

65279-6

65279-6

No. 65279-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

F.G. ASSOCIATES,

Appellants,

v.

GRAHAM NEIGHBORHOOD ASSOCIATION, a Washington non-profit
corporation; RAY STRUB; GEORGE WEARN; JAMES L. HALMO; and
PIERCE COUNTY,

Respondents.

BRIEF OF APPELLANTS F.G. ASSOCIATES

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I. INTRODUCTION

This is a Land Use Petition Act (LUPA) appeal commenced by respondents Graham Neighborhood Association, Ray Strub, George Wearn and James Halmo (collectively referred to as “Graham Respondents”). The Graham Respondents brought this LUPA appeal to challenge the Pierce County Hearing Examiner’s decision approving a Preliminary Plat for a six-lot commercial development known as Mountain View Plaza. Mountain View Plaza will be located next to an existing commercial development, on a major arterial near its intersection with a state highway.

Although the Graham Respondents are the respondents at this stage of the proceeding, they retain the burden of proof, since they initiated the LUPA appeal and since LUPA requires this Court to directly review the decision of the County Hearing Examiner. Though the Graham Respondents make several arguments in their LUPA Petition, their primary challenge is to the Examiner’s conclusion that the application for the Mountain View Plaza development was sufficiently complete to vest the application.

Most of the Graham Respondents’ arguments are made years too late. The application for subdivision approval was deemed complete and vested 14 years ago. Most importantly, the vested rights

at issue here were previously litigated. The County Hearing Examiner specifically ruled in 1998, following a hearing with notice to the public, that the 1996 application for the Mountain View Plaza 6-lot commercial subdivision had vested the project for the commercial uses now proposed. There was no appeal from that decision.

Even without that ruling, the 2009 Examiner's decision to approve Mountain View Plaza is well supported by evidence in the record.

- The proposed uses are allowed outright by the vested Rural Activity Center (RAC) zoning.
- The site adjoins an existing shopping center and is on a major arterial near a major signalized, highway intersection.
- The Examiner followed the recommendation of the County planning staff and the Graham Advisory Commission, a local planning advisory board; both agreed the proposal met all applicable standards.
- The Graham Respondents offered no expert reports to refute the conclusions of Pierce County's engineers and biologists, or the reports of traffic engineers, geologists and fish and wildlife experts who supported the application.

There is no basis under LUPA to overturn the Hearing Examiner's findings. This Court should reverse the trial court and affirm the Examiner's decision to approve the preliminary plat.

II. ASSIGNMENTS OF ERROR

Appellant F.G. Associates assigns error to the trial court's April 13, 2010 Order On Petition Under Land Use Petition Act reversing the Examiner's approval of the Mountain View Plaza plat. (CP 236 – 38) More specifically, F.G. Associates assigns error to the trial court's conclusion that the preliminary plat application was not a "fully complete application" as required by RCW 58.17.033 and the Pierce County Code. F.G. Associates assigns no error to the decision of the Hearing Examiner, which is set forth at AR 30-51 and AR 1-6.

The issues presented by this assignment of error are as follows:

1. Is the Hearing Examiner's finding that the Mountain View Plaza 1996 preliminary plat application was "complete", as defined by Pierce County's code and review practices in effect in 1996, supported by substantial evidence in the record?
2. May a project opponent challenge an application as incomplete when the vested status of the application was already litigated in a prior public proceeding before the Pierce County Hearing Examiner?

3. May a project opponent challenge an application as incomplete, for the first time, after a 13-year review process and 11 years after a Hearing Examiner decided the application was vested?

III. OVERVIEW OF RELEVANT LAW ON VESTING AND THE LOCAL REVIEW PROCESS

The primary focus of the Graham Respondents' appeal (and the sole basis for the trial court's reversal) is their claim that F.G.'s project application was not sufficiently complete to establish vested rights. Their claim presents a fact-intensive question and the unique facts in this case must be evaluated in the appropriate legal context. Prior to evaluating the facts, it is useful to have an understanding of the nature of protected vested rights in general, the rules of review in place at the time F.G.'s application was accepted, and finally, the "give and take" process through which local governments review subdivision applications. Accordingly, F.G. Associates first sets out an overview of the relevant legal framework before presenting the Statement of the Case.

1. A Complete Application Establishes Constitutionally Protected Vested Rights.

Vested rights are constitutionally and statutorily protected. Vesting provides legal protection for property owners to ensure that subsequently enacted regulations will not impair the project that he or

she has lawfully applied to build.¹ Vested rights provide certainty and fairness to property owners and guide government staff in applying the laws.

The purpose of the vesting doctrine is to allow developers to determine, or “fix,” the rules that will govern their land development. The doctrine is supported by notions of fundamental fairness. As James Madison stressed, citizens should be protected from the “fluctuating policy” of the legislature. Persons should be able to plan their conduct with reasonable certainty of the legal consequences. Society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.

West Main Associates v. City of Bellevue, 106 Wn.2d 47, 51, 720 P.2d 782 (1986)

In 1987, the Legislature expanded vested rights to apply to subdivisions (or “plats”). RCW 58.17.033. The statute provides that a proposed subdivision of land “shall be” considered under the zoning and land use controls in effect at the time a completed application for preliminary plat approval is submitted to the local government. RCW 58.17.033(1). Constitutional due process requires that requirements

¹ “Although less than a fee interest, development rights are beyond question a valuable right in property.” *Louthan v. King Cy.*, 94 Wash.2d 422, 428, 617 P.2d 977 (1980), relying on *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, *reh’g denied*, 439 U.S. 883, 99 S.Ct. 226, 58 L.Ed.2d 198 (1978).

for a complete application be reasonably set forth in the governing local ordinance to avoid being unduly vague. *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668, 675-76, 86 P.3d 1169 (2004).

2. The Requirements For A Complete Application Are Locally Established.

The statute extending vested rights to plats expressly states that the requirements for a complete application are determined by local ordinance.

A project permit application is complete for purposes of this section when it meets the procedural submission requirements of the local government and is sufficient for continued processing even though additional information may be required or project modifications may be undertaken subsequently.

RCW 58.17.033(2).

Pierce County, like other Washington municipalities, has in recent years enacted detailed and definite parameters to determine if a subdivision application is complete. However, in 1996, the requirements were substantially less clear. In fact, at that time, the Pierce County Code did not even expressly define a complete application. The entire filing requirements for a subdivision application were set forth in former PCC 16.06.020:

A preliminary plat of a proposed subdivision and/or dedication of land

located in the unincorporated areas of Pierce County shall be submitted for approval by the Examiner by filing with the Pierce County Planning Department, an application, paying the application fee, filing sixteen (16) copies and one (1) reproducible copy of the proposed preliminary plat, submitting a list of adjacent land owners as specified herein, submitting an approved Environmental Worksheet and when appropriate, an application for a zone amendment. Said application for zone amendment may be considered with the application for preliminary plat approval.

This provision did not identify any specific information or detail that had to be included in the forms for an application to be deemed complete as Pierce County's Code does today. Instead, the County practice was to simply assure that each required document was submitted in the number specified by the Code. No evaluation of the substance of the documents themselves was made. (7-23-09 hearing, RP 3-4, 6-7, 20-21)²

As noted earlier, due process mandates that requirements for a complete application must be reasonably set forth in the governing local ordinance to avoid being unduly vague. *WCHS, Inc., supra*, 120 Wn. App. at 675-76. The actual requirements for a fully complete

² References to the record are to the exhibits in the Administrative Record (AR) and to the verbatim Reports of Proceedings (RP) of the two different hearings on April 29, 2009 and July 23, 2009. The administrative record and transcripts were transmitted by the superior court clerk in their original form without clerk's paper numbers.

applicant cannot be unclear and discretionary. *Id.* at 676. Because of the due process considerations, the local government's normal and regular practices in implementing or applying the applicable code to land use applications are especially relevant when courts review applications "after the fact" to determine if they were "complete". *Friends of the Law v. King County*, 123 Wn.2d 518, 524-25, 869 P.2d 1056 (1994).

In *Friends of the Law v. King County*, the Supreme Court addressed a plat application, and like here, the local code at the time the application was submitted did not set forth a clear definition of the requirements for a complete application.³ The Court found the actual requirements for a fully completed application in King County at the time in question to be "highly ambiguous," especially in light of the County's implementation practices. *Id.* at 524. As in this case, there were allegations that the King County staff may not have been as strict as it could have been in implementing the code provision.⁴ *Id.* The

³ The Court noted that, though RCW 58.17.033 appears to set forth unambiguous requirements for a complete application and take a "zero tolerance" policy for compliance, the Legislature left the definition of a complete application to the individual local governments. *Friend of the Law, supra*, 123 Wn.2d at 525, n.3. As a result, the requirements for a complete application may be ambiguous, depending on the applicable local code. *Id.* at 524-25.

⁴ The King County Code required that building setback lines, showing dimensions, to be shown on the plat. However, King County had ignored the administrative requirement for years. *Friends of the Law, supra*, 123 Wn.2d at 524.

ambiguities led to “obvious confusion” regarding the requirements for a complete application. *Id.*

Under the circumstances, the Supreme Court refused to scrutinize the application with a microscope for technical deficiencies to its completeness. Instead, recognizing the due process requirements for vested rights, the Court looked to the local government’s practices with regard to the very general permit application requirements in King County’s code.

We do not accept BALD’s [Building and Land Development Division] argument that former KCC 19.28.030 has been altered through administrative neglect at face value. As we stated before, “[t]he duty of those empowered to enforce the codes and ordinances of the [county] is to ensure compliance therewith and not to devise anonymous procedures available ... in an arbitrary and uncertain fashion.” However, the applicant here attempted in good faith to comply with uncertain parameters then in force. BALD’s failure to enforce certain sections of King County’s ordinances only served to heighten confusion. As this court previously noted, vesting procedures which are “vague and discretionary” cannot be used to deny an applicant vested rights. Hence we conclude that Anstalt’s application, which complied with former KCC 19.28.030, as interpreted by BALD, did vest upon submission.

Id. at 525.

Those who frequently participate in the modern land use review process used by most counties today have grown accustomed to a more rigorous and demanding review process for an initial application.⁵ Consideration of modern practices, however, is inappropriate when reviewing a 1996 application for “completeness”. *Friends of the Law* and due process require that review of F.G.’s application must be considered in context of the actual code and practices in place at the time

3. Land Use Permit Review Is An Iterative Process That Assembles Necessary Information Over Time To Ensure The Final Decision At The End Of The Process Is An Informed Decision.

Finally, fair evaluation of the facts in this case requires an understanding of the iterative nature of the land use review process.

In 1995, the Legislature passed a comprehensive bill to streamline the land use process for all land use approvals and add certainty for all involved. RCW Ch. 36.70B. Local governments were required to establish a process to determine very early on whether an application was complete and thus vested to the rules then in effect. RCW 36.70B.040, et seq. Within 28 days after an application is filed,

⁵ Today, unlike in 1996, Pierce County’s Code expressly defines a complete application and provides a much more detailed and comprehensive list of both the forms that must be submitted and the information that must be included in the forms. Those requirements are extensive and are set forth in PCC 18.40.020. If the

the local government must either determine that the application is complete or specify what information is necessary to make it complete. RCW 36.70B.070(1). In fact, if the government makes no determination within the 28 days, the application is “deemed” complete. RCW 36.70B.070(4). Thus, at the very outset, this all important determination is made. It is vital that this decision be made early on because a complete application fixes the rules that govern the entire review process.

The subdivision application at the time of application, however, rarely has the depth and detail that it does when it is finally reviewed by the Hearing Examiner. This fact was acknowledged by the Legislature when it established the procedural framework under which land development applications are to be reviewed. RCW 36.70B.070(2) provides:

A project permit application is complete for purposes of this section when it meets the procedural submission requirements of the local government and is sufficient for continued processing even though additional information may be required or project modifications may be undertaken subsequently. The determination of completeness shall not preclude the local government from requesting additional information or studies either at the time of

Court wishes compare the general filing requirement set forth in former PCC 16.06.020 to the current code requirement, a copy of PCC 18.40.020 is at CP 141-2.

the notice of completeness or subsequently if new information is required or substantial changes in the proposed action occur.
[Emphasis added.]

It is expected that the information provided in the initial application will be refined, supplemented and even modified as the review process moves forward.⁶

Again, *Friends of the Law v. King County, supra*, is instructive. The Court there addressed an application, deemed complete for purposes of processing, that proposed a 65 lot plat on an 82.3-acre property. As the review process went forward, additional information was provided and the plat proposal was modified. The final version of the plat had 69 lots on approximately 94 acres of land. *Friends of the Law*, 123 Wn.2d at 520-521. The Court noted: “It is to be expected that modifications will be made during the give and take of the approval process.” *Id.* at 528-9. The Supreme Court held that the additional information and changes during the review process in the project modifications did not, however, alter the vested status of the application. “Once a completed application has been submitted, it is

⁶ It is similarly contemplated in SEPA that additional information will be provided during the review process. See, WAC 197-11-100, -335. Information is gathered and considered as a matter of course as the process following submittal of a complete application moves forward.

to be judged under the laws in effect at the time of submission.” *Id.* at 528-29

The iterative and “give and take” approach described above and utilized by Pierce County’s planning staff is also consistent with that used by other local governments. In *Schultz v. Snohomish County*, 101 Wn. App. 693, 5 P.3d 677 (2000), for example, the court approved Snohomish County’s two-step process. In Snohomish County, the first step is a paper review conducted in-house when the application documents are presented for filing. If all items on the checklist appear present, the application is accepted as ‘complete’. The second step of the review process comes after the determination of “completeness,” and is comprised of the more thorough review where actual conditions are evaluated in the field and more information is requested as needed. *Id.* at 698.

The accepted approach is not only realistic and practical, but also provides an opportunity to improve development projects. It allows the reviewing agencies to do more than simply approve or disapprove projects as initially proposed by developers. They instead have the opportunity to request additional study on important issues and to recommend revisions that will make the project better. The process utilized by Pierce County both protected property rights and

ensured that the all necessary and relevant information was considered in the review process.

4. Summary.

In summary, review of a determination of completeness requires consideration of the following principles:

- The “completeness” determination impacts vested rights, which are afforded due process protections.
- The rules regarding “completeness” are locally established.
- The manner in which local government regularly implements and applies the local rules is relevant.

IV. STATEMENT OF THE CASE

A. The F.G. Associates Property

F.G. Associates’ 20-acre property is located on a significant County arterial, 224th Street East, near its signalized intersection with SR-161, a major state highway. (AR 59 –the Aerial photo is attached as Appendix A) In fact, the F.G. property adjoins an existing shopping center located at that intersection. (AR 59; 4-29-09 hearing RP 2) Because of the already heavy traffic on 224th, the County plans to widen that road to four or five lanes (AR 578) and could use some of the projects’ expected \$1.3 million traffic impact fee for that improvement. (AR 197)

Commercial uses have historically existed near the site, and the F.G. property has always had commercial zoning. Before 1994, the property was zoned “G-General” which allowed virtually all commercial and industrial uses. (AR 61) From 1994 to 2008, it was zoned under the Growth Management Act as Rural Activity Center (RAC), a classification intended to provide nodes of commercial, office, service and civic uses to serve rural populations. (AR 72) The County’s Planning and Land Services staff found the property:

1. Within the “commercial core” of the Graham area (AR 69);
2. “Adjacent to existing and permitted commercial use and services” (AR 73);
3. “Not appropriate for rural residential uses” (AR 73); and
4. “Separated from critical areas and conflicting land uses” (AR 72).

B. F.G. Associates’ 1996 Application

In 1996, the County was discussing changes to the RAC zone that would limit the size of some commercial uses. Jerry Graham (the “G” in F.G. Associates”) met with a County Council Member and Council Attorney to discuss the changes. They suggested the partnership submit an application to vest their rights under the current zoning. (AR 181, 172) He received similar advice from the Pierce County Department of Planning and Land Services staff (PALS). (AR 172)

As a result, Mr. Graham and his partners hired a consultant to submit an application for a commercial subdivision known as Mountain View Plaza with six lots. F.G. Associates will acknowledge that their consultant's work cannot be held up as a model of professionalism. The consultant did not submit the quality work that one would hope and some of the answers he provided to the County's SEPA Checklist questionnaire were flippant. Nonetheless, that application was filed and deemed complete by the County on April 25, 1996. (AR 179, 184) Shortly thereafter, the uses allowed in the RAC zone were modified. However, the property remained in the RAC with commercial zoning until 2008.⁷ (AR 59)

The County's decision to accept the application was wholly consistent with the County's code requirements and its department's practices in 1996. As noted earlier, Pierce County did not have a detailed code provision defining a complete application in 1996, but Terry Belieu, a County planner with 20 years of experience, testified as to the County's practice and procedure at that time. He testified that, then, a determination of completeness was simply a finding that all of the County-required documents were submitted. The County did not review the substance of the various submittals. (7-23-09 hearing RP

⁷ In 2008, the property was removed from the RAC zoning. Because of the projects'

3-4, 6-7, 20-21) Belieu testified that during this time period, the level of detail provided in applications accepted by the County ran “the full gamut of simply writing ‘N/A’ in every paragraph rather than trying to describe the project all the way to supplemental pages and letters and documents that are attached to describe the project.” (7-23-09 hearing RP 12) This testimony was uncontradicted.

Belieu introduced Exhibit S-2 (AR 455), the County Submittal Checklist for Mountain View Plaza, setting forth the number and type of documents required for a complete subdivision application. The signature at the bottom of that page identifies the planner who reviewed the F.G. Associates application, and shows that the application was accepted as “complete” on April 25, 1996. (7-23-09 RP 6-7) The County has since then consistently stated that the application was complete on April 25, 1996. Two Hearing Examiners have made that finding, both in 1998 (AR 184, Finding 6) and in the 2009 Hearing Examiner Decision under review here. (AR 40, Finding 13) In both cases, there is a strong record to support that finding. (See e.g. AR 59, 168, 179, 424, 427)

As part of its application, F.G. Associates was required to pay an application fee. (7-23-09 hearing RP 7) According to the undisputed

vested rights, that action did not affect the current proposal and is not relevant here.

testimony of Mr. Belieu, the County itself “always” determines the amount of the fee at the time of application based upon the number of lots proposed. (7-23-09 RP 10) Although all of the plat drawings have always shown six lots (7-23-09 RP 8), and other application documents also showed that number, Pierce County inexplicitly collected a fee for five lots. (AR 270, 7-23-09 hearing RP 8) That County mistake was corrected a few weeks later. Pierce County asked for an additional fee of \$150 for the “sixth” lot and that was promptly paid. (7-23-09 hearing RP 10)

Again, according to Mr. Belieu’s undisputed testimony, it is common (“almost without exception” (7-23- 09 RP 12)) for additional information to be required and provided during the plat review process. That happened here. The original application identified the proposed use of the lots as “commercial” (AR 168) and F.G. was later asked to be more specific about the proposed commercial uses. On December 11, 1996, F.G. submitted a second Environmental Checklist with a more specific description of the use proposed for each lot. (AR 170)

C. The Hearing Examiner Deemed The Application Vested In 1998

In 1998, there was a public, adversarial proceeding that specifically addressed the rights to which the project was vested under the RAC zoning. The proceeding occurred after Pierce County issued a

formal determination stating that the most that could be built on all six lots together was 79,999 square feet of commercial use. (AR 168-169 and 170-171) According to the County, a conditional use permit was required for additional commercial space. *Id.* F.G. Associates believed that this determination limiting the development within the plat was inconsistent with their vested rights under the RAC zone.

As with most vesting cases, the controversy focused on the information provided in the land use application. The County staff based the written determination on the fact that the application did not identify particular, specific uses for the plat, but only generally stated the proposed uses would be commercial. The County also made reference to the Environmental Checklist in its determination. The County staff asserted that F.G.'s Environmental Checklist and Application "did not disclose the specific or intended uses for the future building sites, except indicating the use as commercial on the preliminary plat drawing". (AR 168)

F.G. Associates appealed the determination (AR 166-167), arguing that it was contrary to its vested rights, and also arguing that those vested rights allowed it to build up to 80,000 square feet of commercial space on each of the six lots. (See also AR 172-175)⁸

The matter was presented to the Pierce County Hearing Examiner for decision through a public hearing. As required by the County Code, notice of the appeal and public hearing was provided to the public, providing members of the public with an opportunity to participate should they choose. (AR 183, Finding 3)

The quasi-judicial hearing was held on September 2, 1998. Notably, the County PALS staff admitted at the hearing that the application was complete as of April 25, 1996. Their criticism of the application was based on the general description of uses. According to the summary of the testimony in the Hearing Examiner's written Decision, the PALS Supervisor testified:

“Even though the 6-lot application is deemed complete as of April 25, 1996, the County could not analyze the proposed plat as the Appellant did not specify uses (AR 179) . . . If the Appellant had specified the uses then we would have no problem, but if no uses are specified, than they are vested for no uses. The County would withhold vesting until some use is applied for”. (AR 182)

⁸ There was another argument raised as to whether or not F.G. Associates was vested for larger commercial buildings that would have required a conditional use permit as well as the plat approval. F.G. withdrew that argument and it was never ruled upon by the Hearing Examiner. (AR 186)

The Hearing Examiner rejected the County argument and agreed with F.G. Associates on its appeal. The Examiner made Finding of Fact No. 6 reading in part:

The Appellant was aware of the pending zone reclassification and on April 25, 1996, submitted a completed application for a 6-lot preliminary plat. Said plat proposed 6 lots varying in size from .95 acres to 7.6 acres, but specified no uses other than commercial. The Appellant filed no request for a conditional use permit to authorize a commercial center on one or more of the lots prior to May 1, 1996. (AR 184)

The Examiner also made Finding of Fact No. 7 noting that in December of 1996, F.G. Associates had submitted a revised Environmental Checklist with much more specific information as to the uses on each of the 6 lots. The Examiner decided the case as follows:

The Appellant's challenge of the County's interpretation of the definition of 'commercial center' is hereby granted. The zoning code in effect on April 25, 1996 authorizes the Appellant to place commercial centers of up to 80,000 square feet on each of the 6 plat lots. (AR 186)

Thus, the sufficiency of the application and checklist to vest the project for the proposed commercial uses was already decided. The decision was not appealed, and there is no dispute that what F.G. currently proposes is consistent with that ruling.

**D. The County Continued To Actively Review The F.G. Application
And The Hearing Examiner Ultimately Approved The Plat**

F.G. submitted a number of different reports and studies over the following years the project was under review.⁹ These included expert reports on traffic (AR 194 updating earlier reports), a biological program for enhancement of the drainage corridor for fish and wildlife habitat (AR 49), a wetland analysis (AR 90), a storm drainage plan (AR 257; 4-29-09 RP 16-19), and a geotechnical report (7-23-09 RP 14). F.G. also submitted a third Environmental Checklist on January 6, 2009. (AR 126-138) F.G. submitted all of the information ever requested by the County. (7-23-09 RP 12, 44)

Based on all of this information, the County issued a Mitigated Determination of Nonsignificance (MDNS) under the State Environmental Policy Act (SEPA) on February 24, 2009. (AR 89-93) This represented a finding that the project would not have significant adverse environmental impacts. WAC 197-11-350, RCW 43.21C.031. No appeal was taken from the MDNS.

The Mountain View Plaza project was then reviewed by the Graham Advisory Commission which conducted a public hearing. The

⁹ This was a lengthy review process. Though not directly relevant here, the reasons for that long process included: a huge influx of applications to the County in this period; a County effort to buy the property for drainage purposes; the time needed to complete required reports and for County review of that information; changes in legislation; and the death of one of the partners. (7-23-09 hearing RP 13, 45-46)

Commission members voted 4 to 1 to approve the proposal with several new conditions including a requirement for a noise buffer on the north side of the project. (AR 472)

The Hearing Examiner then conducted two public hearings, the first on the project as a whole and the second focused on the vesting issue raised by the Graham Respondents here. The Examiner again found the project vested and approved it with additional requirements for a 30-foot buffer on the west side of the project and a noise wall on the north. (AR 47 -Decision attached as Appendix C)

E. The Trial Court Reversed The Hearing Examiner's Approval.

The Graham Respondents filed a LUPA petition challenging the Examiner's approval. (CP 33-70) The Graham Respondents applied the shot gun approach to their LUPA petition and asserted a variety of challenges, many of which were not raised in the public hearing conducted by the Examiner. The focus of the Graham Respondents' LUPA appeal, however, was their challenge to the Examiner's finding that the 1996 application was complete and vested the Mountain View Plaza project to the laws in effect at that time. (See CP 33-44; 202-35)

On April 13, 2010, the trial court entered an Order On Petition Under The Land Use Petition Act reversing the Examiner's approval. (CP 236-38) The trial court based its decision on its own conclusion

the Mountain View Plaza application was not a “fully complete application” as required by RCW 58.17.033. (CP 236) F.G. Associates timely appealed. (CP239-43)

V. STANDARDS OF REVIEW AND BURDEN OF PROOF UNDER LUPA

Under Washington's Land Use Petition Act, the party seeking relief from an administrative land use decision, in this case the Graham Respondents, bears the burden of proving error. *North Pacific Union Conference Ass'n of Seventh Day Adventists v. Clark County*, 118 Wn. App. 22, 28, 74 P.3d 140 (2003); RCW36.70C.130(1). The burden remains with the petitioning party even if that party prevailed on its LUPA claim before the trial court. *Quality Rock Products, Inc. v. Thurston County*, 139 Wn. App. 125, 135, 159 P.3d 1 (2007); *Tahoma Audubon Society v. Park Junction Partners*, 128 Wn. App. 671, 681, 116 P.3d 1046 (2005) Thus, this Court stands in the same shoes as the trial court. It reviews the Hearing Examiner's findings of fact and conclusions of law directly and disregards any findings or conclusions made by the trial court. *Id.*; *Humbert/Birch Creek Const. v. Walla Walla County*, 145 Wn. App. 185, 192, n.3, 185 P.3d 660 (1990); *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 47, 52 P.3d 522, (2002); *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Associates*, 151 Wn.2d 279, 688, 87 P.3d 1176 (2004).

The standards of review are set forth in RCW 36.70C.130 and are deferential to the local decision-maker. Relevant to this appeal, the Examiner's approval may only be overturned upon demonstration of at least one of the following:

- (1) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of law by a local jurisdiction with expertise;
- (2) The land use decision is not supported by the evidence that is substantial when viewed in light of the whole record before the court;
- (3) The land use decision is a clearly erroneous application of the law to the facts: . . .

RCW 36.70C.130(1)(b), (c), (d).

The bulk of the challenges asserted in the Graham Respondents' LUPA petition (CP 33-44) and briefing to the trial court (202-235) are to the Examiner's factual findings. Review of the Examiner's factual findings is particularly deferential. The Court applies the substantial evidence test, which requires the Court

to view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the fact finder's views regarding the credibility of witnesses

and the weight to be given reasonable but competing inferences.

State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce, 65 Wn. App. 614, 618, 829 P.2d 217, review denied, 120 Wn.2d 1008 (1992). See also, *Department of Corrections v. City of Kennewick*, 86 Wn. App. 521, 529, 937 P.2d 1119 (1997). Here, the Examiner was the highest forum to exercise fact-finding authority and the Court's review is based upon the record before the Examiner. See, *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-372, 859 P.2d 610 (1993).

The Graham Respondents also challenge the Examiner's interpretation of Pierce County's code. The interpretation of an ordinance is a legal determination reviewed de novo. See e.g., *Nagle v. Snohomish County*, 129 Wn. App. 703, 712, 119 P.3d 914 (2005). LUPA nonetheless provides for deferential review of the Examiner's legal interpretations, since such officials are appointed local experts on land use regulations. LUPA authorizes the Court to grant relief from the underlying County decision only if "[t]he land use decision is an erroneous interpretation of the law, after allowing for such deference as is due to construction of law by a local jurisdiction with expertise." RCW 36.70C.130(1)(b). The statutory standard of review is supported by the common law.

It is axiomatic that courts give considerable deference to the construction of ordinances by those officials charged with their enforcement.

Friends of the Law v. King County, 63 Wn. App. 650, 654, 824 P.2d 539 (1991); See also *Hama Hama v. Shoreline Hearings Board*, 85 Wn.2d 441, 448, 536 P.2d 441 (1975).

VI. ARGUMENT

THE GRAHAM RESPONDENTS DID NOT SUSTAIN THEIR BURDEN AND IT WAS ERROR TO REVERSE THE HEARING EXAMINER.

- A. **The Examiner's Finding That The Mountain View Application Was Complete In 1996 Is Supported By The Substantial Evidence And Consistent With The Code And County Practices Then In Effect.**

The Graham Respondents argue that the application forms filed almost 14 years ago were not filled out properly and that the fee collected by the County was \$150 short for three weeks. They thus argue the project is not vested.

Notably, the Graham Respondents did not present any evidence to the Examiner to contradict the sworn testimony by County staff that the 1996 determination of completeness was wholly consistent with the County's regular review practices under the less definite Code requirements in 1996. Rather, they advocate that the Court should hold the application under a microscope 14 years later and critique it without regard to the County's actual review practices and

requirements in 1996. The Graham Respondents advocate that the Court likewise give no regard to the fact that F.G. Associated reasonably relied upon the County's completeness determination – as well as a formal adjudication of the issue in 1998 – before it dedicated substantial time and funds to providing all of the additional studies and reports the County requested to complete its review.

In essence, the Graham Respondents assert that there are no limits on a challenge to the completeness determination and that all of the studies, reports and processes completed by F.G., the County and the public in the last 14 years were a complete waste of time. It is no surprise that the law will not permit this untimely attack.

1. This Issue Was Decided In A Prior Quasi-Judicial Proceeding.

The most simple and complete answer to the Graham Respondents' challenge is that prior litigation, the 1998 quasi-judicial Hearing Examiner process (AR 178-88), specifically determined the extent of commercial activity permitted on the property through the 1996 application. As required by the County Code, notice of the appeal and public hearing was provided to the appeal, providing members of the public, including the Graham Respondents, with the opportunity to participate. (AR 183, Finding 3) The Graham Respondents chose not to participate. The public quasi-judicial

proceeding which specifically addressed the vested status of the Mountain View Plaza application resulted in a final written decision by the Hearing Examiner that was not appealed. The Graham Respondents may not now, 12 years later, make the same argument rejected by the Examiner in 1998.

Under LUPA, a final land use decision like that made by the Examiner in 1998 must be appealed within 21 days. RCW 36.70C.040. This is a stringent requirement and any other challenge is barred. *Id.*

To allow respondents to challenge a land use decision beyond the statutory period of 21 days is inconsistent with the Legislature's declared purpose in enacting LUPA. Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner.

Chelan County v. Nykreim, 146 Wn.2d 904, 52 P.3d 1 (2002). The Hearing Examiner's 1998 decision was a final determination on the vested status of the Mountain View Plaza plat application. The Graham Respondents' argument is barred by LUPA.

2. Payment Of The Fee Determined By The County (Even If Erroneously Calculated By The County) Does Not Deprive F.G. Associates Of Its Vested Rights.

Even without the 1998 formal determination, the Graham Respondents present no argument that would affect the vesting of this project. They make much of the fee paid to support the application, and allege that the fee paid on April 25th was \$150 less than it should have been for a 6-lot plat. They cannot dispute that the \$150 was paid within a few weeks after the application was made, and they cite no case that holds a three-week shortfall of \$150 could ever result in the loss of vested rights, let alone 14 years and tens of thousands of dollars later. No case law even hints at such an astonishing and unfair result.

More importantly, there is no evidence in the record of any error by F.G. Associates; any mistake was that of Pierce County which was solely responsible for determining the fee. The testimony was undisputed that the County determines the fee at the time of application. (7-23-09 hearing RP 8, 10)

Here, the County initially charged a fee for a 5-lot plat and the reason for that is a mystery. Mr. Belieu testified that in his extensive review of the County's file, he found no plat drawing showing anything other than 6 lots. (7-23-09 hearing RP 8) The plat application

document bearing the engineer's seal shows 6 lots (AR 124), as does the soils analysis (AR 114), the Plat Data Sheet (AR 269), and the Health Department Plat Review Application form (AR 281). Mr. Belieu noted there was "significant evidence that 6 lots were proposed." (7-23-09 hearing RP 10). No evidence to the contrary was presented.

Despite the mystery, there was no dispute that the County determined the fee and thus is responsible for any error. There was certainly no harm or any absence of good faith on F.G. Associate's part. When it was notified of the shortfall within a few weeks after the application, the additional \$150 was quickly paid. (7-23-09 hearing RP 10, 44 and AR 271) The County error cannot deprive a property owner of vested rights.

3. F.G.'s Application Provided The Required Minimum Information To Commence The Review Process.

The Graham Respondents argue that the designation of the project as commercial was not sufficiently precise. Again, this issue was already litigated and decided by the Hearing Examiner in 1998. (AR 178-88) They also argue that absence of full environmental study with the initial application renders the application incomplete. It is up to the County, however, to determine what constitutes a complete application. RCW 36.70B.070(2) provides:

A project permit application is complete for purposes of this section when it meets the procedural submission requirements of the local government and is sufficient for continued processing even though additional information may be required or project modifications may be undertaken subsequently.

See also, RCW 58.17.033(2).

Here, Pierce County, consistent with its regular and routine practices, found that the procedural submission requirements were satisfied and accepted the application as complete on April 25, 1996. Had more detail as to proposed uses or anything else been required to make the application complete, the County was obligated to so notify F.G. at the time. RCW 36.70B.070(4). Any additional information required for a complete application could and would have been provided.

As noted above, additional information can be required later in the process; and that occurred here, through the normal iterative review process. F.G. was asked to provide additional detail about uses and did that in 1998 in the form of a second Environmental Checklist. (AR 168, 179) F.G. Associates submitted a third Environmental Checklist with even more detail in January of 2009 (AR 126-138), and voluntarily limited the uses even more in a lengthy letter dated March 30, 2009. (AR 217-250).

There is certainly nothing wrong with this. In fact, the whole environmental review and land use process is intended to provide information that results in improved projects. The various reports on the stream, wetlands, traffic, and stormwater led to refinement of the plan and a much more detailed plan than could ever have been created early on in the process without PALS' and the public's input. The PALS staff representative testified that the level of detail accepted by the County with the F.G. Associates application was consistent with the practice at the time. There is not one bit of evidence to dispute this fact. Graham Respondents' argument disregards the single ordinance in effect at the time, disregards the County's practice at the time and seeks to impose current standards on an action that occurred 14 years ago. The law does not support this hindsight approach.

4. The Environmental Checklist Was Sufficient And Was Later Supplemented, Consistent With the SEPA Regulations, By Extensive Additional Information.

The Graham Respondents allege that there were deficiencies in the Environmental Checklist that made the application complete. The sufficiency of the SEPA checklist was already decided in 1998, and this issue may not be argued now for the reasons set forth under paragraph 1 above.

This challenge also fails for two other independent reasons. First, the SEPA-related challenges are not properly before the Court. A plaintiff alleging noncompliance with SEPA must exhaust administrative remedies before filing suit. *CLEAN v. City of Spokane*, 133 Wn.2d 455, 465, 947 P.2d 1169 (1997). Where the municipality has a SEPA appeal procedure in place, exhaustion requires that a petition to seek review under that administrative appeal process before seeking judicial review. *Id.*; RCW 43.21C.075(4). Pierce County does, in fact, provide a SEPA appeal procedure. PCC 18.80.030(B); 18D.10.080; PCC 1.22.080(B)(1). The Graham Respondents failed to utilize that appeal process and are thus barred from raising any SEPA issues in this LUPA appeal. *Id.*; RCW 36.70C.060.

Second, even if SEPA issues can be raised now, the suitability of individual answers on the SEPA Checklist does not determine the completeness of an application for purposes of vesting. We can all agree that F.G. Associates' consultant certainly did not serve his clients. Some of his answers were even unprofessional. No one is more disappointed in him than the F.G. Associates partners who relied upon him and his expertise to make this application. But, 14 years ago the County accepted the application including the environmental

checklist as complete. (AR 455, and see AR 184; 7-23-09 hearing RP 3.7)

Mr. Belieu testified this was fully consistent with the County's practices in accepting applications and that submittals varied significantly in the level of detail.

A: I've seen all kinds of information entered into the standard forms that we publish. The Master Application, the Environmental Checklist, some people historically have not taken and made an effort to completely fill out those questions. Some people – some good – some agents will do a very detailed explanation. It has historically run the full gamut of simply writing "N/A" in every paragraph rather than trying to describe the project all the way to supplemental pages and letters and documents that are attached to describe the project. So, it – its just a full – range of – of effort or the understanding of the project when the application is made.

Q: But it's not at all uncommon for additional information to be provided as the project goes through the – the review process?

A: Its – its almost, without exception, that each project is required to submit additional information late on through its review process. (7-23-09 hearing RP 12)

So, the F.G. application was not markedly different from others accepted by the County. In fact, SEPA contemplates the submission of

additional information after the SEPA Checklist is initially accepted. SEPA expressly authorizes the reviewing agency to require further information after the initial information is submitted if the agency deems it necessary to conduct its environmental review. WAC 197-11-100. There is no prohibition against revising or supplementing the Environmental Checklist after a complete application is submitted. To the contrary, WAC 197-11-100(2) provides that “[a]n applicant may clarify or revise the checklist at any time prior to a threshold determination. It is understood that the information initially provided in the checklist may be inadequate to make the threshold determination. Accordingly, the reviewing agency is authorized to require the applicant “to submit more information on subjects in the checklist.” WAC 197-11-335.

SEPA is a procedural statute designed to ensure that local government considers environmental impacts to the fullest extent in its permitting and other decisions. RCW 43.21C.030. SEPA’s purpose is thus to provide decision-makers with all relevant information about the potential environmental consequences to provide for reasoned decision-making. *City of Des Moines v. Puget Sound Regional Council*, 98 Wn. App. 23, 35, 988 P.2d 23 (1999). This goal is met when all relevant environmental information is gathered and considered by the

Examiner before it renders a final decision on the project. There is no requirement in SEPA that all relevant environmental information be submitted for the initial application to be deemed complete. See, *Adams v. Thurston County*, 70 Wn. App. 471, 855 P.2d 284 (1993).

Here, the application was appropriately supplemented – first in 1996 at the request of the County (AR 168) and again in 2009 when an entirely new third Environmental Checklist was submitted. (AR 126-138) The application was also supplemented by a traffic impact analysis, a wetlands report, a stream report and a geologic report. (7-23-09 hearing RP 13-14) This supplementation and refinement of information provided in the initial checklist was contemplated and authorized by the SEPA regulations. That supplemental information was provided does not, however, render the initial application “incomplete” for purposes of vesting.

5. The Graham Respondents’ Belated Challenge Undermines The Integrity Of The Review Process.

It is important to all who participate in the land use review process that time and resources are not wasted on meaningless exercises. This was a primary reason the Legislature required local governments to establish a process to determine very early on whether all land use applications are complete and thus vested to the rules then in effect. See, RCW 36.70B.040, .070. This critical initial

determination sets the direction and framework for the entire review process.

As a result, the Legislature expressly provided that an application will automatically be deemed complete, regardless of the information included in the application, if the local government fails to make a written completeness determination within 28 days of the application's receipt. RCW 36.70B.070(4)(a). In other words, it is complete as a matter of law and presumably not subject to challenge. An application found complete by an affirmative local decision should not be any more subject to collateral challenge than an application deemed complete by operation of law. Certainly, a challenge asserted 13 years after the determination of completeness is barred.

All of the efforts in this particular 14-year review process were based upon the County's determination of completeness. That determination was the cornerstone for all of the processes that followed. The County formulated its requests for study and expert reports based on the uses allowed under the RAC zoning designation – a zoning designation that applied because of the applications' vested status. F.G. Associates, at no small effort and expense, provided all of the requested additional study in good faith and in justifiable reliance

upon the County's prior completeness determination. Even the public comments were based upon this premise.

If courts perform an after-the fact substantive review of an initial application, disregarding the practice of the local government that accepted it, then every application will be subject to re-evaluation at any time. Applicants who in good faith provide expert studies and reports based upon the local determination of completeness may find years later that their efforts were wasted because the rules of the review process changed after-the fact. The Graham Respondents' belated challenge, if accepted, will threaten the integrity of the entire process. Such a result would be inconsistent with the intent of RCW 36.70B.070 et seq. At the very least, the doctrine of laches should bar the Graham Respondents' challenge. See, *Buell v. City of Bremerton*, 80 Wn.2d 518, 522-23, 495 P.2d 1358 (1972).

The Graham Respondents' challenge is without merit. Independently, it comes too late.

B. The Graham Respondents Cannot Meet Their Burden On Their Other Challenges (That Are Not The Basis Of The Trial Court's Reversal).

As noted earlier, the Graham Respondents took a shot gun approach to their LUPA petition and raised several challenges in their petition that did not form the basis of the trial court's reversal.

Presumably, the Graham Respondents will raise these challenges in this proceeding, so those challenges are addressed below.

1. The “cancellation” of the F.G. Application Was A Computer Mistake.

The Graham Respondents have argued that the plat application was cancelled and inappropriately revived by staff. The undisputed testimony presented at the Examiner’s July 23, 2009 hearing wholly refutes this challenge. The Examiner was well within his discretion to accept this testimony as credible and true, especially since no contrary evidence was presented.

In June, 2005, Pierce County sent out a notice to owners who had pending projects that, at the time, required further studies or other information. The purpose was to notify Applicants their projects were required to move forward. (7-23-09 hearing RP 16) This was a result of a new provision codified at Pierce County Code 18.160.080 (7-23-09 hearing RP 15) that was intended to prevent projects from lying dormant.¹⁰ One of these letters was sent to F.G. (AR 301)

Planner Terry Belieu testified that an application like the F.G. application is made up of several components: the primary or “parent” application and other affiliated applications such as those for wetland

approval, traffic review, geotechnical review, etc. (7-23-09 hearing RP 16-17) The parent application for F.G. Associates is the subdivision itself. (7-23-09 hearing RP 16) In sending out notices such as that sent to F.G. Associates, the County's process was only to look at the parent application to see if the project was active. (7-23-09 hearing RP 17) In mailing the notice, the County did not check other related files to see if activity was pending on those portions of the very same project submission. *Id.*

The PALS computer, according to Mr. Belieu, was programmed to insert a cancellation notice if no application was taken on the parent application within 12 months from the mailed notice. (7-23-09 hearing RP 18) Again, in posting this notice, there was no review of other related applications to see if work was ongoing for other aspects of the project. *Id.* Consistent with its program, the PALS computer posted the notice of cancellation for this project in February of 2006. (7-23-09 hearing RP 18) This occurred even though F.G. Associates "had continuously been in contact with the Department through various applications associated with this project" (7-23-09 hearing RP 26) and:

The evidence is that the Applicant was
continuously working on resolving the

¹⁰ Note that this was adopted after the F.G. application vested, so it does not apply to this project in any event. Under RCW 58.17.033, an application is vested to the Development Regulations that are in effect on the date of application.

design of this project through all of the other associated applications. (7-23-09 hearing RP 27)¹¹

No notice of this “cancellation” was given to F.G. Associates. (7-23-09 hearing RP 19)

F.G. Associates continued to work through its new consultant towards getting the project approved until one of its agents found out about the cancellation notice and called it to Mr. Belieu’s attention. (7-23-09 hearing RP 19). Mr. Belieu evaluated the file and asked that it be re-activated. In its staff recommendation to the Hearing Examiner, PALS stated:

Pierce County staff correctly “removed the cancellation” on the PALS+ computer data entry to reflect the multiple associated permit application reviews in process including but not limited to staff review of wetland verification report; traffic analysis; landslide and geo-technical assessment; noncompensatory mitigation plan, and a fish and wildlife variance. (AR 427)

There was no error here. The County originally deemed the application inactive by mistake and later simply corrected that error.

¹¹ In fact, when the County sent its letter in June of 2005, one of the things pending for review by the County was a wetland report submitted by F.G. in 2004. The County biologist did not visit the site to check on the report until some time after the notice was sent. (7-23-09 hearing RP 39-40) The only inaction as to wetlands was on the part of the County.

2. There are no fish in the drainage ditch and no fish and wildlife variance was required.

The Graham Respondents also allege an error was made with respect to a fish and wildlife variance. There was no factual dispute among experts regarding the drainage course that crosses the property, and there was ample evidence to support the approval. F.G.'s biologist prepared a report that was reviewed and approved by the Pierce County biologist. Graham Respondents offered no expert evidence on this or any other point. The Hearing Examiner specifically found that the "evidence" put on by the Graham Respondents was not entitled to much weight. (AR 40)

A representative of F.G. Associates' engineering firm testified that the water course across the property is a seasonal ditch that carries water from a Washington State Department of Transportation stormwater pond across the site where it flows to an area purchased by Pierce County for regional stormwater facility. (4-29-09 hearing RP 14-18) The ditch "does not support fish and wildlife". (4-29-09 hearing RP 17) The County's biologist agreed. AR 589

Even though this is a stormwater ditch, only a portion will be rerouted and placed in a pipe. Another segment will be left as an open drainage course that will meander across the property in a separate

landscaping tract with native plantings for environmental enhancement. (4-23-09 hearing RP 17; AR 649-668)

In fact, the SEPA determination included a specific finding on this point:

The proposal will have no significant adverse environmental impacts on fish and wildlife, water, noise, transportation, air quality, environmental health, public services and utilities, or land and shoreline uses. (AR 89)

Even more specifically, the MDNS also stated:

The variance criteria (21.18.069) in Title 21 Critical Areas and Natural Resources Lands under which the project is vested deals with the preservation of vegetation for maintaining proper water temperature, minimizing sedimentation, and providing food and cover for critical fish species. Because this drainage course does not provide habitat for any fish species, let alone 'critical' fish species, a determination has now been made by Pierce County Resource Management not to require a fish and wildlife variance. However, a noncompensatory mitigation plan has been received and approved to mitigate for relocation impacts to the on-site Type 5 drainage course per this title. (AR 90) [Emphasis added]

Once again, no appeal was taken from this determination, and it may not be challenged now.

3. The Examiner's finding on public interest is well supported by the record.

The Graham Respondents may ask the Court to substitute its judgment for that of the Hearing Examiner on the question of whether the project as a whole is in the public interest under RCW 58.17.110. This is a fact-laden argument, and the Hearing Examiner made extensive findings all of which are supported by evidence in the record. The Graham Respondents' argument is made without any supporting case law and does not provide any basis for reversal of the Hearing Examiner's Decision.

Initially, we note that the Hearing Examiner's Decision was supported by an affirmative recommendation from PALS which is the County agency responsible for administration of the Zoning Code and Development Regulations (PCC 18.25.030; 18.12.040). The Hearing Examiner is required to consider the recommendation. PCC 1.22.100.A. Moreover, the County has created a series of neighborhood land use advisory commissions that conduct their own public meeting, hear the input of the community and make a recommendation to the Hearing Examiner. PCC Ch. 2.59 The Graham Advisory Commission likewise recommended approval of this subdivision. (AR 472)

It is interesting by contrast that Mr. Wearn and Mr. Halmo professed to represent the interests of local residents though Mr. Wearn lives 7 miles away (4-29-09 hearing RP 38) and Mr. Halmo lives some 20 blocks away (see AR 49 for Mr. Halmo's address). From that distance, their allegations of harm must be viewed as more of an abstract concern than an actual impact.

As to compatibility with surroundings, the Hearing Examiner made findings that are supported by evidence in the record:

15. The site is approximately 20 acres in size and is bordered on one side by major County road and is close to a state highway. The proposal is almost an addition to an existing established permitted retail and office use and consists of infill as opposed to spreading out along a narrow roadway. . . . This site is in the center of a 'built environment bounded on the south frontage by 224th abutted by commercial retail butting to the east'.

16. According to staff the site is not appropriate for rural residential low density, single-family agricultural, forestry or recreational use because it is bordered on the south frontage by 224th Street, a major County arterial road and the adjacent properties to the east are developed and occupied by commercial retail use. (AR 43-44)

The Hearing Examiner and staff both cited extensive comprehensive plan policies of the County that support this type of use

to provide a convenient source of consumer goods for local rural residents. (See Findings of Fact 19 and 20 at AR 44-45 and Staff Report at AR 66-76.) The Comprehensive Plan is important because it embodies the “public interest” with respect to land use. Also directly related to the question of the public interest is the MDNS under SEPA which concluded there were no significant adverse environmental impacts on noise, transportation, air quality, environmental health or land uses, among other things. (AR 89)

The Examiner’s findings are well supported by the substantial evidence in the record.

4. The Graham Respondents’ Remaining Challenges Were Not Raised Before the Hearing Examiner And, Thus, Cannot Be Raised In This LUPA Appeal.

The Graham Respondents LUPA petition includes the following additional allegations: (1) that F.G. did not respond to a request for a stormwater plan; (2) that the storm drainage system will not meet the County standards; (3) that a Hydraulic Project Approval (by the Washington State Department of Fish & Wildlife) should have been an express condition of approval; and (4) the County improperly issued a “Corrected MDNS”, a corrected SEPA threshold determination. None of these allegations have merit. The allegations are not, however, properly before the Court.

The issues were not raised to the Hearing Examiner below and may not be brought up for the first time on appeal. LUPA requires petitioners to exhaust their administrative remedies prior to judicial review of a land use decision. RCW 36.70C.060; *Citizens for Mt. Vernon v. City of Mt. Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997). To do so, they must have raised the issues presented for judicial review to the hearing examiner. *Id.* at 869. An issue is properly raised when there is more than “simply a hint or slight reference to the issue in the record. *Id.*; *Boehm v. City of Vancouver*, 111 Wn. App. 711, 722, 47 P.3d 137 (2002). Independently, the SEPA is not properly before the Court because the MDNS was not timely appealed to the Hearing Examiner and, thus, the Graham Respondents did not exhaust their administrative remedies. *CLEAN v. City of Spokane*, 133 Wn.2d 455, 465, 947 P.2d 1169 (1997); RCW 43.21C.075(4); PCC 18.80.030(B); 18D.10.080; PCC 1.22.080(B)(1); RCW 36.70C.060.

Because the issues are not properly raised, and because the trial court did not reference any of these challenges as a basis for its reversal, F.G. Associates will not affirmatively address the substance of

the issues in this opening brief.¹² Should the Graham Respondents raise the issues in its briefing to this Court, F.G. reserves the right to provide substantive responses in its reply.

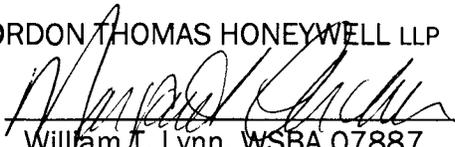
VII. CONCLUSION

The Graham Respondents have a difficult burden of proof and will not meet it here. The County followed its own practices and codes, and demanded all of the studies and reports the law required. The Examiners' findings are well supported by the record and the law and the Court has been presented no basis to overturn the approval. This Court should reverse the decision of the trial court and affirm the decision of the Examiner.

Dated this 7th day of July, 2010.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By 

William T. Lynn, WSBA 07887

Margaret Y. Archer, WSBA 21224

Attorneys for F.G. Associates

¹² F.G. Associates did provide substantive responses to these challenges in its briefing to the trial court (CP 98-106) and incorporates those responses by reference.

APPENDIX A

March 10, 2010

Legend

- Tax Parcels
- Ortho - AerialExpress 2009 (1 foot)



Disclaimer: The map features are approximate and are intended only to provide an indication of said feature. Additional areas that have not been mapped may be present. This is not a survey. The County assumes no liability for variations ascertained by actual survey. **ALL DATA IS EXPRESSLY PROVIDED 'AS IS' AND 'WITH ALL FAULTS'**. The County makes no warranty of fitness for a particular purpose.

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APPENDIX B

OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

REPORT AND DECISION

CASE NO.: ADMINISTRATIVE APPEAL: CASE NO. AA12-98
(PRELIMINARY PLAT/MOUNTAIN VIEW PLAZA)

APPELLANT: F. G. Associates
28919 158th Avenue East
Graham, Washington 98338

AGENT: Chuck Sundsmo
118 Violet Meadow Street South
Tacoma, WA 98444

APPLICANT: William Lynn
P.O. Box 1157
Tacoma, WA 98401

SUMMARY OF REQUEST:

Appellant is appealing the decision of a Planning and Land Services Administrative Official to deny the filing of a Conditional Use Permit application based upon criteria in the Development Regulations, Title 18A, which is no longer in effect. The appellant alleges that there was an error in the interpretation of the regulations by the Administrative Official governing the Commercial Center Use Type in the Rural Activity Center (RAC) zone classification. The site is located at 9517 224th Street East, Graham, Washington, in the Southwest 1/4 of Section 9, Township 18 North, Range 4 East, in Council District #1.

SUMMARY OF DECISION:

See decision.

PUBLIC HEARING:

After reviewing Planning and Land Services Report and examining available information on file with the application, the Examiner conducted a public hearing on the request as follows:

The hearing was opened on September 2, 1998, at 9:25 a.m.

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

EXHIBIT "1" - Planning and Land Services Staff Report and Attachments

EXHIBIT "2" - Memorandum from William Lynn

EXHIBIT "3" - Photos of site and surrounding area

VICKI MEUSCHKE appeared and presented the Planning and Land Services Staff Report. Staff refused to accept the conditional use permit application. On May 25, 1996, the appellant applied for a preliminary plat in the RAC zone. They applied for a six lot plat, and while the County accepted the application for five lots, later corrected the application and the appellant paid for the additional lot. Even though the six lot application is deemed complete as of April 25, 1996, the County could not analyze the proposed plat as the appellant did not specify uses. On December 11, 1996, the appellant designated commercial centers for several lots in the environmental checklist, but since uses are no longer allowed in the RAC. The appellant alleges that since the plat was vested under the old RAC, accessory permits such as conditional use permits are also vested. The issue is whether or not a conditional use permit for a land use no longer allowed is authorized subsequent to the vesting date of the plat. Another issue is the department's interpretation of the Commercial Center use. Staff reviewed the subdivision in accordance with the subdivision code and zone regulations in effect on April 26, 1996. The appellant had not applied for a conditional use permit at that time and commercial centers were allowed in the RAC pursuant to a conditional use permit. On December 11, 1996, the zoning code prohibited commercial centers in the RAC even with a conditional use permit. The Noble Manor case is not open ended, and that case is not applicable if the use is not shown on the short plat. Since the appellant showed no uses, the plat is not vested. In Hale v. Island County, the use was specified on the plat or application, but here the use was unknown. Also approval was granted before the Growth Management Board decision. However, the board couldn't deem the approval invalid. The Central Puget Sound Board asked the County to change its zoning code. The code doesn't consider the size of the lots. Each lot could be 80,000 square feet of commercial use if three different owners own the lots. It is a loop hole within the regulation, and they have drafted an amendment to correct the problem.

Appearing was WILLIAM LYNN, attorney at law, who introduced Exhibit "2", his memorandum and referred to the site plan which was in the record as Exhibit "1d". The appeal presents a vested rights issue and also an issue of interpretation of commercial center assuming they are not vested.

Upon questioning of MS. MEUSCHKE, MR. LYNN solicited the following testimony. Under

the old code a building of less than 80,000 square feet was not considered a commercial center. This is true under the new code as well. Under the old code buildings between 80,000 and 200,000 square feet were considered Level I commercial centers and were allowed pursuant to a conditional use permit. Buildings in excess of 200,000 square feet were not allowed. Under the new code, buildings in excess of 80,000 square feet are not allowed. The appellant submitted a completed application in April, 1996, and included a checklist and plat map as part of the application. They indicated commercial uses, but not the intensity. It was not clear that commercial uses were proposed. The application did not address environmental impacts at all. Further information was needed. Adonais Clark and the appellant had conversations regarding the application. No other communication was had from the appellant until November or December when they provided clarification. They did specify the uses and the square footage in December, 1996. The notice to the appellant regarding completion depends on the planner, the caseload, the size of the project, etc. No notification was made until Mr. Clark was convinced of the need for completeness. The GMA Board decision is not retroactive to completed applications. On May 1, 1996, the community center became a prohibited use. The board decision was in February, 1996, and gave the County until May 1, 1996, to change the code. All lots of the four lot short plat get 80,000 square feet of commercial buildings if they are owned by different people and if they are self contained. If the plat is owned by one person, then that person is limited to 80,000 square feet for the whole short plat. Short plats create a problem as they divide land without uses, but a formal subdivision needs a checklist and needs to specify uses. Concerning the "Commercial Center" definition, she is relying on the December, 1996, checklist in making her determination that they are proposing a commercial center. It is clear that the described uses exceed the allowable square footage and put the project into the commercial center category. She referred to page two of the staff report and stated that lots four and five required a conditional use permit. Also, the entire tract had to be considered to determine the cumulative square footage. Such would be the case even if there was no central complex and no joint parking. She distinguishes between approved plat lots and proposed plat lots. The commercial center means 80,000 square feet of building and no parking or integration. It concerns a plat application only and not an approved plat.

Appearing was ADONAI CLARK, who in response to questions by Mr. Lynn stated that he was responsible for processing the plat. He has no notation in the file regarding a written request. Oral conversations occurred with Mr. Sundsmo regarding this file and others. He sees nothing in the file in the nature of a letter requesting more information.

Appearing was JERRY GRAHAM, the property owner, who stated that it was zoned General Use before adoption of the 1994 Comprehensive Plan. The property extends from 224th to single family subdivisions to the north. The Graham Town Center is east of the property and separates it from the 224th/SR-161 intersection. He was aware of the zone change before it occurred and was an active participant. He had oral discussions with the County Council and with staff. He met with Jan Shabro with Chuck Sundsmo present. He

had lobbied the Council about the zoning change and knew they were limiting the size of buildings, impervious surfaces, and industrial uses. He met with Councilmember Shabro to discuss the outright uses in the RAC. Mr. McGuire was present also. She said that he could testify at the Planning Commission meeting and also start the process of development. Mr. McGuire said to file the subdivision to vest the uses. He submitted the application fairly quickly and definitely prior to the zone change. He was asked in the fall of 1996 to clarify the application, maybe in November, 1996. He received no notice from the County regarding an incomplete application nor the need for additional information. He was concerned with the size of the building as he felt the RAC changes were too restrictive. Also, the restrictions on impervious coverage amount to a waste of land.

Appearing was CHUCK SUNDSMO who was actively processing the plat on a day to day basis. The appellant has accurately reflected what happened. He met with Sam Yekalam in the pre-filing conference and after filing the application, only the fee issue caused him to place a phone call to Adonais Clark. He called again about one month prior to submitting the amended checklist. There were discussions about the conditional use permit at one point, but other items were also needed. He was with the planner during the filing of the plat. He was looking at the vesting ordinance and no one told him he would have to file a conditional use permit to vest the uses.

Appearing was WILLIAM LYNN who stated that the County is struggling to accept the Noble Manor case. They still treat differently approved plats and applied for plats. The question is what are you vested for if you indicate commercial uses. Clearly the zoning code has a grouping of uses designated commercial which includes commercial centers. A conditional use permit is in keeping with the zoning code. The only difference is the additional review. These uses must go through the permit process and the appellant has the burden of proof of meeting all of the criteria. They also need other permits for the commercial uses to include wetland, building, etc. The application was complete in April, 1996. The PDD analogy is a good one. The County has permitted the filing of PDDs, and there is really no distinction between a PDD and a conditional use permit. They are both varying the application and asking relief from the standards. They must demonstrate that the use fits in the area. The County acknowledged that it does not apply the definition in the code. The 80,000 square foot limit applies whether we have two acres or 100 acres. They ignore the intent of the ordinance. It is wrong to take away rights from someone if they own two lots of a short plat. A sale of one of the lots should not increase the commercial rights. They should all be in the same boat. The County cannot explain it. The Council adopted a definition and then did not like it. A commercial center is a shopping center and it can be divided into lots with shared parking. He reviewed the language that the County came up with and finds it difficult to regulate. It encourages separate accesses with no shared parking and amounts to uncoordinated planning which they try to avoid.

VICKI MEUSCHKE then reappeared to state that the County authorized a PDD in the Mountain Creek plat through the wetland regulations.

Appearing was SEAN GAFFNEY who had a conversation with Chuck Sundsmo. He had heard that the County was considering cutting back activities in the RAC. He told another appellant that they had better file their conditional use permit if they intended to vest. He told Mr. Sundsmo that he had to get his conditional use permit application filed, but the problem was that they did not know the use. A PDD allowed in a zone classification is still allowed following changing the code if the plat is vested. This was his advice to the appellants which took place prior to filing the preliminary plat. The definition of "commercial center" has not changed since January, 1995. They are not allowed in the RAC. They consist of a combination of commercial uses and 80,000 square feet is a large use. If each lot will have a separate commercial use of less than 80,000 square feet than all uses are allowed. The original RAC allowed a variety of commercial and industrial uses. The board said to reduce the intensity of the uses.

Upon questioning by MR. LYNN, MR. GAFFNEY stated that if the uses on the lots were distinctly different, then 80,000 square feet per lot is agreeable. He distinguished between a WalMart and the Proctor District in Tacoma.

Reappearing was VICKI MEUSCHKE who stated that the County is not struggling with Noble Manor. If the appellant had specified the uses then we would have no problem, but if no uses are specified, then they are vested for no uses. The County would withhold vesting until some use is applied for. The RAC allowed commercial uses, but if the uses exceeded a certain size, then they had to file a conditional use permit. The binding site plan is not present here as it is very specific. The County is not required to fill in the gaps of a preliminary plat.

Appearing was MIKE KRUGER who stated that Longbranch Estates was filed prior to the new comprehensive plan. Wetlands were found throughout the project. The WMR allows for clustering of development and on-site density transfers through the PDD process. It is also allowed through Title 18A. The test is based on Title 18A, not on a previous application.

Upon questioning by MR. LYNN, MR. KRUGER said that the PDD would allow a reduction in lot size.

Reappearing was MR. LYNN who stated that there is no distinction between modifying a lot size and determining the lot size of a building that can be permitted. In December, 1996, they were only interested in the uses shown on the lots set forth on Page 2 of the staff report. Nothing suggests a complex. The County never asked about parking or a complex.

No one spoke further in this matter and so the Examiner took the request under advisement and the hearing was concluded at 11:32 a.m.

NOTE: A complete record of this hearing is available in the office of Pierce County

FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS:

1. The Hearing Examiner has admitted documentary evidence into the record, heard testimony, and taken this matter under advisement.
2. This request is exempt from review under SEPA.
3. Notice of this request was advertised in accordance with Chapter 1.22 of the Pierce County Code. Notice of the date and time of hearing was published two (2) weeks prior to the hearing in the official County newspaper.
4. The appellant has a possessory ownership interest in a 19.71 acre parcel of property abutting the north side of 224th St. E., west of its intersection with SR-161 in Graham. The rectangular parcel extends along 224th St. E. for a distance of 661 feet and is 1,297 feet in depth. Prior to the effective date of the 1994 Pierce County Comprehensive Plan on January 1, 1995, the site was located within the General Use zone classification which until 1990 authorized commercial uses outright, and subsequent thereto through the conditional use process. Upon the effective date of the 1994 Comprehensive Plan, the site was placed within the Rural Activity Center (RAC) designation, and upon adoption of the Development Regulations - Zoning in July, 1995, was placed in the RAC zone classification. The original RAC classification authorized commercial centers of less than 80,000 square feet as an outright permitted use; commercial centers of between 80,000 and 200,000 square feet with a conditional use permit; and prohibited commercial centers in excess of 200,000 square feet.
5. Section 18A.25.270(H) of the Pierce County Code (PCC) defines "Commercial Centers" as follows:

Commercial Centers Use Type refers to any lot or combination of lots with a store or variety of stores, offices, and services integrated into a complex utilizing uniform parking facilities. A variety of goods are sold or services provided at these centers ranging from general merchandise to speciality goods and foods. Commercial centers can be grouped into two levels:

Level 1: Any store or commercial center containing a variety of stores with a cumulative floor area over 80,000 square feet and up to

200,000 square feet.

Level 2: Any commercial center containing a store or variety of stores with a cumulative floor area greater than 200,000 square feet.

Thus, the four components to the definition of a commercial center are:

1. A lot or combination of lots;
 2. With a store or variety of stores, offices, and services;
 3. Integrated into a complex; and
 4. Utilizing uniform parking facilities.
6. In February, 1996, the Central Puget Sound Growth Management Hearings Board in the case of City of Gig Harbor, et al v. Pierce County, ruled that the RAC did not comply with the State of Washington Growth Management Act and required the County to eliminate commercial centers from the RAC. In response to said decision, on May 1, 1996, the Pierce County Council adopted changes to the comprehensive plan and zoning regulations which eliminated commercial centers from the RAC. The appellant was aware of the pending zone reclassification and on April 25, 1996, submitted a completed application for a six lot preliminary plat. Said plat proposed six lots varying in size from .95 acres to 7.6 acres, but specified no uses other than "commercial". The appellant filed no request for a conditional use permit to authorize a commercial center on one or more of the lots prior to May 1, 1996.
7. In December, 1996, the appellant submitted an environmental checklist assessing impacts for the following uses on plat lots:
- A. Lot one adjacent to 224th St. E. and containing 1.14 acres: 40,000 square feet of wholesale trade, contractor yards.
 - B. Lot two adjacent to 224th St. and containing .95 acres: 40,000 square feet of food stores, general merchandise sales.
 - C. Lot three containing .95 acres adjacent to 224th St. E.: 40,000 square feet of food stores, general merchandise sales.
 - D. Lot four abutting the north property lines of lots one through three and containing 7.6 acres: a Commercial Center Level 2 containing 200,000 square feet.

E. Lot five north of lot four and containing 4.56 acres: a Level 2 commercial center containing 200,000 square feet.

F. Lot six north of lot five and containing 4.51 acres: a 30 unit senior living center.

8. On October 22, 1997, Chip Vincent, Principle Planner, Advance Planning, submitted a memorandum to Councilmember Jan Shabro advising that since the appellant had not filed an application for a conditional use permit prior to the May 1, 1996, zone change, commercial centers were not authorized on any lots and that the appellant was limited to one, 80,000 square foot building on the entire 19.71 acre parcel:

An appellant cannot apply for a conditional use permit based on a previous zoning rule which is no longer applicable. The maximum size of a commercial building that could be developed on the site is 80,000 square feet.

In order for this preliminary plat to receive an environmental determination, the appellant will be required, among other things, to specify the intended uses for the development. These uses must be consistent with the uses that were permitted outright on the date of the preliminary plat application, April 25, 1996.

Based upon Mr. Vincent's memorandum, Vicki Meuschke, Principle Planner, Current Planning, prepared her staff report (Exhibit "1"), concluding that the appellant could not submit an application for a conditional use permit. Furthermore, because the appellant owned all six lots, it was limited to one 80,000 square foot structure. At the hearing, Sean Gaffney, Advance Planning, testified that each lot could have a separate commercial use of up to 80,000 square feet so long as the lots were not integrated into a complex and did not utilize uniform parking facilities. Thus, if each lot were developed distinctly different with its own commercial use, then each lot could contain structure of up to 80,000 square feet regardless of whether all six lots were owned by one entity or under separate ownerships.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.
2. The definition of "commercial center" authorizes up to 80,000 square feet of commercial uses on each of the six plat lots if and only if, the six commercial uses

stand alone and are not integrated into a complex and share parking facilities. Thus, the appellant's proposed uses for lots one, two, and three of 40,000 square foot commercial uses are authorized outright by the effective RAC zone classification. Likewise, lot six which proposes a 30 unit senior housing facility is permitted outright. The uses proposed for lots four and five, Level 2 commercial centers, are prohibited in the previous RAC classification and therefore cannot be allowed even with a conditional use permit. However, lots four and five can each be developed outright with a commercial center with up to 80,000 square feet of commercial uses.

3. Since the appellant indicated its desire to proceed with the development in accordance with uses set forth in Conclusion No. 2 above, the appellant will not submit an application for a conditional use permit and therefore that portion of the appeal is moot.

DECISION:

The portion of the appellant's appeal challenging the County's determination that the appellant may not file an application for a conditional use permit subsequent to the effective date of a zoning change is moot. The appellant's challenge of the County's interpretation of the definition of "commercial center" is hereby granted. The zoning code in effect on April 25, 1996, authorizes the appellant to place commercial centers of up to 80,000 square feet on each of the six plat lots.

ORDERED this 24th day of September, 1998.


STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

TRANSMITTED this 24th day of September, 1998, to the following:

APPELLANT: F.G. Associates
28919 158th Avenue East
Graham, WA 98338

AGENT: Chuck Sundsmo
118 Violet Meadow Street South
Tacoma, WA 98444

APPLICANT: William Lynn
P.O. Box 1157
Tacoma, WA 98401

OTHERS:

Jill Guernsey	955 Tacoma Avenue S. #301	Tacoma, WA 98402
Richard Hayertz	6430 Tacoma Mall Blvd.	Tacoma, WA 98409
R. Froom	15713 138 th Ave. E.	Puyallup, WA 98374
New Home Trends	8034 118 th Ave. NE	Kirkland, WA 98033
Alma Stewart		

PIERCE COUNTY PLANNING AND LAND SERVICES
PIERCE COUNTY BUILDING DIVISION
PIERCE COUNTY DEVELOPMENT ENGINEERING DEPARTMENT
PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT
TACOMA-PIERCE COUNTY HEALTH DEPARTMENT
FIRE PREVENTION BUREAU
PIERCE COUNTY PARKS AND RECREATION
PIERCE COUNTY COUNCIL
PIERCE COUNTY RESOURCE MANAGEMENT

CASE NO. ADMINISTRATIVE APPEAL: CASE NO. AA12-98 (PRELIMINARY PLAT/MOUNTAIN VIEW PLAZA)

NOTICE

1. RECONSIDERATION: Any aggrieved person feeling that the decision of the Examiner is based on errors of procedure or errors of misinterpretation of fact may make a written request for review by the Examiner. The request must be filed with the Planning and Department with a reconsideration fee as required by the Department of Planning and Land Services, and filed not later than 4:30 p.m. on, October 5, 1998 with the Planning Department. This request shall set forth the alleged errors or misinterpretations, and the Examiner may, after review of the record, take such further action as he deems proper and may render a revised decision.

2. APPEAL OF EXAMINER'S DECISION: The final decision by the Examiner may be appealed in accordance with the Land Use Petition Act, Chapter 347, Laws of 1995, Sections 701-719, and Pierce County Ordinance No. 95-112.

NOTE: In an effort to avoid confusion at the time of filing a request for reconsideration, please attach this page to the request for reconsideration.

APPENDIX C

OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

REPORT AND DECISION

CASE NO.: PRELIMINARY PLAT: MOUNTAIN VIEW PLAZA
APPLICATION NOS. 206064, 222882, 222883, 261497, 398699,
584088, 591578, 646283

OWNER: F.G. Associates
Attn: Kelly Afdem
13206 126th Avenue East
Puyallup, WA 98373

AGENT: Larson and Associates
Attn: Bill Diamond
4401 South 66th Street
Tacoma, WA 98409

PLANNER: Terrence Belieu

SUMMARY OF REQUEST:

Formal subdivision of 19.71 acres into five commercial lots, and one lot for a septic drainfield. Lot 1 is proposed to be developed with a 3,470 square foot food restaurant; Lot 2 is proposed to be developed with a 5,540 square foot bank; Lot 3 is proposed to be developed with a 5,370 square foot sit down restaurant; Lot 4 is proposed to be developed with an 80,000 square foot grocery store; Lot 5 is proposed to be developed with an 80,000 square foot home improvement center; and Lot 6 is proposed to be developed with septic drainfields. The proposed uses on Lots 1-5 are permitted outright in the RAC zone classification which was in effect at the time of application (April 25, 1996). The site was classified as Rural 10 (R10) zone effective January 1, 2008. The project site will be served by public and private roads, Rainier View Water Co., and on-site septic disposal systems. The project site is located at 9715 - 224th Street East, within a portion of the SE ¼ of Section 9, T18N, R4E, W.M., in Council District 3.

SUMMARY OF DECISION:

Request granted, subject to conditions.

DATE OF DECISION: October 9, 2009

PUBLIC HEARING:

After reviewing Planning and Land Services Report and examining available information on file with the application, the Examiner conducted a public hearing on the request as follows:

The hearing was opened on April 29, 2009 at 1:05 p.m.

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

- EXHIBIT "1" - Planning and Land Services Staff Report and Attachments
- EXHIBIT "2" - Aerial Topography
- EXHIBIT "3" - Reduced Cover Sheet – Strom Water
- EXHIBIT "4" - Landscape Plan
- EXHIBIT "5" - Landscape Plan (Small)
- EXHIBIT "6" - PC 18
- EXHIBIT "7" - Letter regarding vested rights (Charlotte Cassidy)
- EXHIBIT "8-1" - Photo
- EXHIBIT "8-2" - Photo (Aerial)
- EXHIBIT "8-3, 4" - Photos
- EXHIBIT "8-5" - Aerial Photo
- EXHIBIT "8-6,7" - Photos – Creek going through site
- EXHIBIT "8-8" - Photo – Ducks
- EXHIBIT "8-9" - Photo – Creek (barn above)
- EXHIBIT "8-10,14" - Photos – Pipe exiting onto site
- EXHIBIT "8-11" - Photo – View same as 10
- EXHIBIT "8-12-16" - Photos – other end of pipe south of 224th
- EXHIBIT "9" - A – L
- EXHIBIT "10" - Bud Rehbergs information
- EXHIBIT "11" - Soil Survey

Appearing was TERRENCE BELIEU who briefly summarized the staff report which with its attachments was marked as Exhibit "1" and admitted into evidence. The applicant submitted a completed application on April 25, 1996. A MDNS was issued on February 18, 2009. No appeal was filed from the MDNS. On the date of the original application the site was zoned RAC. Today it is zoned Rural 10 (R-10). The site is mostly cleared with grasses and it slopes from 224th to the north. There is a drainage course in the center which will be reduced in size. To the east of the site is the Graham Town Center, to the north are single family residences, to the south is 224th Street, and to the west are single family residences. Correspondence from the public indicates that the neighbors in the residential area to the north are concerned about the size and the noise generated from the Graham Center.

They are also concerned about the possibility of flooding. There will be a 30 foot wide fenced buffer to the west and north. He then discussed changes to Conditions 16, 17, and 18 of the staff report and referred the Hearing Examiner to the history of this proposal on pages 6 and 7. At one time because of a County mistake and a glitch in the computers it appeared that this project was shut down by the County. However, the project was continuing to go forward and has been marching at a slow pace ever since the application was submitted on April 25, 1996. On September 24, 1998, Hearing Examiner Stephen Causseaux issued a decision which indicated that the applicant was vested to go forward with the application submitted on April 25, 1996.

Appearing was JEFF ROSCOE who was concerned about a SEPA condition. The Hearing Examiner indicated that he had no power to change SEPA conditions because there was no appeal from the SEPA determination.

Appearing was BILL DIAMOND, agent for the applicant, of Larson and Associates. He submitted Exhibits "3", "4", "5", and "6" into evidence. They are objecting to Conditions 16, 17, and 18. There will be a fence along the north property line. The drainfield will be an area in Lot 6. There is a drainage ditch that crosses the site. It is a Type 5 stream, which does not contain fish.

Appearing was BILL LYNN who briefly summarized their presentation. He indicated that the County has a noise ordinance which they will comply with as well as the SEPA conditions. There is nothing, according to Mr. Lynn, showing that a 30 foot buffer is necessary for this site. They have a vested application to use this site consistent with their application. He submitted a copy of the RAC zone provisions in effect on April 25, 2006.

Appearing was GEORGE WEARN who submitted Exhibit "7" into evidence. He requested that the Hearing Examiner deny the project. He believes that the appearance of fairness has been violated. It is not fair when the agent from Larson and Associates is married to a member of the County staff. He does not believe that the application is properly vested. The Hearing Examiner questioned him as to why his attorney was not present. Exhibits "8-1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16" were admitted into evidence. These pictures were submitted to give the Hearing Examiner view of the creek flowing through the site. The characterization of the creek as a drainage ditch is not an appropriate characterization. He did not appeal the MDNS determination.

Appearing was JAMES HALMO who was concerned about the bypass of 224th and Meridian which is proposed to be located on the east side of the site. He is also concerned about the possibility of this development blocking mountain views. He is also concerned about the amount of impervious surface and potential runoff. He introduced a letter from Washington State expressing their viewpoint that the site contains a water of the State.

Appearing was BUD REHBERG who sits on the Graham Advisory Commission. He indicated he was not taking a position either for or against the project. Exhibit "11" was admitted into the evidence. His term ends in January, 2010.

Appearing was RAYMOND STRUB with questions. His single family residence is to the north of the site. If water damage is done to his home, who is responsible for it? Who is going to maintain lot 6? How close will the drainage area be to the property line? If sewers come in what happens to lot 6 and how will this affect property values? Will a bar be installed on site? He is concerned about noise and lights and the effect on single family residences to the north.

Reappearing was BILL LYNN who questioned Mr. Rehberg and wanted to know if he had permission to be on the site. Mr. Rehberg indicated that he thought he did.

Reappearing was JAMES HALMO who admitted Exhibits "A-L" into evidence. The RAC zone for this area was stricken by the Pierce County Council. He is concerned about noise from the home improvement store and he is requesting as much buffer as possible. He is also concerned about flooding of the site.

Much of the evidence presented in this hearing was presented for the first time. Because of the absence of study on all of the issues that had been raised, the Hearing Examiner took this matter under advisement and allowed each party time to review the issues raised and address them.

No one spoke further in this matter. The hearing was concluded at 2:50 p.m.

The hearing was reopened on July 23, 2009, at 9:03 a.m., at the request of the attorney for the applicant. The hearing was reopened because of the large number of issues which were raised in the previous hearing which had not been presented for study prior to the hearing.

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

- EXHIBIT "S1"** - Supplemental Staff Report
- EXHIBIT "S2"** - PALS Document
- EXHIBIT "S3"** - Letter of July 15
- EXHIBIT "S4"** - Letter of January 12, 2006
- EXHIBIT "S5"** - Mr. Lyon's Brief

Reappearing was TERRY BELIEU who issued a supplemental staff report which was marked Exhibit "1S". He briefly summarized the supplemental staff report. Around December, 2006, the County sent out a standard letter indicating that this project which hadn't been completed would be cancelled. The letter was sent out by mistake. Staff has reviewed the entire process from beginning to end and determined that the application is

still valid and complete. The problem the County has is that the computer programs are not coordinated. The person who sent the letter out indicating that the project was no longer in existence did not have information indicating that the applicant was still working on it and that in fact it was being reviewed by the SEPA official when the letter was sent out.

Reappearing was BILL LYNN who questioned Mr. Belieu briefly. Mr. Belieu has been the planner for this project for four to five years. It is very common, according to Mr. Belieu, for Planning to ask for additional information from applicants. It takes the County long periods of time to respond when additional information is requested. Cancellation was placed without knowledge of the ongoing review, reports, and studies. It was done by mistake.

Appearing was KEITH SCULLY, attorney for George Wearn, who questioned Mr. Belieu about the fee at the time of the original application. Mr. Belieu had previously indicated that the County determines the fee amount, not the applicant. He had previously indicated that around December, 2008, the County had reactivated the project into the computer system. The computer had automatically thrown the project out. The County had been working on a statistical approach on applications. Various portions of the systems had not been coordinated for determining what projects should be cancelled and which should not. The County employees had to go back into the system and reenter projects which were mistakenly cancelled. The original fee was computer generated. The original receipt indicated five lots. The application says six lots. He can't speculate why the original receipt was for five lots. We do not do a plan review of the initial application. We just check to see if the number of documents are correct. Normally additional information is provided after the initial application is filed. The applicant was clearly in contact with the County in response to the request for a supplemental application when the computer cancelled the project.

Appearing was KATHERINE GEORGE, attorney who is representing the same client as Mr. Scully. The Hearing Examiner ruled that two attorneys can not represent the same client.

Reappearing was KEITH SCULLY who further questioned Mr. Belieu.

Reappearing was MR. LYNN who follow-up questions.

The Hearing Examiner questioned whether Mr. Causseaux's decision of 1998 included a determination that the project was vested as of April 1996.

Reappearing was MR. SCULLY who indicated that the project was not vested.

Appearing was JILL GUERNSEY, Deputy Prosecuting Attorney for Pierce County, who indicated that Finding No. 6 in Mr. Causseaux's 1998 decision refers to the April date. His decision would appear to be a determination as to the vesting date of April, 1996.

Reappearing was MR. LYNN who asked him several questions. Mr. Graham indicated that the application was always for six lots and he believes it was a clerical error to indicate five lots.

MR. SCULLY cross-examined and presented closing arguments.

Reappearing was JILL GUERNSEY who responded to the questions raised regarding Appearance of Fairness Doctrine which is a judicial doctrine and not applicable in the manner suggested by the application to the project.

Reappearing was MR. LYNN who indicated that it is very clear that the applicant was continuously in contact with the department about this project and that he is vested from the date of application.

Reappearing was MS. GUERNSEY who discussed the Appearance of Fairness Doctrine as it relates to the hearing process.

The hearing was concluded at 10:40 a.m.

The following exhibits were submitted and made a part of the record as follows:

- EXHIBIT "S6" - Graham Advisory Commission Meeting Minutes of April 14, 2009
- EXHIBIT "S7" - Letter to Examiner from William Lynn dated March 30, 2009
- EXHIBIT "S8" - Letter to Examiner from William Lynn dated May 12, 2009
- EXHIBIT "S9" - Letter to Examiner from James Halmo dated May 18, 2009
- EXHIBIT "S10" - Letter to Examiner from William Lynn dated May 22, 2009
- EXHIBIT "S11" - Chronology submitted by Keith Scully dated May 26, 2009
- EXHIBIT "S12" - Letter to Examiner from Michael Gendler and Katherine George dated May 26, 2009
- EXHIBIT "S13" - Memorandum to Parties of Record from Examiner dated May 28, 2009
- EXHIBIT "S14" - Letter to Examiner from William Lynn dated June 11, 2009
- EXHIBIT "S15" - Letter to Examiner from Keith Scully dated June 15, 2009
- EXHIBIT "S16" - Memorandum to Sue Larson from Examiner dated June 29, 2009
- EXHIBIT "S17" - Letter to Jill Guernsey from Examiner dated August 26, 2009
- EXHIBIT "S18" - Letter to Examiner from Keith Scully and Katherine George dated September 1, 2009
- EXHIBIT "S19" - Letter to Examiner from Jill Guernsey dated September 2, 2009

NOTE: A complete record of this hearing is available in the office of Pierce County Planning and Land Services.

FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS:

1. The Hearing Examiner has admitted documentary evidence into the record, heard testimony, viewed the property, and taken this matter under advisement.
2. Pursuant to the State Environmental Policy Act (SEPA) and the Pierce County Environmental Regulations (Pierce County Code, Title 18D), the Pierce County Environmental Official designate has reviewed this project and issued a Mitigated Determination of Nonsignificance (MDNS) on February 18, 2009, with a comment period ending date of March 5, 2009.
3. A notice of the public hearing was published in the Puyallup Herald newspaper two (2) weeks prior to the hearing. Parties of Record were sent written notification.
4. This proposal was presented to the Graham Advisory Commission on April 14, 2009. The Commission, after public testimony and study, voted to recommend approval with a friendly amendment made and seconded as follows: 1. Staff receive clarification of Conclusion 2 of the hearing examiner decision dated December 24, 1998, for the preliminary plat of Mountain View Plaza relating to parking and storm water drainage. 2. Some type of maintenance agreement shall be required for lot 6 (drainfield). 3. Staff will determine if the proposed project concurs with G7 and G34 Road Plans as noted in the Graham Community Plan. Commissioner Randall voted no with reference to the recommendation because she felt that the neighbors' concerns were not addressed to her satisfaction. She also felt that the developer needed to create a noise buffer to mitigate noise caused by the development. She was also concerned about water flow and how it would be channeled.
5. The staff reports adequately set out proposed findings, conclusions, and recommendations and are hereby incorporated by reference.
6. The applicant has a possessory ownership interest in a 19.71 acre site located 1,300 feet west of the intersection of 224th St. E. and SR-161 in Graham, Washington. The site address is 9715 - 224th Street, Graham, Washington. The project site is mostly cleared and graded. The site slopes down from south to north. A drainage course bisects the project site from the southeast corner to the northwest side of the property carrying water to adjacent property. The property abutting the east is developed as a commercial retail shopping center. The property to the north is a residential subdivision known as Graham Park Estates. The property to the west is undeveloped and appears to be used for drainage. 224th Street East abuts the project on the south. The south frontage of the site has recently been used for temporary seasonal uses such as contractor staging area for

local construction, a firework stand and other temporary activities.

7. The applicants are requesting preliminary plat approval to subdivide this 19.71 acre site into six separate lots. Lot one will be a 3,470 square foot fast food restaurant; lot two will be a 5,540 square foot bank; lot three will be a 5,370 square foot sit down restaurant; lot four will be an 80,000 square foot grocery store; and lot five will be an 80,000 square foot home improvement retail shop. Basically, the applicant is requesting to establish five separate commercial centers on six lots. The five separate centers will not be integrated into a complex and they will not share parking facilities. The proposed uses are authorized outright by the RAC zone classification.
8. The site plan shows three lots abutting 224th Street and two lots abutting a new private road, 96th Avenue E. which will intersect with 224th Street at the south end of the site. Lot four appears to contain a cul-de-sac containing access to lot five. Each of the lots has its own independent parking and each lot will support one commercial building with footprints varying in size. The site plan also indicates that buildings on lots four and five will load and unload on the east side of the buildings. Thus, avoiding late night noise impacts to neighbors in the single family residences to the north in Graham Park Estates.
9. The minimum lot size is one acre. The average lot size is 2.29 acres. Water will be furnished by Rainier View Water Company. Bethel School District provides school service to the area. The roads within the subdivision will be private accessing off 224th Street onto the proposed 96th Avenue East. Tacoma City Light will furnish power. Telephone will be provided by Qwest Communication and septic system will be located on lot six until sewers are available at which time the applicant will consider commercial development of lot six. The landscaping plan indicates that the north and western portion of the site between these commercial centers and the single family residences will be fenced and will have fast growing Leyland Cypress trees planted along the border. Each of the individual parking lots will be individually landscaped with different types of vegetation, sidewalks and lighting.
10. Throughout the hearing process there was substantial opposition to Mountain View Plaza. Several of the opponents contended that the project was not properly vested as of April 25, 1996. They contend that the applicant's project should be denied because it was not properly vested and that current zoning prohibits commercial development in this area. As previously stated, this site is adjacent to a commercial development very close to an intersection with a highway. The issues have been properly briefed by both parties. Mr. Belieu clearly testified that the County's method of determining whether or not an application is complete for vesting is whether or not the applicant has submitted the proper number of copies of documents required by the code. If they do it is deemed complete. No inspection of individual documents is done when the application is submitted it is merely a counting process. Applicants have been working on this project for the past 13

with it

years and have spent large volumes of money relying upon the original application. This issue was addressed initially by Hearing Examiner Stephen Causseaux on September 24, 1998 wherein inherent with his decision is the conclusion that the applicants were vested to build in accordance with the RAC zone because of their April 25, 1996 application date at which time the area was zoned RAC. See also RCW 36.70B.070(4). The project was cancelled by the County computers in the 1997-1998 area. According to Mr. Belieu, at this time the computer cancelled the project even though the applicants were working with the County on wetland review and other processes. On May 9, 2008, when the cancellation was discovered, the Staff corrected the cancellation notice. There was no evidence submitted throughout the hearing process that the applicant ever received any notice of this cancellation and given the nature of the correspondence, it could have been easily misinterpreted. If the applicant received it, he could have believed it did not apply because the applicant was working with the County on various portions of the application. Given the overall confusion and the County's testimony, it would be unconscionable to cancel this project because of the computer glitch.

- 11. ^{opponents} The applicants also contend that the project is improper because it is in violation of the Appearance of Fairness Doctrine. They cite In re the Marriage of Meredith, 148 Wn. App. 887 (2009). The opponents indicate that Vicki Diamond who is an employee of the County and worked on this project several years ago violated the Appearance of Fairness Doctrine because she is now married to Bill Diamond, one of the agents for the applicant, who went to work for Larsons & Associates in April, 2000. Mr. Diamond and Ms. Meuschke were married on April 27, 2004. Information received by the Examiner indicates that when Ms. Meuschke started dating Mr. Diamond she started referring all cases involving him to the other people and she built a firewall between herself and his projects sometime in 2005. Although the opponents made some type of general allegation concerning the fact that she is married to Mr. Diamond they did not call either Mr. or Mrs. Diamond to the stand to address this issue. The Examiner is left with no evidence of Mr. and Mrs. Diamond having colluded in any way. In any event, as indicated in In re the Marriage of Meredith, supra. the Appearance of Fairness Doctrine is a judicial doctrine. Under the Appearance of Fairness Doctrine the judicial proceeding is valid only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair impartial and neutral hearing. The opponents have failed to submit any evidence that this hearing process has violated the Appearance of Fairness Doctrine in some way. During the hearing process they could have presented any type of relevant evidence they felt was necessary. If in fact, they felt Ms. Meuschke had worked on this project in some way favored Mr. Diamond they could have questioned her and Mr. Diamond on this issues. They could have demonstrated to the Examiner where and in what manner favors were received. Questions of improper behavior without supporting evidence are insufficient to justify denial of a project.
- 12. There were also issues raised by opponent concerning future road projects in the

area and the drainage way which carries water from other sites to the site on the west side of the parcel. These issues were addressed in the MDNS process and there is no appeal from the same. As previously stated, the Examiner has no authority to change provisions of an MDNS unless they are brought to the Examiner in the appeal process. Information which was submitted with reference to the drainage ditch and conversations of individuals at the State level lack the quality of evidence necessary for this Examiner to give much weight to them. (See memorandum of applicant and letter dated May 12, 2009, from Mr. Lynn).

13. Prior to the effective date of the comprehensive plan adopted by Pierce County Council on January 1, 1995 this site was classified as General Use zone. The applicant could have built anything he wanted to on each of the lots. The history of this project started on April 25, 1996 when the applicant submitted a completed application to subdivide this site into six (6) individual lots. On April 25, 1996, the site was zoned RAC. Staff has set out on pages 4, 5 and 6 of the staff report as follows:

November 1994:	Pierce County Council adopted the Comprehensive Plan.
January 1, 1995:	Comprehensive Plan became effective - subject property classified as Rural Activity Center (RAC). The site was classified as general (G) use zone prior to the effective date of the 1994 Comprehensive Plan.
April 25, 1996	Application for Preliminary Plat subdivision was accepted by Pierce County. The parcel was classified as Rural Activity Center (RAC).
1998	County staff letter(s) to applicant advising that the entire 20-acre site can accommodate only one 80,000 square foot commercial center use building.
June 26, 1998	Applicant submitted an appeal of the County interpretation that the site can accommodate a total of not more than 80,000 square feet of commercial center uses.
Sept. 24, 1998	Hearing Examiner decision on AA12-98, granting the right to develop each lot with commercial center uses allowed in the Rural Activity Center on the date of the application of April 25, 1996, with up to 80,000 square feet of commercial uses on each lot. No appeal was filed from this decision.

- December 2004 Additional reports and studies requested and submitted as to the permit application.
- December 29, 2004 Staff review for wetland, application number 398699.
- June 6, 2005 Notice of cancellation.
- October 30, 2006 Pierce County adopted Ordinance Nos. 2006-53s and 2006-53s which adopted the Graham Community Plan and implemented development regulations, to be effective March 1, 2007.
- Jan. 4 and 5, 2007 Three Petitions for Review (PFRs), appeals to the Central Puget Sound Growth Management Hearings Board, of the Graham Community Plan, were timely filed, by "The Halmo Petitioners", CROWD, and the Muckleshoot Indian Tribe.
- March 1, 2007 Graham Community Plan became effective. The site was classified as RAC.
- Early 2007 Additional reports and studies requested and submitted as permit application.
- January 9, 2007 Traffic Impact Analysis, application number 584088.
- March 13, 2007 Landslide Hazard Geotechnical Assessment, application number 591578.
- Sept. 27, 2007 The Central Puget Sound Growth Management Hearings Board ruled on the appeals and determined that the Graham sub-area Community Plan was "out of compliance" and mandated that Pierce County reduce the land area of the Rural Activity Center (RAC) zone classification.
- Sept. 28, 2007 An order of invalidity was issued by the Central Puget Sound Growth Management Hearings Board regarding the Rural Activity Center in Graham (224th & SR-161) and some EC zoned parcels on the northern portion of the plan area.
- In response to this order a notice was placed on all parcels within the Graham RAC (pre-adoption of the

Graham Community Plan) and those previously mentioned EC zoned parcels.

The notice states:

"Applications received within the original Graham RAC boundary after September 28, 2007 will be reviewed in light of the Halmo et al. & C.R.O.W.D. vs. Pierce County, Central Puget Sound Growth Management Hearing Board Decision made on September 28, 2007. Contact Advance Planning for further guidance."

- February 25, 2008 Application cancellation by computer error.
- May 9, 2008 Staff corrected cancellation notice.
- January 23, 2008 The Central Puget Sound Growth Management Hearings Board accepted Pierce County Council's proposed corrections to the Graham Community Plan. The corrections included the significant reduction in the size of the Rural Activity Center (RAC).
- As a result of the reduced RAC zoned land, the subject site was re-classified to Rural 10 (R10) zone.
- September 2008 Additional reports and studies requested and submitted as permit application.
- Sept. 11, 2008 Non-Compensatory Wetland Mitigation report, application number 646283.
- Sept. 11, 2008 Fish and Wildlife Variance, application number 646286.
- April 14, 2009 Graham Land Use Advisory Commission meeting held.
- April 29, 2009 Hearing Examiner, Public Hearing held. Letters and correspondence regarding vesting submitted at the hearing and after the hearing from the applicant and opponents.
- Memo from Hearing Examiner to all parties including County staff to submit further explanation of issues raised that were not discussed in the staff report. Hearing Examiner requested the comments and explanation be submitted by June 15, 2009.

June 11, 2009

Letter from Bill Lynn requesting the Hearing Examiner re-open the hearing to accept testimony on the vesting of the application.

14. As previously stated, the comprehensive plan adopted by Pierce County January 1, 1995, designates this site as Rural Activity Center (RAC) zone. The RAC designation and zone creates area where residents can gather, work, shop, entertain and tourists traveling to outline recreation areas can obtain needed services. There is a broad range of commercial, service and residential uses envisioned within a RAC zone. These areas should have accesses onto state routes and major arterials and should be configured to provide an alternative to strip mall development. The strip development is typically found along these parts of road systems. There are two (2) RAC's within a Graham Community Plan area. One located at SR 161 centered in the vicinity of 224th Street East and the other at the intersection of 161st and 304th Street East. There are currently 440 acres designated RAC representing less than 1% of the total plan area. The Pierce County Comprehensive Plan outlines specific location sites and expansion criteria for RACs including:
 - A. RACs should be located no closer than 5 miles from any satellite city UGA or CUGA boundary.
 - B. RACs boundaries may only be expanded if an evaluation of an existing developmental lands and unoccupied commercial building square footage demonstrates a need for more land and the expansion area comes no closer than 5 miles to a UGA or CUGA as described above.
 - C. Proposed expansions allows RACs to be compatible with adjacent uses and should not go into areas of natural hazards.
15. This site is located near the northwest corner of the intersection of 224th Street and SR 161. It is approximately 20 acres in size and bordered on one side by a major county road and is close to a state highway. The proposal is almost an addition to an existing established permitted retail and office use and consists of infill as opposed to spreading out along a narrow roadway. According to staff this site is clearly within a logical boundary to be included within an RAC zone. This site is in the center of a "built environment bounded on the south frontage by 224th abutted by commercial retail budding on the east. According to staff this area was classified as RAC in the 1994 Comprehensive Plan, the 10 year plan update and the 2007 Grand Community Plan.
16. According to staff the site is not appropriate for rural residential low density, single family agricultural forestry or recreational use because it is bordered on the south frontage by 224th Street a major county arterial road, and the adjacent properties to

the east are developed and occupied by commercial retail use.

17. The Graham Community Plan, page 47 indicates that the Rural Activity Center (RAC) designation provides for a range of commercial, office, service or civic uses necessary to serve a rural population. The intensity of development should be a smaller scale (i.e. buildings with less square footage) than commercial development allowed within urban portions of the plan area such as proposed.
18. Page 52 of the Graham Community Plan indicates that Rural Activity Centers should be the focal points for commerce and social activities within the plan area and as such provide a variety of business and daily services and public facilities. More intensive uses should be in the urban area and development in rural centers should be smaller in scale and in a rural character. This site was originally included within the Graham Community Plan. The applicant's proposal is consistent with rural objective 7 principle 1 standard 7.1.3 principle 4, principle 8, principle 10 and principle 15 of the Graham Community Plan. The site is located near and adjoining a northwest corner of 224th Street East and SR 161. Neighboring properties east contain multi tenant commercial center buildings.
19. The functions of rural centers include serving the retail and other business needs of local communities and providing employment opportunities including those related to tourism and natural resource based industries at a scale in character appropriate to the rural environment. See Pierce County Code 18A.33.150. The applicant's proposal is consistent with each of the above provisions. It is providing buffers between this proposed development and a less intensive residential uses. Therefore, it is consistent with objective 19, principle 1, 2 and 5 of the Graham Community Plan will result in a compact node of development that is appropriate to the scale and character of the surrounding neighborhood. Future building permit applications and conditional approval herein require that the future building permit applications be in compliance with county and community design, goals, policies, objectives and standards. The use is consistent with this zoning as of the date of application.
20. Storm drainage will be provided on site according to county standards. Traffic impact fees will be paid at the time of building permit application. In addition to traffic fees, the MDNS requires improvements on the road on 224th including the widening of it and dedication of an appropriate area are for future growth. The MDNS also addresses storm water drainage as well as the drainage ditch which crosses the site. A condition of approval herein will require a 2 or 3 split rail wood fence along the buffer boundary of the wildlife habitat conservation area as set out in the MDNS. The conditions of approval will require the applicant to comply with all local, state and federal regulations and obtain relevant permits. Although the applicant has objected to a condition of approval herein as previously stated it will require a 30 foot wide landscape buffer along the north and west perimeter of the project site to buffer its impacts upon residential areas. A landscape buffer shall be

established prior to final plat approval. A six (6) foot wire fence will also be required the west and north perimeter of the subject site in order to minimize the impact upon adjacent residential areas. This six (6) foot fence shall be constructed before final plat approval. A noise continuing barrier shall be constructed in accordance with standards of Title 18A.15.050 for final plat approval.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.
2. The applicant's request is consistent with the provisions of 1608030 in that it makes appropriate provisions for public health safety and general welfare for open spaces drainage way streets or roads alleys other public waste transit stops portable water supplies sanitary waste parks and recreation through the payment fees will provide sidewalks and other planning features to assure safe walking conditions for individuals who use the facility. Both subdivision and through the public interest are providing a commercial center for the rural areas in an attractive manor and location and therefore the request for preliminary plat for Mountain View Plaza should be granted subject to the following conditions:
 1. The SEPA mitigating measures set forth in the Mitigated Determination of Nonsignificance issued by the Pierce County Environmental Official on March 5, 2009, are hereby made conditions of approval as set forth hereinafter. Provided, however, that said mitigating conditions are not subject to change by the major amendment process, but must be changed by the Environmental Official through the SEPA process.
 2. The final plat for this proposal shall be submitted to the Pierce County Hearing Examiner for approval and signature within five (5) years of the effective date of the Hearing Examiner's decision on the Preliminary Plat, subject to the conditions for time extensions as outlined in Title 16 of the Pierce County Code.
 3. All requirements of the Pierce County Building Department must be met prior to the issuance of building permits for this proposal.
 4. Prior to the issuance of any permits on this site (site development) or the initiation of any grading, clearing, filling, or vegetation removal, the project shall complete the requirements necessary to obtain approval and shall obtain Final Approval Critical Area Approval.
 5. A 2- or 3-rail, split rail, wood fence or Pierce County approved substitute fence along the buffer boundary of the wildlife habitat conservation area is

required. This is being required to distinguish the critical area from the developed portions of the site and help protect the wildlife habitat conservation area from intrusion and other human impacts. The split rail fence shall be installed prior to final plat approval. Photographs of the installed fences shall be submitted to the Pierce County Environmental Biologist for this project upon completion.

6. The applicant must comply with all other local, state, and federal regulations and obtain relevant permits. This includes the U.S. Army Corps of Engineers and the Washington State Department of Ecology (DOE). **It is the sole responsibility of the applicant to contact the other jurisdictions and secure any and all other permits required for this proposed project.**
7. The following notes shall be included on the face of the final plat:

"Notice: This site lies within a fish and wildlife habitat area, as defined within Title 21 Chapter 21.18— Effective 1991 to 2/1/98. Restrictions on use or alteration of the site may exist due to natural conditions of the site and resulting regulations.

"The critical area approval for this formal plat was recorded at the Pierce County Auditor's office on _____(date), recording number _____.
8. A storm drainage plan must be submitted to the Development Engineering Section as part of the site development plans. The drainage plans shall be in accordance with Ordinance 90-132, the Pierce County Site Development Regulations.
9. The preliminary plat shall conform to the conceptual drainage plan submitted to Pierce County on February 4, 2009 by Larson and Associates.
10. All private roads within and providing access to this plat must conform to Ordinance 92-120, the private road and emergency vehicle access standards.
11. All public roads within and providing access to this plat must conform to Ordinance 91-111S, the Pierce County road standards.
12. The Pierce County Public Works Department is requiring 10 feet of right-of-way to be dedicated along the 224th Street East frontage. The dedication of right-of-way shall be made prior to final building inspection for the first structure on the site, or final plat approval, whichever comes first. For further information related to the right-of-way required, please refer to the February 12, 2009 Public Works Department correspondence.

13. Utility easements shall be provided on the face of the final plat which are necessary to the provision of water, power, sewer, natural gas, and mail delivery to the lots within the subdivision. The affected purveyors should be contacted prior to development of the final plat for their specific easement requirements.
14. When encroachments or conflicts are known prior to submittal of the final plat, Pierce County encourages resolution to these issues so that final plat approval will not be delayed by disputes.
15. Operation of equipment and associated materials in the construction of the project has the potential to result in generating dust. Impacts to neighboring properties shall be controlled by frequently watering the site as necessary to prevent the travel of dust.
16. A 30 foot wide landscape buffer shall be provided along the west and north perimeter of the project site. A landscape plan shall be submitted to Current Planning for review and approval and the landscape buffer shall be installed prior to any building permits be issued.
17. A 6 foot high wire mesh (cyclone) fence shall be constructed along the west and north perimeter of the subject site.
18. A noise attenuating barrier shall be constructed in accordance with the standards of Title 18A.15.050 of the Pierce County Code.
19. Any discharge of sediment-laden runoff or other pollutants to waters of the state is in violation of Chapter 90.48, Water Pollution Control, and WAC 173-201A, Water Quality Standards for Surface Waters of the State of Washington, and is subject to enforcement action.
20. Erosion control measures must be in place prior to any clearing, grading, or construction. These control measures must be effective to prevent stormwater runoff from carrying soil and other pollutants into surface water or storm drains that lead to waters of the state. Sand, silt, clay particles, and soil will damage aquatic habitat and are considered pollutants.
21. Proper disposal of construction debris must be on land in such a manner that debris cannot enter the natural stormwater drainages or cause water quality degradation of state waters.
22. After completion of this project, there is likelihood that stormwater runoff will contain increased levels of grease, oils, sediment, and other debris. It is recommended that stormwater treatment devices be installed so that any

discharge will be appropriately treated to remove these substances.

23. During construction, all releases of oils, hydraulic fluids, fuels, other petroleum products, paints, solvents, and other deleterious materials must be contained and removed in a manner that will prevent their discharge to waters and soils of the state. The cleanup of spills should take precedence over other work on the site.
24. Soil in stockpiles should be stabilized or protected with sediment-trapping measures to prevent soil loss. All exposed areas of final grade or areas that are not scheduled for work, whether at final grade or otherwise, shall not remain exposed and un-worked for more than two days, between October 1 and April 30. Between May 1 and September 30, no soils shall remain exposed and un-worked for more than 7 days.
25. Clearing limits and/or any easements or required buffers should be identified and marked in the field, prior to the start of any clearing, grading, or construction. Some suggested methods are staking and flagging or high visibility fencing.
26. A permanent vegetative cover should be established on denuded areas at final grade if they are not otherwise permanently stabilized.
27. Properties adjacent to the site of a land disturbance should be protected from sediment deposition through the use of buffers or other perimeter controls, such as filter fence or sediment basins.
28. All temporary erosion control systems should be designed to contain the runoff from the developed two year, 24-hour design storm without eroding.
29. Provision should be made to minimize the tracking of sediment by construction vehicles onto paved public roads. If sediment is deposited, it should be cleaned every day by shoveling or sweeping. Water cleaning should only be done after the area has been shoveled out or swept.
30. Wash water from paint and wall finishing equipment should be disposed of in a way which will not adversely impact waters of the state. Untreated disposal of this wastewater is a violation of State Water Quality laws and statutes and as such, would be subject to enforcement action.
31. The decision set forth herein is based upon representations made and exhibits, including plans and proposals submitted at the hearing conducted by the hearing examiner. Any substantial change(s) or deviation(s) in such plans, proposals, or conditions of approval imposed shall be subject to the approval of the hearing examiner and may require further and additional

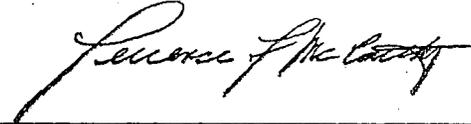
hearings.

32. The authorization granted herein is subject to all applicable federal, state, and local laws, regulations, and ordinances. Compliance with such laws, regulations, and ordinances is a condition precedent to the approvals granted and is a continuing requirement of such approvals. By accepting this/these approvals, the applicant represents that the development and activities allowed will comply with such laws, regulations, and ordinances. If, during the term of the approval granted, the development and activities permitted do not comply with such laws, regulations, or ordinances, the applicant agrees to promptly bring such development or activities into compliance.

DECISION:

The request to allow subdivision of 19.71 acres into five commercial lots, and one lot for a septic drainfield for a site located at 9715 - 224th Street East is hereby granted subject to conditions contained in the conclusions above.

ORDERED this 9th day of October, 2009.



TERRENCE F. McCARTHY
Deputy Hearing Examiner

TRANSMITTED this 9th day of October, 2009, to the following:

OWNER/ F.G. Associates
APPLICANT: Attn: Kelly Afdem
13206 126th Avenue East
Puyallup, WA 98373

AGENT: Larson and Associates
Attn: Bill Diamond
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Spanaway, WA 98387

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Spanaway, WA 98387

PIERCE COUNTY PLANNING AND LAND SERVICES
PIERCE COUNTY BUILDING DIVISION
PIERCE COUNTY DEVELOPMENT ENGINEERING DEPARTMENT
PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT
TACOMA-PIERCE COUNTY HEALTH DEPARTMENT
FIRE PREVENTION BUREAU
PIERCE COUNTY PARKS AND RECREATION
PIERCE COUNTY COUNCIL
PIERCE COUNTY RESOURCE MANAGEMENT

CASE NO: PRELIMINARY PLAT: MOUNTAIN VIEW PLAZA
APPLICATION NOS. 206064, 222882, 222883, 261497, 398699,
584088, 591578, 646283

NOTICE

1. **RECONSIDERATION:** Any aggrieved party or person affected by the decision of the Examiner may file with the Department of Planning and Land Services a written request for reconsideration including appropriate filing fees within seven (7) working days in accordance with the requirements set forth in Section 1.22.130 of the Pierce County Code.

2. **APPEAL OF EXAMINER'S DECISION:** The final decision by the Examiner may be appealed in accordance with Ch. 36.70C RCW.

NOTE: In an effort to avoid confusion at the time of filing a request for reconsideration, please attach this page to the request for reconsideration.

No. 65279-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

F.G. ASSOCIATES,

Appellants,

v.

GRAHAM NEIGHBORHOOD ASSOCIATION, a Washington non-profit
corporation; RAY STRUB; GEORGE WEARN; JAMES L. HALMO; and
PIERCE COUNTY,

Respondents.

CERTIFICATE OF SERVICE

GORDON THOMAS HONEYWELL LLP
William T. Lynn
Margaret Y. Archer
Attorneys for Appellants F.G. Associates

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WSBA No. 2122421224

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ORIGINAL

THIS IS TO CERTIFY that on this 7th day of July, 2010, I did serve true and correct copies of the following:

1. Brief of Appellants F.G. Associates; and
2. Certificate of Service.

via ABC Legal Messengers (or by other method indicated below) by directing delivery to and addressed to the following:

Keith P. Scully
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Seattle, WA 98101
keith@gendlermann.com

Jill Guernsey
Deputy Prosecuting Attorney – Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402
jguernsey@co.pierce.wa.us

Dated this 7th day of July, 2010, at Tacoma, Washington.



Cheryl M. Koubik
Legal Assistant to Margaret Y. Archer