. Because they're also all in phase C.

I do want to respond to abandonment.

Abandonment requires habitual and substantial violations. But the most important case,

St. Luke's Evangelical, says that, Before affirmative relief by way of cancellation or modification of a restriction -- restrictive covenant is available, a material change in the character of the neighborhood must have occurred so as to render the perpetuation of the restriction of no substantial benefit to the dominant estate -- my clients.

The only fact which could affect abandonment is the allegation that in 1977, phase three, lot one was replatted into 13 lots. It's a replat. That's what they're doing here.

It's across a fairway in another phase. It doesn't affect -- it's geographically removed. It -- it doesn't affect the single lot sub -- density in our subdivision.

And of course, abandonment depends upon the number of violations and the extent. There's only been one.

THE COURT: One of the plaintiffs has a lot in phase one, and the rest are in phase two. Is that lot -- the phase one lot on the other side of the fairway, too? Or is that --

MR. ERIKSON: All the phases are separate. One, two and three are separated by fairways.

THE COURT: Okay. Thanks.

MR. ERIKSON: And interestingly, the way the thing got annexed, our lots are all -- all the lots -- all the improved lots are outside of the city. These two lots are inside the city. Probably why they signed the -- the application.

When it comes to preclusion, Henderson v. Bardahl, said that, Preclusion only applies when an issue has been finally determined by a court of competent jurisdiction.

So if the hearings examiner doesn't have jurisdiction, preclusion can't apply to his holding, because it was outside of his jurisdiction.

A little bit like in Halverson, they applied for subdivision. The neighboring owner came in and say, I own this property. I've been adversing this property. I've been here more than ten years.

The hearings examiner said, Not my bailiwick. You can go to court.

She did. And, in fact, she went there to quiet title.

Now, if you read it, she'll -- she also sneaked in a certiorari petition just at the last moment. So she didn't fail to exhaust. But that's not the basis of the decision.

The Court said, We will quiet title.

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notwithstanding the proof plat, because the examiner didn't have jurisdiction to grant it. And the reason they didn't have jurisdiction to grant it was the rule said that all the owners have to sign.

She was an owner after a run of ten years. She hadn't signed.

We agree with you that there's no privity for purposes of collateral estoppel. We think that the fact that the two proceedings infringe on different rights is even more important.

The LUPA appeal involved a governmental infringement on the right to use your land -- their land. And the present action involves infringement upon plaintiffs' rights to enforce a restrictive covenant. Very different things.

Even if they had been joined, of course, as LUPA allows, they'd have to be bifurcated. Discovery would have had to have taken place. This hearings examiner can't make fact findings on issues that are not within his jurisdiction.

And that -- that's important. Because when we're talking about collateral estoppel, both the U.S. Supreme Court and the Washington Supreme Court focus on the fact that administrative agencies only have preclusion as to factual findings, not -- not

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legal determinations.

Well, the interpretation of a covenant is a legal determination. Therefore, one, he didn't have jurisdiction to make.

Even if you gave his findings preclusive effect, putting the law in there and -- and deciding how that plays out is not something he could do.

So really, all you're looking at here is surplusage. There's not a decision that could preclude you in any way.

I've only got 15 minutes, and I think I covered most of it.

THE COURT: Okay.

MR. ERIKSON: I'll reserve to respond, if that --

THE COURT: Okay.

MR. ERIKSON: -- comes up.

THE COURT: Do you have rebuttal?

MS. RIDENOUR: Only a few points, Your Honor.

The hearings examiner does have jurisdiction to apply the state subdivisions -- subdivision statute, which is RCW 58.17.215.

As I previously stated, Superior Court then has decision -- jurisdiction to review that decision.

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And the application of the CC&Rs in this specific context follows within the definition of a land use decision.

The Vikings case that plaintiffs' counsel cites, it has to deal with -- the City said it didn't have authority to enforce a restrictive covenant in considering its urban growth boundary application.

Again, totally different than the subdivision statute, which the land use examiner did have jurisdiction to decide.

The Asche -- Asche case, notably, actually, it -- it talked about the fact that the -- Asches, in that case, they wanted to argue that they should have a separate action for injunctive relief, because that's not something they could have gotten in LUPA. Which is one of the arguments the plaintiff made in their briefing.

However, in that Asche case cited by plaintiffs, the Court actually went to lengths to say, No. Injunctive relief is something you could seek in LUPA.

And that is on page 793 of the opinion, where the Court states: The County responds that LUPA allows a stay of action pending review, and that reversal still provides the same relief as an

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injunction via a nuisance claim. The County's position is correct.

The validity of the subdivision requirements and meeting the signature requirements is, again, something that the hearings examiner had the authority to look at. Therefore, the Asche case is distinguishable on that point, Your Honor.

And then the right of -- the last point I wanted to make is just that the right of relief really is the same, seeking declaratory relief that the CC&Rs prohibit subdivision of the lots at issue in this case.

The chart, if I may approach, Your Honor, that I cited in our reply brief clearly talks about what Mr. Avolio argued for in his land use petition and opening brief, the judgment that was made, and then the complaints alleged here.

The claims, issues and facts are all the same. That is what claim and issue preclusion is intended to bar is relitigating these same issues here.

And lastly, the only other point I wanted to make, Your Honor, we've been talking about jurisdiction. And the argument from plaintiff being that the Court -- Superior Court and hearing examiner

did not have jurisdiction to decide these issues.
I want to note again that Mr. Avolio stipulated -- and we put that in our brief -- stipulated to jurisdiction at the Superior Court level.
So we think that argument has been waived, that they couldn't -- that the Superior Court couldn't decide the issue of whether the CC&Rs apply. There was no comment that this would be limited to the land use proceeding.
THE COURT: Well, I mean, they stipulated to the jurisdiction that -- that the Superior Court had jurisdiction to review the hearing examiner's decision.
They didn't necessarily stipulate that the hearing examiner had the authority to make every factual comment he made in the course of his decision.
I mean, hearing examiners are like judges. They often run on about a bunch a things that aren't really necessary to what they have to decide.
MS. RIDENOUR: They stipulated to jurisdiction on the issue that the Superior Court could review the direct issue, which was before the Court, whether the CC&Rs apply to phase two.
And that was decided. They found it didn't

apply. And then, therefore, we believe that ruling is controlling, Your Honor.
All right.
THE COURT: Do you have anything else?
MR. ERIKSON: Just a couple.
The LUPA requirement for the procedural motion and the procedural order is not that they stipulate to the precise issue of the case, but just that there are no -- no jurisdiction issues to proceed. That's all they did. None to proceed for appeal.
But there is Williams v. Leone & Keeble, which is 171 Wn.2d 726 -- and I'm looking at 730 -- says, Subject matter jurisdiction does not turn on agreement, stipulation or estoppel.
So it doesn't matter what they might have agreed or stipulated to. They can't create or take away jurisdiction that way.
I'll -- I'll put that in -- in additional authority.
Also, I wanted to comment that the defendants rely on James v. Kitsap County for the proposition that a hearings examiner and/or Superior Court on review may decide the application of a restrictive covenant when -- when determining whether

to approve a petition to subdivide a lot.
The actual holding in James was, We find that the imposition of impact fees as a condition on the issuance of a building permit is a land use decision subject to LUPA.
Neither the words, Restrictive, nor, Covenant, appear in the case. So it's not authority on that proposition at all.
I didn't mention that in my brief, so I thought I should tell you here.
Your Honor, we -- we've asked you to reject the defendant's motion. And if you like my analysis, then to grant ours.
THE COURT: All right. Well, thank you both.
I would indicate that I appreciated both counsel very thoroughly presenting their case in writing, and their responses and replies, and giving me the documents in reference to the other case that was involved. So I had the opportunity, before I came in, to look over the issues and the cases.
And so I appreciated that. That -- that really assisted in my analysis and in understanding your arguments.
And it's true, in most cases, I would think,

that a hearing examiner, in ruling on whether a -- an application for a division of property, as in this case, is bound -- able to consider certain things and not to consider others.
And if they go outside what they're able to consider in making their decision, then courts are not necessarily bound by the fact that they did that.
And I think they do -- I mean, I don't mean to be rude, then. But I've read some fairly lengthy decisions by hearing examiners that talk about a lot of things that aren't right on point for what they have to decide, whether or not the publishing land use decision is allowable under the law or not.
So the fact that they say it, and the fact that even -- that parties may bring things up in the course of it, that's part of the summary that goes on, summary about what people say, and what they say in their letters, and that sort of thing.
And I guess that's-- that's interesting for purposes of the record. But it doesn't always provide a basis for a legal decision related to the land use action.
However, in this case, the application to subdivide the property was dealt with under RC -- among other things; there were other issues -- but was

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dealt with around RCW 58.17.215, and as counsel has provided the statute.

And that indicates that in that sort of situation, where you have a -- an application for a subdivision of property -- and just quoting from the statute -- if the subdivision is subject to restrictive covenants, which were filed at the time of the approval of subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all the parties agreeing to terminate or alter the covenants.

So in that particular situation, the Court has to make certain findings in order to allow things to proceed.

And so in this case, the record is clear. And there's no real dispute.

Down below, the plaintiffs in this case, represented by counsel, participated in the proceeding, submitted materials to the hearing examiner, and told the hearing examiner that, It's our position that you should make the factual determination that this property that is seeking to be subdivided is subject to restrictive covenants. And that the application would result in a violation of

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those covenants. And therefore, you should deny the application, because it doesn't have the signature of all these parties.

So the plaintiffs in this case asked the hearing examiner to make certain findings -- factual findings: One, that the subdivision that we're talking about was subject to restrictive covenants. They wanted to find that as a fact.

And two, that the application for the alteration would result in a violation of the covenant.

And three, that the application was defective as a result of not having the signature.

And as a result of making those factual findings, they wanted the hearing examiner to deny the land use decision.

The people on the other side said, We want you to make factual decisions, too, about the statute. We want you to find that the -- that the subdivision is not subject to the restrictive covenants.

And that even if it were subject to the restrictive covenants, that the alteration, in this particular case, would not result in a violation, and that sufficient signatures from the people who are affected.

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So the hearing examiner had, at the request of both parties, to make a factual decision in order to apply the law, a law which they're required to apply in this circumstance.

It wasn't some lark that the hearing examiner went off on. Both sides said, You need to make certain factual decisions. We're going to give you the information on how to make them. And we're going to argue the law to you. And we want you to decide. Because you have to decide in order to decide whether this should be permitted or denied.

The hearing examiner took all of that information from plaintiffs and defendant, and then made a decision, which was adverse to the plaintiffs, and favorable to the defendant.

After that was done, three of the plaintiffs decided not to pursue appeal of that land use decision.

One of them did decide to appeal and went before the Superior Court, arguing not that the hearing examiner did not have the jurisdiction, or did not have the authority to make these factual legal decisions concerning the decision they had to make under 58.17215, but that they'd made them incorrectly. That they, in fact, had made improper factual and

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legal finding.

And the Superior Court, after fully hearing that issue, decided that they didn't make a mistake. That, in fact, they had decided correctly.

And then Mr. Avolio, I believe it was, decided not to appeal further the LUPA decision.

So the question is, being that's the undisputed record, whether that posture of the case means that the plaintiffs are now barred, by legal doctrine from raising, in essence, the same issue again.

And I don't think that I would find as a -- that -- it's essentially the same issue. They want findings that the subdivision is subject to the restrictive covenants; that the application for alteration would result in a violation; and that the application was improperly granted as a result, and therefore, should not be allowed to proceed.

And they are precluded from doing that. Mr. Avolio, I think, is precluded from doing it on both the basis of res judicata and collateral estoppel. Not to mention that they're in privity with each other in the sense that the term, Privity, is used in the law. They may have aligning interests.

But on the other hand, almost everybody in

the subdivision might have aligning interests.
And so if I were to follow that logic, anybody who came in who had absolutely nothing to do with the process up to this point, but decided to come in and challenge what was going on would be in privity to everybody else. And that's simply not the way the term, Privity, is used.
However, as to the other three plaintiffs, they are collaterally estopped from raising the same issues. They had a full opportunity to litigate those issues before a person with authority to make a decision, who did make a decision. And now they wish to raise the same issues again.
So I'm granting the defendant's motion, and denying the plaintiffs' cross-motion.
MR. HALL: Thank you, Your Honor.
MS. RIDENOUR: Thank you, Your Honor.
THE COURT: We need it on for presentation -- September 4th is my next docket. Do you want to set it on for then?
MS. RIDENOUR: For presentation of the order?
THE COURT: September 4th, then, at 9:00. And if both of you come to the agreement on the form of the document, you can certainly bring it before

then.
MR. ERIKSON: Okay.
MS. RIDENOUR: Thank you, Your Honor.
MR. HALL: Thank you, Your Honor.
THE COURT: Thank you.
MR. ERIKSON: If you get it to me, then we won't have to come over. We'll --
MS. RIDENOUR: Just sign it (unintelligible). Okay.
MR. HALL: All right. Thank you.
THE COURT: Anything further?
MR. ERIKSON: Thank you.
MS. RIDENOUR: Thank you, Your Honor.
MR. HALL: Thank you.
(The proceeding concluded at 2:07 p.m.)

CERTIFICATE

I, Sinead R. Wilder, a Certified Court Reporter for Washington, pursuant to RCW 5.28.010 authorized to administer oaths and affirmations in and for the State of Washington, do hereby certify that after having listened to an official audio recording of the proceedings having occurred at the time and place set forth in the caption hereof, that thereafter my notes were reduced to typewriting under my direction pursuant to Washington Administrative Code 308-14-135, the transcript preparation format guidelines; and that the foregoing transcript, pages 1 to 34, both inclusive, constitutes a full, true and accurate record of all such testimony adduced and oral proceedings had on the official audio recording, to the best of my ability, and of the whole thereof.
Witness my hand and CCR stamp at Vancouver, Washington, this of , 2015.

SINEAD R. WILDER
Certified Court Reporter
Certificate No. 3227