

No. 75401-7-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

FILED
Oct 25, 2016
Court of Appeals
Division I
State of Washington

RMG WORLDWIDE, LLC, MICHAEL H. MOORE,
its Manager,

Appellant,

v.

PIERCE COUNTY,

Respondents.

**OPENING BRIEF
OF APPELLANT RMG WORLDWIDE, LLC,
MICHAEL H. MOORE, ITS MANAGER**

Dennis D. Reynolds
DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777 Phone
(206) 780-6865 Fax
*Counsel for Appellant RMG Worldwide,
LLC, Michael H. Moore, its Manager*

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR	5
III. ISSUES RELATED TO ASSIGNMENS OF ERROR	8
IV. STATEMENT OF CASES.....	9
A. The Historic Land Use Decisions and Related Approval Process.	9
B. The Zoning Change Made After Approval of UP 9-90 and Its First Amendment.....	13
C. Moore’s Request to Change the Mix of Use.....	14
D. The First Administrative Appeal (<i>Moore I</i>).....	15
E. Moore’s Request (In the Alternative) to Have the Rezone/PDD Request Processed for Decision.....	16
F. The Second Administrative Appeal (<i>Moore II</i>).....	17
G. The Consolidated Judicial Appeals.....	17
V. ARGUMENT	18
A. Standard of Review.....	19
B. The 1995 Pierce County Zoning Atlas Map Shows That UP 9-90 As Amended Is a Zoning Entitlement.....	22
C. The PDD/Rezone Application Was Not Abandoned.....	29
D. The Hearing Examiner’s Decision Conflicts with Important Statutory and Constitutionally Protected Property Rights.	34
1. Statutory Rights	34
2. Protected Property Rights	35

E.	The County Must Process the Proposed Third Major Amendment Like It Did the First and Second Major Amendment to UP 9-90.	42
VI.	CONCLUSION.....	48
APPENDIX.....		49
CERTIFICATE OF SERVICE AND MAILING		50

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Chelan County v. Nykreim</i> , 146 Wn.2d 904, 52 P.3d 1 (2002).....	19
<i>Cingular Wireless LLC v. Thurston County</i> , 131 Wn. App. 756, 129 P.3d 300 (2006).....	21
<i>City of University Place v. McGuire</i> , 102 Wn. App. 658, 9 P.3d 918 (2000).....	20
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wash.2d 801, 828 P.2d 549 (1992).....	20
<i>Crescent Harbor Water Co. v. Lyseng</i> , 51 Wn. App. 337, 753 P.2d555 (1988).....	4, 27
<i>Crisp v. Vanlaeken</i> , 130 Wn. App. 320, 122 P.3d 296 (2005).....	4, 27
<i>Franklin County Sheriff's Office v. Sellers</i> , 97 Wn.2d 317, 646 P.2d 113 (1982).....	21
<i>Griffin v. Thurston County Bd. of Health</i> , 165 Wn.2d 50, 196 P.3d 141 (2008).....	19
<i>Habitat Watch v. Skagit County</i> , 155 Wn.2d 397, 120 P.3d 56 (2005).....	19, 29
<i>Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.</i> , 120 Wn. App. 246, 84 P.3d 295 (2004).....	4, 27
<i>Lauer v. Pierce Cty.</i> , 173 Wn.2d 242, 267 P.3d 988 (2011).....	19, 20
<i>Mountain High Homeowners Ass'n v. J.L. Ward Co.</i> , 228 Or. App.424, 209 P.3d 347 (2009).....	5

<i>Nieshe v. Concrete Sch. Dist.</i> , 129 Wn.App. 632, 127 P.3d 713 (2005).....	3
<i>Overton v. Economic Assistance Auth.</i> , 96 Wn.2d 552, 637 P.2d 652 (1981).....	21
<i>Phoenix Dev., Inc. v. City of Woodinville</i> , 171 Wn.2d 820, 256 P.3d 1150 (2011).....	21
<i>Pinecrest Homeowners Ass’n v. Glen A. Cloninger & Assocs.</i> , 151 Wn.2d 279, 87 P.3d 1176 (2004).....	20
<i>Riverview Cmty. Grp. v. Spencer & Livingston</i> , 181 Wn.2d 888, 337 P.3d 1076 (2014).....	4, 5, 27
<i>Skagit County v. Dept. of Ecology</i> , 93 Wn.2d 742, 613 P.2d 115 (1980).....	22
<i>Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm’n</i> , 123 Wn.2d 621, 869 P.2d 1034 (1994).....	21
<i>Wenatchee Sportsman Ass’n v. Chelan County</i> , 141 Wn.2d 169, 4 P.3d 123 (2000).....	19
Statutes	
GMA	14
Growth Management Act.....	2
Growth Management Act (RCW Chapter 36.70A)	10
RCW 36.70C.020(2)	19
RCW 36.70C.110.....	2
RCW 36.70C.130.....	6
RCW 36.70C.130(1)	19, 20
RCW 36.70C.130(1)(c).....	21

RCW 36.70C.130(1)(d)	21
RCW 36.70C.130(i)(f)	22
Other Authorities	
Restatement (Third) of Property: Servitudes § 2.10 (2000)	5
Stephen Phillabaum, ENFORCEABILITY OF LAND USE SERVITUDES BENEFITING LOCAL GOVERNMENT IN WASHINGTON, 3 Univ. Puget Sound L. Rev. 216, 216- 18 (1979).....	4

I. INTRODUCTION

This appeal concerns a special use permit, UP 9-90, called an “unclassified use permit.” The Director of the Pierce County Department of Planning and Land Services (“PALS”) failed to give due legal effect to what occurred in 1990 when UP 9-90 was issued and in 1991 when a key amendment was approved for residential development. In defending its unsupportable actions, Pierce County emphasizes that what it says now controls over what it actually did. This is wrong. This Court should reverse for errors of law the County’s inadequate recognition of the UP 9-90, the decision that the Original Application was somehow abandoned or lost due to the passage of time and the decision refusing to process an application for a Major Amendment to an existing land use approval.

The 1991 amendment (“First Amendment”) was a “Major Amendment” and was made pursuant to a request for a Planned Development District/Rezone submitted by the Appellants’ predecessor. A PDD/Rezone was an allowed land use option at the time. *See* Historic Code, PCC § 18.10.390 (AR 14-180 to 183).¹ That permitting process resulted in a change to the Pierce County Zoning Map. The only way to change the Map was via a land use approval because no legislative enactment was promulgated. The 1995 Map clearly shows UP 9-90 as a

¹ *See* **Appendix A-2**, the Historic Code.

zoning entitlement, explicitly mentioning it by number, and applying that classification along with a “General Zoning” designation to the Classic Golf Course now owned by RMG Worldwide, LLC (“Moore”).² The UP 9-90 label on the Zoning Map is an overlay designation. At the time of the permit decisions in 1990-91, the applicable General Zoning would have allowed residential development with no density limitation. (AR 14-180, 14-181).³ The UP 9-90 reference on the Zoning Map demonstrates that the County approved a special category with a unique residential density rezoned to .67 units per acre. (AR 14-379) The unique residential density established by UP 9-90 (and the key amendment thereto) vested the Classic property against later enacted down-zoning made to a rural area under the Growth Management Act (“GMA”). (AR 14-180, 14-181).

Pierce County now denies that its official Zoning Map established what the Map clearly demarcates: approval of the PDD/Rezone and associated densities, as amended. However, the County cannot explain how the Map designation was made. Again, the only way was by permit

² See **Appendix A-1** (Zoning Map).

³ “AR” is the Administrative Record. There were two administrative appeals and two records. The Administrative Record includes the transcript (TR) of the two proceedings before the Pierce County Examiner. AR cites to the 2014 appeal are denominated “14-” followed by the page number(s). The AR cites to the 2015 appeal are denominated “15-” followed by the page number(s). The Clerk’s Papers denominate the 2014 Administrative Record as Page Nos. 1-468; the 2015 Administrative Record is Page Nos. 469-564. The Superior Clerk did not assign any new numbering or designation of the Record submitted by Pierce County pursuant to RCW 36.70C.110 to the King County Superior Court in the Clerk’s Papers.

approval, because there is no corresponding legislative enactment. It also denies ever making a decision on the PDD/Rezone application but cannot point to any statement that the PDD/Rezone application was ever withdrawn by the predecessor. Pierce County should be bound by what it actually did when it demarcated UP 9-90 on its official Zoning Map and created the corresponding equitable servitude.

The Court should rule that Moore is entitled to the benefits of the unclassified use permit for the property that it purchased. This special use permit is a protected property interest providing an entitlement to certain benefits, including vesting against future zoning. *Nieshe v. Concrete Sch. Dist.*, 129 Wn.App. 632, 641-42, 127 P.3d 713 (2005) (“A protected property interest exists if there is a legitimate claim of entitlement to a specific benefit.”) (quoting *Goodisman v. Lytle*, 724 F.2d 818, 820 (9th Cir. 1984)) (internal quotation marks omitted).

Importantly, this Zoning Map designation is consistent with an equitable servitude created in 1990-91 in the permit decisions. The County and Moore’s predecessor agreed in a Memorandum Agreement and Covenant to Run With the Land dated May 15, 1991 that “... Applicant has voluntarily applied for the above-stated approval [UP 9-90] which grants applicant the right to use or develop the property in the approved manner....” (AR 14-243) *See also* Application, Part III-Questions, Item 7

(AR 15-317). An equitable servitude is a covenant that sets an owner's expectations by placing certain burdens and benefits on the future use of the land. *Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888, 897, 337 P.3d 1076 (2014). The burdens on the property owner benefit the County here, as it locked in conditions of approval on the entire property, which run with the land. The benefit to the property owner is found in the creation of a neighborhood restricted to particular uses that provide a private alternative to zoning. *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 252, 84 P.3d 295 (2004).

The residential development conditions were part of the “bundle of sticks” that the original owner thought it was receiving when it reactivated all components of the Original Application to change the mix of uses previously approved. *Id.* at 253; *see also Crisp v. Vanlaeken*, 130 Wn. App. 320, 323, 122 P.3d 296 (2005) (An equitable servitude is a property interest.); *Crescent Harbor Water Co. v. Lyseng*, 51 Wn. App. 337, 339, fn. 3, 753 P.2d555 (1988) (An equitable servitude is a use interest. *See also* Stephen Phillabaum, ENFORCEABILITY OF LAND USE SERVITUDES BENEFITING LOCAL GOVERNMENT IN WASHINGTON, 3 Univ. Puget Sound L. Rev. 216, 216-18 (1979) (Government-imposed conditions are land-use planning tools that create reciprocal benefits/and burdens on both the

landowner and public).⁴ Substantial evidence supports a conclusion that the mitigation conditions placed on the 157-acre property created protected property rights and obligations that run with the land, and therefore require the County to process a “Third Major Amendment to UP 9-90” to allow more residential use at the unique residential density and less use of the approved golf course.

II. ASSIGNMENTS OF ERROR

The Pierce County Hearing Examiner made 36 Findings of Fact and drew 20 Conclusions of Law in two Reports and Final Decisions appealed to the King County Superior Court and consolidated for review (*Moore I* and *Moore II*). The Superior Court made no explicit ruling on or mention of the Examiner’s Findings and Conclusions, simply holding that the two administrative decisions issued by the Hearing Examiner were affirmed. It denied Moore’s consolidated appeal. Moore assigns error as follows:

A. Superior Court⁵

⁴ To establish an equitable servitude by estoppel, a property owner must show: (1) an express or implied representation made under circumstances where (2) it is reasonably foreseeable that the person to whom the representation is made will rely on it; (3) that the person relies on the representation; (4) that such reliance is reasonable; and (5) that establishing a servitude is necessary to avoid injustice. *Mountain High Homeowners Ass’n v. J.L. Ward Co.*, 228 Or. App.424, 438, 209 P.3d 347 (2009) (cited favorably by *Riverview Cmty.*, 181 Wn.2d at 898-99); *see also* Restatement (Third) of Property: Servitudes § 2.10 (2000).

⁵ The Superior Court’s Order Denying LUPA Petition for Review dated June 6, 2016 (CP 455-56) is referred to throughout this Brief as “the Order.”

1. The Superior Court erred in holding that Moore failed to meet its burden of proof under RCW 36.70C.130, denying Moore's LUPA appeal, and affirming the Pierce County Examiner's two administrative decisions, AA5-14 and AA3-15. See CP 455-56.2. The Superior Court erred in impliedly affirming the Findings entered by the Examiner when Moore challenged specific findings for lack of substantial evidence.

B. Pierce County Hearing Examiner (*Moore I*, Case No. AA5-14)⁶

2. The Pierce County Hearing Examiner erred in concluding at Finding No. 4 and Conclusions of Law Nos. 5 and 10 that the County's unclassified use permit decisions did not vest the property against future zoning changes because it was not a zoning entitlement.

3. The Examiner erred in concluding at Findings Nos. 8-9 that the County did not approve a PDD/Rezone when it made its determination to amend the unclassified use permit for residential use, as demarcated on the 1995 Map.

4. The Examiner erred in concluding at Conclusion of Law No. 2 that the Original Applicant by applying for an unclassified use permit for the golf course somehow gave up its PDD/Rezone application.

5. The Examiner erred in concluding at Conclusions of Law Nos. 7, 8, 9, and 13 that the present owner of the property must meet

⁶ The Examiner's August 5, 2014, Report and Decision is Appendix A-3. The Order on reconsideration is **Appendix A-8**.

residential zoning densities specified by current law if it changes the mix of previously approved uses.

6. The Examiner erred in concluding at Conclusion of Law No. 15 that the administrative decision dated March 24, 2014, issued by PALS was correct and PALS had no obligation to process a request to amend the unclassified use permit. See Report and Decision, August 5, 2014, p.14X.

C. Pierce County Hearing Examiner (*Moore II*, Case No. AA3-15)⁷

7. The Pierce County Hearing Examiner erred in concluding at Findings Nos. 4, 5, 11, 12, 14, 15, 16 and 17 and Conclusions of Law No. 2 that the current property owner/applicant's predecessor decided to change the "process" for approving its land use application to one of amending the unclassified use permit, thereby foregoing or abandoning its site specific PDD/Rezone request.

8. The Examiner erred in concluding at Finding No. 5 that all actions of the County, the predecessor and the current owner of the Classic Golf Course are consistent with abandoning the PDD/ Rezone request filed by the predecessor in 1990.

⁷ The Examiner's August 6, 2015, Report and Decision is Appendix A-7.

9. The Examiner erred in incorporating (Finding No. 6) the same Findings and Conclusions made in *Moore I*, challenged herein for the same reasons identified above, *infra*, Assignment Nos. 3-6.

10. The Hearing Examiner erred in concluding at Finding No. 9 that the original applicant and the current owner/applicant “understood” that the process was changed in 1991 such that PALS would not consider a PDD/ Rezone.

11. The Hearing Examiner erred in concluding at Conclusions of Law Nos. 3 and 4 that public policy supports the County’s administrative decision to not process a request by the current property owner to act upon the PDD/Rezone request.

12. The Examiner erred concluding at Conclusion of Law No. 5 that the property owner/applicant did not meet its burden to show to be clearly erroneous an administrative decision issued by PALS that it could not process a previously submitted PDD/rezone application.

13. The Examiner erred in entering a decision to the effect that: “**Decision**: Appellant’s appeal is denied.” Report and Decision, August 6, 2015, p.13X.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Whether the Superior Court erred when it accepted the Hearing Examiner’s findings of fact 4, 8 and 9 from *Moore I* and Findings Nos. 4, 5, 6, 9, 11, 12, 14, 15, 16 and 17 from *Moore II* when such

findings are not supported by substantial evidence in the record? (Assignments of Error 1, 2, 3, 7, 8, and 10).

- B. Whether the Pierce County Examiner erred in deciding that no Planned Development District/Site Specific Rezone decision was made for the property Appellants now owns? (Assignment of Error 2, 3, 4, 5, 6, 9, 12 and 13).
- C. Whether, in the alternative, the Examiner erred in deciding that Appellants predecessor abandoned its Planned Development District/Site Specific Rezone application? (Assignment of Error 7, 8, 9, 10, 11, 12, 13).

IV. STATEMENT OF THE CASE

A. The Historic Land Use Decisions and Related Approval Process.

In 1989, LeMay and Otaka, Inc. owned one piece of contiguous property in the Graham area of unincorporated Pierce County – 157-acres of undivided land zoned General. On May 18, 1990, LeMay and Otaka (“the Original Applicant”) submitted a single combined application (“the Application”) (AR 14-333 to -336)⁸ and paid the appropriate fees to Pierce County.⁹ The Application was titled “Classic Estates, a PDD.”¹⁰ It included a PDD/Rezone, commercial designation, residential plat components (AR 15-151; AR 15-207), and a mixed use project, including a golf course. (AR 14-

⁸ See also AR 15-13, AR 15-197, -198) The Application described the proposal as “creation of 96 single-family lots, an 18-hole championship public golf course, and commercial reserve area on a 157.6 acre parcel of vacant land.” (AR 14-333) The Application also included a zone reclassification “from G to SA-PDD, C-2-PDD,” and a preliminary plat application. *Ibid.* The entire proposal was intended to go to the Examiner “at one time.” (AR 15-135)

⁹ The fees paid were separate fees for each component. (AR 15-151; AR 15-207) See also AR 562.

¹⁰ Pierce County was informed as early as May 1988 of a planned development for the golf, commercial and residential proposal LeMay envisioned. (AR 14-226)

259 to -260). The record shows that Original Applicant never changed its request. No alternative to the PDD has ever been submitted. (AR 15-13, AR 15-197, -198).

The record shows that LeMay at the time desired flexibility but also rights “in perpetuity.” (AR 15-255) To achieve this goal, the County urged use of a Planned Development District.¹¹ (AR 15-236, -237) The purpose and effect of the PDD/Rezone project component is explained by the Examiner in his First Decision:

.... Chapter 18.10.600¹² of the Pierce County Zoning Code (PCZC) in effect in 1990 set forth the criteria for a planned development district (PDD). A PDD consisted of a multiple use development that, when approved, created its own, flexible zone classification and also amended the County zoning map. Section 18.10.600(A) PCZC provides in part:

A PDD is intended to be a flexible zoning concept...The uses within the PDD depend on the uses in the underlying or the Potential Zone. **The residential densities within the PDD may vary** depending upon how the land is developed with general aesthetics, natural areas, and open space being an incentive.

Section 18.10.600(B) PCZC provides that PDDs are of two types: residential or nonresidential. Said section then provides:

¹¹ (AR 15-96, -97). At the time of the Application in 1990, adoption of the Growth Management Act (“GMA”) (RCW Chapter 36.70A) and possible “down-zoning” of rural property was on the horizon. (AR 15-191)

¹² See Appendix A-2. A partial text of the historic PDD Ordinance is in the Record. (AR 15-812 – 15-817)

...A residential PDD shall mean that the principal purpose of the PDD is to provide one or more types of housing at densities of dwellings the same as densities permitted by the underlying zone....

PDD approval would bind the parcel for development in accordance with a site plan approved by a hearing examiner. As set forth in PCZC 18.10.600(U):

U. Parties Bound by PDD District. Once the preliminary development plan is approved by the Examiner, all persons and parties, their successors, and heirs who own or have any interest in the real property within the proposed PDD, are bound by the Examiner's action [approving a preliminary development plan].

* * *

Examiner's Ruling dated August 5, 2014 (*Moore I*), Finding No. 6, AR 15-789; AR 15-790. (Emphasis supplied) (*footnote added*).¹³

An unclassified use permit was neither requested or required by the County initially to construct the golf course. However, just prior to the golf course opening, the County decided that an unclassified use permit was required to operate the golf course. (Tr. 7/3/2014; AR 14-113 to -114; AR 14-116; AR 14-122 to -124; Tr. 6/10/2015, AR 15-201). LeMay was directed to obtain an unclassified use permit for the golf use only per PCC § 18.10.620 (AR 14-184 to -186), which it did on June 26, 1990, paying

¹³ For the Court's convenience, the Examiner's First Decision is annexed hereto as **Appendix A-3**.

the appropriate fee and filing a separate application. This action was not voluntary. (AR 14-338 to -341; AR 15-242). LeMay was under duress because it had to open the golf course as soon as possible. (Tr. 7/3/2014, p.61:6-10; AR 14-128; Tr. 5/19/2015; Tr. 6/10/2015, AR 15-215).

UP 9-90 was issued on October 2, 1990 for the golf course use. The Examiner found that UP 9-90 "... covered the entire 157-acre parcel." (AR 14-37, Finding No. 9; AR 14-43 -44, Conclusion No. 10) Moore's predecessors thereafter divided the 157-acre parcel into three lots in 1993. (AR 14-38, Finding No. 10.)

On September 11, 1990, prior to issuance of UP 9-90, LeMay requested that the County's Department of Planning and Land Use Services ("PALS") continue processing ("reactivate") its combined application filed in May 1990, including its PDD, rezone and preliminary plat components. AR 15-277.¹⁴

On January 10, 1991, County Planner Grant Griffin advised LeMay that: "I will be processing the residential portion of this proposal as a Major Amendment to the already adopted and approved Classic Golf Course Unclassified Use Permit, UP 9-90." (AR 15-330)

The record shows that the County's rationale for using the major amendment procedure to approve the residential component of the UP 9-

¹⁴ See **Appendix A-4** Barb LeMay letter dated September 11, 1990.

90 mixed-use project was to give it authority to enforce the conditions of approval for the golf course use (the first approved use) to the entire tract of land to maintain flexibility and control. (Tr. 7/3/2014, p.8:20-23; AR 14-80)

The “First Major Amendment” to UP 9-90 for the residential component and a lot for a water tower use was approved on March 5, 1991. (AR 14-386 – 14-416)

Between 1991 and 1999, the golf course and residential subdivision were completed. In 2004 and 2005, the golf course portion of the property was conveyed to Moore and the current ownership began. Before then, the County processed three more amendments to UP 9-90: second on August 7, 1991, through a Minor Amendment (temporary clubhouse) (AR 14-400, 14-401); third on July 6, 1995 (conversion of water reservoir parcel to residential) (AR 14-414) (Major Amendment); and fourth on June 29, 1999, through a Minor Amendment (Tournament Pavilion) (AR 14-455 to -459).

B. The Zoning Change Made After Approval of UP 9-90 and Its First Amendment.

By 1995, as noted, the Pierce County Official Zoning map showed the unclassified use permit as amended as a zoning entitlement. The designation is in formal cartographer’s lettering of “UP9-90.” There is a

shaded border indicating that UP 9-90 applied to the entire 1/4 section (the NE pf 12-18-03). The designation is dated “1/11/95.”

C. Moore’s Request to Change the Mix of Use.

In 2014, Moore envisioned a change in the mix of approved use under UP 9-90.¹⁵ Specifically, Moore desired to amend the permit to allow for redevelopment of at least some of the golf course portion of the site to residential use at a density consistent with that for the residential component approved in 1991 as part of the “First Amendment.”¹⁶

This decision was not made lightly. It occurred only after assessing legislative options which ultimately proved futile, despite assurances of County officials since 2004 that the Classic Golf Course property would be the “first parcel” placed into an Urban Growth Area pursuant to the GMA. (TR. 7/3/2014, AR 14-118). Moore requested approval of another Major Amendment to allow single family lots in some of the golf course, as follows:

Most simply put, we would submit an application that would ask the Examiner to approve another Major Amendment that would result in some or all of the golf course

¹⁵ The Pierce County Code specifies that the previously used process (here, a major amendment to UP 9-90) must be used to change the mix. *See* former PCC § 18A.85.040.A.C, now codified as PCC § 18A.75.010. The local ordinances cited are found in **Appendix A-5**.

¹⁶ The Classic Golf Course is surrounded by urban density housing and can be easily connected to urban services, including sewer. AR 15-193)

being platted into additional single family lots.

Halsan letter to Mr. Dennis Hanberg, Director, Planning & Land Services. (AR 14-314).

PALS refused to process the requested application unless it was “consistent with the current zoning density” prescribed by the Zoning Code and issued an Administrative Decision to that effect dated March 24, 2014. (AR 14-321 to -322) Applying current zoning density requirements would dramatically reduce the density from an average lot size of one unit per 14,974 square feet (approved in the First Amendment to UP 9-90) to one unit per five acres. (AR 14-312; AR 14-379)

D. The First Administrative Appeal (*Moore I*).

Moore appealed the Administrative Decision (AR 14-303 to -320) (“Decision I”). In a Report and Decision dated August 5, 2014 (and following a denial of a motion to reconsider dated September 22, 2014, Case No. AA5-14) the Examiner upheld PALS’ administrative decision. (AR 14-32 to -64)¹⁷ According to the Examiner’s reconsideration decision, the Examiner determined that the planned development and zone reclassification component of the Original Application submitted by Moore’s predecessor-in-interest – the rights to which are now assigned to

¹⁷ See Appendix A-3.

Moore – remained unresolved:

2R. Appellant raises an issue as to whether the originally submitted application for the Planned Development District (PDD) and zone reclassification are still valid applications. Appellant notes that the County considered the applications complete, the applicant did not withdraw the applications, and the County did not mail a notice to the applicant advising of the expiration of the application. Such issue is beyond the scope of the present Administrative Decision and is therefore not before the Examiner for decision.¹⁸

See Decision On Reconsideration, September 22, 2014, p.3. (AR 14-3.)

Moore filed a timely LUPA Petition to appeal the Examiner’s First Decision. (CP 1-52).¹⁹

E. Moore’s Request (In the Alternative) to Have the Rezone/PDD Request Processed for Decision.

Moore alternatively submitted a second request to PALS via a letter dated October 15, 2014, requesting that—consistent with the Examiner’s view—the County finally issue a decision on the pending PDD/Rezone component of the Original Application, as previously requested by Moore’s predecessor-in-interest. (AR 15-371 to -374) Relying upon a staff report signed by Jeffrey D. Mann, AICP, Senior Planner, dated January 14, 2015,

¹⁸ The Motion to Reconsider is AR 14-13 to -24 and attached as **Appendix A-6**

¹⁹ The parties thereafter agreed to stay that appeal while Moore pursued, as an alternative, a second request for a final decision on the PDD/Rezone component of the Original Application. (CP 53-55; CP 56-57).

PALS issued an Administrative Decision determining that the 1990 Rezone/PDD application for the Classic Golf Course "... is no longer viable." (AR 15-295 to -369) In reaching that conclusion, Mr. Mann simply relied upon the County file on the project, or incomplete portions thereof, and failed to speak with applicant Moore (who was also the original project manager for LeMay), the planner for Moore, Carl Halsan (employed by PALS in 1990-91), the project engineer in 1990-91 Rich Larson, the original applicant LeMay, or former Pierce County Executive Joe Stortini who worked to facilitate opening the Golf Course. All were available and willing to shed light on the issues at hand. (Tr. 5/19/2015, AR 15-49, -50).

F. The Second Administrative Appeal (*Moore II*).

Moore appealed the second administrative decision. (AR 15-292 to -300) The Hearing Examiner upheld the Administrative Decision that the PDD/Rezone component of the Original Application was no longer viable, Case No. AA3-15 ("Decision II").²⁰ (AR 15-1 to -14) As a result, Moore filed a second LUPA petition. (CP 469-557)

G. The Consolidated Judicial Appeals.

The King County Superior Court consolidated Moore's two LUPA appeals. (CP 58-59, CP 563-564). The court granted a motion to supplement, allowing the 1995 Zoning Map to be considered in both

²⁰ For the Court's convenience, the Examiner's Second Decision dated August 6, 2015 is annexed hereto as **Appendix A-7**

consolidated appeals “for all purposes.” (CP 451-452). The Superior Court denied the consolidated appeals, and this timely appeal followed. (CP 458-462. 463-468). The County did not cross-appeal the Order on Supplementation.

V. ARGUMENT

Moore seeks recognition of the full bundle of rights it purchased and that Pierce County granted the property owner in UP 9-90 and its amendment. Moore also desires the benefit of a corresponding equitable servitude created when the County insisted that the conditions of approval be deemed covenants which run with the land. The Examiner’s conclusion that there are no more extant development rights under the UP 9-90 is inconsistent both with Moore’s right to request an amendment of the permit and with the UP’s status as a protected (or “vested”) property right and equitable servitude.

The County’s decision to process the combined application as a “major amendment” to the UP 9-90 in early 1991 was made without informing the Original Applicant, LeMay, that the change meant anything other than to review and approve what the Original Applicant requested, including the PDD/Rezone component. No withdrawal or change to the Original Application was ever made; nor was an additional application or fee requested by the County to process and approve the “First

Amendment.” The Original Applicant did not amend its combined application. The County now contends that this process was “unavailable” under its unclassified use process – even though *in fact* it approved residential development under that very process, a result binding under the doctrine of finality.²¹ However, in its Staff Report to the Examiner on the golf course application, PALS made the assuring comment that: “This application is for the golf course and nothing else. The single family development will be handled under its own application and hearing.” (AR 14-353)

A. Standard of Review.

The role of this Court under LUPA is to correct wrongful land use decision-making. See RCW 36.70C.020(2); *Griffin v. Thurston County Bd. of Health*, 165 Wn.2d 50, 54, 196 P.3d 141 (2008). LUPA authorizes the Court to reverse a land use decision if the petitioner carries the burden of establishing any one of six standards of review set out in RCW 36.70C.130(1). See *Lauer v. Pierce Cty.*, 173 Wn.2d 242, 252, 267 P.3d 988 (2011). Moore pursues relief under the following LUPA Standards:

- (a) The body or officer that made the land use decision engaged in unlawful procedure

²¹ See *Chelan County v. Nykreim*, 146 Wn.2d 904, 931, 52 P.3d 1 (2002); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410-11, 120 P.3d 56 (2005); *Wenatchee Sportsman Ass’n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000). Even improperly issued permits are binding under this doctrine. *Nykriem*, 146 Wn.2d at 931-32.

or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

This Court applies the LUPA standards of review directly to the Hearing Examiner's decision. *Lauer*, 173 Wn.2d at 252. Questions of law under subsections (a), (b), and (f) are reviewed *de novo*. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004).

There is no deference to the Examiner's erroneous legal rulings. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000); *City of University Place v. McGuire*, 102 Wn. App. 658, 667, 9 P.3d 918 (2000); *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 813-14, 828 P.2d 549 (1992). Courts do not defer to an

interpretation which conflicts with the language of the law. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994). It is ultimately for the court to determine the purpose and meaning of the law. *Overton v. Economic Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981); *Waste Mgmt. of Seattle*, 123 Wn.2d at 627; *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325-26, 646 P.2d 113 (1982).

The substantial evidence standard, RCW 36.70C.130(1)(c), requires the Court to determine whether a fair-minded person would be persuaded by the evidence of the truth of the challenged findings. *Abbey Rd. Grp.*, 167 Wn.2d at 250; *Cingular Wireless LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). Under this standard, the Court “consider[s] all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.” *Abbey Rd. Grp.*, 167 Wn.2d at 250.

Finally, under the clearly erroneous standard, RCW 36.70C.130(1)(d), a decision is clearly erroneous if, “although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed.” *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 829, 256 P.3d 1150

(2011); *Skagit County v. Dept. of Ecology*, 93 Wn.2d 742, 748, 613 P.2d 115 (1980).

Moore believes that its appeal can be resolved without the need for this Court to reach constitutional claims as allowed by RCW 36.70C.130(i)(f), although constitutional law defines the property rights inherent in UP 9-90.

B. The 1995 Pierce County Zoning Atlas Map Shows That UP 9-90 As Amended Is a Zoning Entitlement.

Addressing LUPA Standards (c) and (d), Pierce County's published zoning map is an official statement regarding zoning ordinances that regulates the use of public and private land. *See Responsible Urban Growth Group v. City of Kent*, 123 Wn.2d 376, 388, 868 P.2d 861 (1994). Zoning maps are regulatory in nature — the purpose of which is to classify and regulate the types of land uses allowed. *See Norco Const., Inc. v. King County*, 97 Wn.2d 680, 690, 649 P.2d 103 (1982); *Snohomish County v. Thompson*, 19 Wn. App. 768, 769, 577 P.2d 627 (1978).

Pierce County's 1995 Zoning Atlas Map shows the Moore property as zoned pursuant to UP 9-90, an overlay designation to the then General Zoning. (AR 15-755) *See* Richard Settle, *Washington Land Use and Environmental Law and Practice* § 2.12(f), at 71 (1983) (An overlay is an additional land use regulatory layer in addition to ordinary zoning that may serve a wide variety of purposes.). The 1995 Zoning Map, being

contemporaneous with the County's 1990 and 1991 decisions, indicates that, at that time, County officials believed that the entire property – not just Lot 2 as argued by the County below, was “zoned” UP 9-90.²² No other vehicle to change zoning is identified except the PDD/Rezone. The County has taken the position that it did not make a zoning decision in approving UP 9-90. However, the County's Zoning Atlas Map in 1995 shows the Moore property as zoned pursuant to UP 9-90, an overlay designation to the then General Zoning. (AR 15-775)²³ At the time, General Zoning would have allowed residential development with no limitation, so the UP 9-90 reference demonstrates that a special category was assigned of the nature and effect of a PDD. *See* Historic Code, PCC § 18.10.390 (AR 14-180 to 183). The Zoning Map contains a shaded border indicating that UP 9-90 applied to the entire one-quarter section.

This Zoning Map is hard evidence²⁴ and directly refutes the Examiner's conclusion that UP 9-90 had no zoning effect. *See* AR 14-38, finding 9 (stating that “Pierce County zoning maps were not changed” as evidence that the major amendment did not change the zoning of the property).

²² It should be noted that in *Moore I*, the County did not supply the official Zoning Map to the Examiner.

²³ The Zoning Map is annexed hereto as Appendix A-1.

²⁴ The Zoning Map is not just substantial evidence that a PDD/Zoning change was made, it is the evidence.

The response by Pierce County to the Superior Court was that any reliance on the Zoning Map by the Examiner was “waived.” That is not so and constitutes an error of law, LUPA Standard (b), if the County implies that the Superior Court made such a ruling. One, in *Moore II*, the County provided the Zoning Map to the Examiner. (CP 143) (AR 15-755) Two, Appellants cannot waive facts which are public record. What the County apparently means is that an argument was waived, but in *Moore II* the question before the Examiner was whether the PDD/ Rezone component of the Application had been abandoned. The question of zoning entitlement had been addressed in *Moore I* and was not before the Examiner at that time.

The County cannot now pick and choose what it approved, or imply motive or intent over the written record. The decision documents and related actions are controlling evidence; guesses or speculation about what PALS planners may have been thinking when they decided to approve a residential subdivision as a Major Amendment to the UP cannot be the foundation of a proper decision by the Examiner. Speculation cannot sustain a finding. *See Johnson v. Aluminum Precision Prods., Inc.*, 135 Wn. App. 204, 208-09, 143 P.3d 876 (2006) (mere speculation and conjecture will not sustain a finding).

It is undisputed that the County treated the First Amendment Decision as a plat approval and changed its Zoning Map. Turning to the First Amendment decision (and related Staff Report), it is uncontroverted the decision did not contain all required finding for a plat approval (AR 14-26; AR 14-145) or the magic words “PDD/Rezone.” Since the language is vague, conduct must control since the County presented no witness from 1990-91 who could testify as to intent.

The Staff Report on the First Amendment dated February 4, 1991, advised the Examiner of his authority to grant “...Planned Development Districts or Potential Rezones....” The Staff Report makes all required findings for a PDD. At the time, as set out in former PCC § 18.10.610K (Appendix A-2), a PDD proposal had to show that (1) it was in “substantial conformance” with the Comprehensive Plan, (2) exceptions from the standards of the underlying district were warranted by the design and amenities incorporated in the development plan and program; (3) the proposal was in harmony with the surrounded area or its potential future use; (4) the ownership and means of preserving and maintaining open space was suitable; (5) the approval would result in a beneficial effect upon the area which cannot be achieved under other zoning districts; and (6) the development would be pursued in a conscientious and diligent manner.

Taking these in order, the Report, p.3 (AR 14-232) finds consistency with the “Rural-Residential policies of the area...”. The Report p.3, also finds consistency with the size of the lots “...in keeping with subdivisions found both to the north and south.” The Report notes the ownership and that the conditions of the UP 9-90 approval “... will guide ownership over the entire project site to include the proposed subdivision.” The Report, pp. 7-8 (AR 14-236, 14-237) notes that the proposal mitigates all significance adverse impacts. Beneficial effects other than harmony are noted by keeping the lots larger than allowed by applicable zoning, thereby maintaining current levels of services on the public roads serving the state (Report, p 4, AR 14-223), and the Applicant will participate in any future road improvement district or local improvement district.

There is further proof (substantial evidence) that the First Major Amendment was intended to make a PDD/Rezone decision approving a unique urban density entitlement for the entire property.

First, it is a major amendment. The significance of this fact is that the major amendment provision in the Code at the time expressly contemplated and allowed for amendments that exceed the criteria in the Minor Amendment code. Yet, this was an odd approach considering that residential was a permitted use under the general zoning in effect at this

time. From the start, the County recognized the need for amendments to deal with requirements imposing more restrictive criteria or standards than the existing Zoning Code.

Second, the County wanted its residential mitigation conditions to run with the land, which is strong evidence of its intent to establish a zoning entitlement. Such conditions create what is called an equitable servitude, which is a covenant that sets an owner's expectations by placing certain burdens and benefits on the future use of the land. *Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888, 897, 337 P.3d 1076 (2014). Equitable servitudes are often used to “permit the creation of neighborhoods restricted to particular uses, providing a private alternative to zoning[.]” *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 252, 84 P.3d 295 (2004). Thus, equitable servitudes constitute protected property rights because they create a right or obligation that runs with the land. *Id.* at 253; *see also Crisp v. Vanlaeken*, 130 Wn. App. 320, 323, 122 P.3d 296 (2005) (An equitable servitude is a property interest); *Crescent Harbor Water Co. v. Lyseng*, 51 Wn. App. 337, 339, n.3, 753 P.2d555 (1988) (An equitable servitude is a use interest).

Third, the County (acting through PALS) has consistently confirmed after approval of the UP 9-90 that the underlying general

zoning applies, and that all future development is subject to the terms and conditions of the Amended UP which is still “in effect.” For example, the Staff Report for amendment to the UP 9-90 for the residential component states: “the preliminary subdivision is part of, and therefore subject to the Unclassified Use Permit conditions.” *See* Staff Report, February 14, 1991, p.3. (AR 14-22)

In a letter to the Hearing Examiner dated July 20, 1998, PALS stated “...the plat is subject to the underlying zone of the UP, which was General Use (G).” (AR 14-240, AR 14-241) Staff insisted that the bulk requirements in effect under General Use zoning controlled plat development. *See also* letter, PALS to Kelly Nelson, Larson and Associates dated June 10, 1998. (AR 14-256, 14-257)

A Notice of Application dated May 12, 1999 submitted by Classic Golf Course for a minor amendment to add an 1800 square foot tournament pavilion at the golf course notes the newly adopted Reserve 10 zoning, but states: “The site is governed by an Unclassified Use Permit, UP 9-90, which provide guidelines for the golf course.” (AR 14-277) A Decision by the Director of PALS dated July 29, 1999 on a Minor Amendment for the tournament pavilion notes UP 9-90 is still “in effect” and its conditions of approval “binding.” (AR 14-279 to -281)

The County, as noted, has argued that the UP was not needed to

approve anything but the golf course and that UP 9-90 was solely for Lot 2. This is wrong. The County processed the approval of the residential subdivision on Lot 3 as a major amendment to UP 9-90. UP 9-90 as adopted (and amended) was viewed, processed and approved by the County as a PDD for the whole site, as originally proposed by the applicant. The Hearing Examiner misinterpreted what occurred and what was decided in order to characterize the First Major Amendment as something other than a UP amendment, an erroneous application of the law to the facts. This view is inconsistent with the record. Speculation or surmise is not evidence. *Johnson, supra*, 135 Wn. App. at 208-09.

If this Court agrees that a zoning decision was made when the County amended the UP 9-90, the doctrine of finality prevents the County from taking away that which it originally authorized. *See, e.g., Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 182, 4 P.3d 123 (2000); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410-11, 120 P.3d 56 (2005) (holding that previously unchallenged final land use decisions cannot be collaterally attacked). It is an error of law to fail to apply this doctrine.

C. The PDD/Rezone Application Was Not Abandoned.

Again, addressing LUPA Standards (c) and (d), it is impossible to rationally conclude that Moore's predecessor abandoned the

PDD/Rezone/Plat application when the County acted on at least two components of the application (including the water tower lot conversion to residential) *after* the date the application was allegedly abandoned and in accordance with the unequivocal written request by the Original Applicant (AR 15-327). Given the County's decision to process the residential component of the mixed-use proposal as a major amendment to the UP in 1991 (and process that plat through 1998), it is understandable that Moore would not reference the PDD/Rezone/Plat application during that time. Today, LeMay still owns a piece of land which was part of this original land use entitlement process which the County Assessor treats as zoned commercial, although the *current* Zoning Map designation is R-5. See TR 5-19-2015 Hearing, p.77:22-25; p.78; p.79:1-13 (Testimony of Scott Penner). Under this scenario, there was no reason to change.²⁵

Simply, Moore had no reason to refer to another permit process when the County was already approving the *entire* planned development district through the UP process. Moore's silence on the matter is perfectly reasonable, given that it had the existing land use approvals on the site in hand and, up to that point, had been assured by the County that it was simply a matter of time before the property was pulled into the urban growth area as it was an Urban Extension area. After the County reversed

²⁵ These facts further suggest that the County perceived that a zoning change had occurred since the Original Application also requested a commercial use.

itself and stated that it would not include the site, Moore sought to amend his existing approvals.

The record is devoid of evidence that the PDD/Rezone component of the Application was withdrawn, amended, modified, forgone, rescinded, canceled, revoked, denied, merged, expired, lapsed, or replaced. *See, e.g., Van Sant v. City of Everett*, 69 Wn. App. 641, 647-48, 849 P.2d 1276 (1993) (City alleging abandonment of a use must show (a) an intention to abandon; and (b) an overt act, or failure to act, which carries the implication that the owner does not claim or retain any interest in the right to the nonconforming use.). The only word used by the Original Applicant with respect to the residential component of the Master Application was “reactivate.” *See* Barb LeMay letter to Griffin, September 11, 1990.

There is simply no evidence to support a determination the Original Applicant decided to “forgo” the PDD/Rezone. The support cited by the Examiner, from County Principal Planner Robert “Doc” Hansen letter dated June 26, 1990,²⁶ related only to the golf course component. The Examiner misconstrued that letter, reading it to somehow include a limitation with respect to possible future development. In fact, that letter indicated that a Major Amendment to the Unclassified Use Permit

²⁶ A true and accurate copy of this letter found at Appendix A-9.

“...could be requested in the future and would be necessary if future land development is to take place” (AR 15-311, -312) There is no limitation in that language.

The ruling on abandonment is also an error of law. The law of abandonment requires an unequivocal act. The only unequivocal act here supports the opposite of abandonment – reactivation. On September 11, 1990, LeMay reactivated the entire Application with no limitation. *See* Appendix A-4 (reactivation letter). The County in this regard concedes it controlled the process used for approval, and had no right to force withdrawal of a request. (AR 15-141, 15-143.) There was not an either/or choice except for the form of the process. (AR 15-217, 15-244.) LeMay was never asked to give up what it wanted: the benefits of a flexible and vested PDD entitlement. *See* p.6, *infra*.

The County cannot legally “take away” a vested application that it has deemed complete simply by demanding an additional permit approval not originally required unless it does so with notice through a registered letter, per former PCC § 18.160.080. No such registered letter was sent, so the applications are still pending. Here, it is undisputed that LeMay did not withdraw its application, and PALS did not cancel, or otherwise notify the Original Applicant of any intent to do so. Permit applications do not simply disappear – particularly where the landowner went to great expense

to propose a valuable development. (AR 15-138; Halsan Testimony: application amendments or withdrawals must be in writing.) To the contrary, once an application has been accepted and deemed complete, the local government must issue a decision on the application within statutory time periods. RCW 36.70B.070; PCC 18.100.010.

The County will argue the long 25-year period supports abandonment. In fact, the passage of time favors Moore when one considers that the owners believed that the PDD (at a minimum) had been approved and that they had acquired the applied-for development rights, which is the case. Only when the County reneged on its promises to bring the property into the UGA was there a need to act. Moore's testimony to the Examiner is wholly consistent with the understanding that the PDD/Rezone/Plat application remained viable after submission of the UP application:

We intended to do a PDD on the whole property, which would have included, at this hearing, the subdivision, the golf course, and an area set aside for commercial use in the future ... retail, neighborhood commercial or something. We then, through the encouragement of Planning, changed into simply a UP on the golf course portion now. The subdivision and any other uses will be addressed at a later time. We did talk about doing the whole 157 +/- acres; we intended to do the whole project at once. We now modified; we're simply doing the golf

course today. We will be submitting at some point in the future a site plan for the subdivision and other uses.

(AR 15-533) That statement unequivocally supports and confirms that at all times the Original Applicant and Moore sought and believed they had received approval of a residential / golf course PDD.

D. The Hearing Examiner's Decision Conflicts with Important Statutory and Constitutionally Protected Property Rights.

Addressing LUPA Standards (a), (b) and (f), no legal justification supports the County's actions or the Hearing Examiner's decisions that divest Moore of vested property rights based on the UP 9-90, as amended. The County throughout the administrative and judicial process has tried to characterize this matter as one of choices, or argue that the passage of time justifies denial of Moore's requests. This position has no support in the law. Fundamental property rights and statutes support granting Moore relief.

1. Statutory Rights

The County asserts GMA polices are relevant. They are relevant so far as they protect Moore. The GMA requires (1) protection of property rights, both from "arbitrary and discriminatory actions" and that "just compensation" be paid for a government taking of vested property rights and (2) that the permitting process be "predictable." See RCW 36.70A.020(6)(7). These protections are as important as any other GMA

policies. *E.g., Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 127, 118 P.3d 322 (2005) (ruling that the GMA’s general goals in RCW 36.70A.020 are nonprioritized, such that no one goal takes precedent over another). It is an error of law to ignore these statutory rights.

2. Protected Property Rights

The Hearing Examiner’s decision conflicts with Washington law concerning vested rights – another error of law. Moore asserted a right to make legitimate use of the property consistent with UP 9-90, as amended, which approved residential uses via a decision that was intended to have the legal effect of a PDD/Rezone. The Examiner’s decision effectively cancelled the valid PDD/Rezone application and foreclosed Moore from using the major amendment process. This deprived Moore of development rights specifically approved in the UP 9-90. This Court should reverse under RCW 36.70C.130(1)(a), (b), and (f). *See Town of Woodway v. Snohomish Cty.*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014) (“development rights are valuable property interests”).

(a) The Fundamental Rights at Issue.

The term “property” refers to the collection of protected rights inhering in an individual’s relationship to his or her land. *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S. Ct. 357, 89 L. Ed. 311 (1945). Among these are the rights to possess, use, exclude others, and

dispose of the property. *Id.*; see also *Wash. ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (One of the defining characteristics of property ownership is the right to make reasonable use of one’s land.). Each of these property rights is protected by both the U.S. Constitution and the Washington Constitution. *Manufactured Hous. Communities of Washington v. State*, 142 Wn.2d 347, 355, 13 P.3d 183 (2000).

For purposes of protection under the Federal and Washington State Constitutions, “[p]roperty in a thing consists not merely in its ownership and possession but also in the unrestricted right of use, enjoyment and disposal.” *Id.* at 364 (emphasis supplied). Such ownership and development rights constitute a fundamental attribute of property ownership. *Id.*

The right to build on one’s property is a fundamental attribute of property ownership and exists without regard to zoning laws which operate as restrictions on the use of property. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 833 n.2 (1987) (the “right to build on one’s own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a ‘governmental benefit.’”); *River Park v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) (“An owner may build on its land; that is an ordinary element of a property interest.). “Zoning classifications are not

the measure of the property interest but are legal restrictions on the use of property.” *Id.* at 166.; *Harris v. County of Riverside*, 904 F.2d 497, 503 (9th Cir. 1990) (It is well established that “[t]he right of [an owner] to devote [her] land to any legitimate use is properly within the protection of the Constitution.”) (citations omitted).

(b) Applicable Constitutional Protections.

The Examiner erred in ignoring the property rights vested in UP 9-90 as amended and the equitable servitude. In short, property owners who submit a land use application are not requesting a government-created benefit; they are following the procedures required to exercise their right to make use of the property. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2, 107 S. Ct. 3141, 97 L. Ed.2d 677 (1987). Therefore, the procedures for obtaining (or denying) a land use permit affecting property rights must comply with constitutional requirements. *See Mission Springs, Inc. v. City of Spokane*, 134 Wn. 2d 947, 962-63, 954 P.2d 250 (1998) (holding that permit procedures must provide due process because landowners have a right to make reasonable use of their land).

Like an equitable servitude, it is well-settled that uses established by special use permits are vested against any future changes in development regulations. *See 3883 Connecticut LLC v. District of*

Columbia, 336 F.3d 1068, 1073 (D.C. Cir. 2003) (Recognizing a property interest is in the “continued effect of the permits.”); 17 William B. Stoebuck, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 4.22 at 233 n.1 (1995). Thus, the Superior Court clearly erred when it left in place the Hearing Examiner’s conclusion that “the approval of a UP did not vest the parcel(s) covered by the UP for either new uses or residential density should zoning of the parcel(s) change,” without citing any authority for such a ruling and without jurisdiction to decide questions of constitutional law.²⁷

Importantly, the County’s issuance of UP 9-90 and its amendments established vested rights with both procedural and substantive components. Procedurally, vested rights doctrine holds that “a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application’s submission.” *Noble Manor v. Pierce County*, 133 Wn.2d 269, 275, 943 P.2d 1378 (1997). Substantively, the doctrine recognizes that development rights are legitimate expectations in property and due process protects such expectations against future fluctuations in land-use policy. *Town of Woodway*, 180 Wn.2d at 179-80.

²⁷ Indeed, in a separate conclusion, No. 14, the Hearing Examiner stated that he lacked the authority to decide constitutional issues. AR 14-25.

The substantive aspect of the doctrine holds that a landowner is entitled to develop his or her land, free from subsequent changes to zoning laws after the issuance of a permit or other entitlement. *Id.* This doctrine “ensures that ‘new land-use ordinances do not unduly oppress development rights, thereby denying a property owner’s right to due process under the law.’” *Abbey Rd. Group*, 167 Wn.2d at 251 (quoting *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 637, 733 P.2d 182 (1987)); *see also Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 891, 976 P.2d 1279 (1999) (The doctrine based on “constitutional principles of fairness and due process, acknowledging that development rights are valuable and protected property interests.”).

Because this case involves residential development rights established by the previously-approved Unclassified Use Permit, UP 9-90 and an equitable servitude, it is the substantive aspect to the doctrine that is truly at issue. This doctrine “ensures that ‘new land-use ordinances do not unduly oppress development rights, thereby denying a property owner’s right to due process under the law.’” *Abbey Rd. Group*, 167 Wn.2d at 251 (quoting *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 637 (1987)); *see also Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 891 (1999) (The doctrine based on “constitutional principles of fairness and due process, acknowledging that development rights are

valuable and protected property interests.”).

Both the law and the facts show that the UP permit has not expired,²⁸ nor has it been relinquished. Thus, the permit could be amended either by minor or major amendment, and indeed it was four times.

The County, by requiring that any new amendment needs to be reviewed under current regulations, and adhere to current zone classification (the Reserve 5) instead of the previous General Use zoning, deprives Moore of rights specifically granted in earlier permit approvals, thereby depriving Moore of the right to “reasonable and profitable use of its property,” an error in law of both land use law and statutory law, and of constitutional dimension. The Pierce County Council is solicitous of rights created by unclassified use approvals and explicitly made them controlling over new zoning:²⁹

Planned Unit Developments previously authorized by Unclassified Use Permit, prior to the effective date of this Section, shall be repealed and reclassified to Planned Development Districts pursuant to this Section as is now in effect. Except for the reclassification of a prior Unclassified Use Permit to a Planned Development District, all prior Planned Unit Developments may continue to develop on the basis of controls

²⁸ There is no time limit on a PDD type approval. (AR 15-185)

²⁹ The Examiner acknowledged this point. (AR 14-36)

contained in the resolution establishing the development

PCC § 18A.75.050.Q (Prior Existing Planned Unit Developments). *See also* PCC § 18A.05.060(B) (“Use still subject to original approval until said approval is relinquished ... Original use permit still governs the use.”). *See also* PCC § 18A.75.050.R and Examiner’s recitation, pp.6-7, *infra*.

The fact that a UP *may, and was, be amended* is evidence in and of itself that the UP 9-90’s development rights have not dissipated or been extinguished. The UP 9-90 establishes Moore’s legitimate expectations, and due process required the County to provide notice and hearing if the County intended to cancel, or otherwise limit, the permit.

In a similar situation, the Washington State Supreme Court demonstrated the law’s unwavering regard for permit rights, stating:

RCW 81.80.280 requires notice and a hearing before the commission can cancel, suspend, alter or amend any permit; it then authorizes such changes only on the basis of certain violations. Clearly the permits are not subject to the arbitrary whim or caprice of the commission, once they have been issued. ***In this respect, a permit, once acquired and exercised, becomes a property right, subject to being divested for cause.***

Lee & Eastes, Inc. v. The Public Service Commission, 52 Wn.2d 701, 704, 328 P.2d 700 (1958) (emphasis added); *see also Taylor-Edwards*

Warehouse & Transfer Co. v. Department of Public Service, 22 Wash.2d 565, 157 P.2d 309 (1945). No time limit is set out in either the UP or Code for amendments. Moore has a vested property right in the permit, and due process requires the County to provide notice and hearing if the County intended to cancel or alter the terms of the permit. For these reasons, the Hearing Examiner's decision was erroneous under the law.

E. The County Must Process the Proposed Third Major Amendment Like It Did the First and Second Major Amendment to UP 9-90.

Moore's proposed Third Major Amendment sought to follow the exact procedure the County employed to approve the First and Second Major Amendment to UP 9-90, establishing a 96-lot single-family residential subdivision; it was an error of law for the Examiner to conclude to the contrary. Both law and equity demand that the County follow the same procedure for identical land-use proposals. *See Whatcom County Fire Dist. No. 21 v. Whatcom County*, 171 Wn.2d 421, 428-29, 256 P.3d 295 (2011) (A failure by the government to follow procedures constitutes clear error). In light of the permit history, the County is estopped from now claiming that residential use was not contemplated, or that residential components of the approved development cannot be added via the major amendment process. *See Silverstreak, Inc. v. Washington State Dept. of Labor and Industries*, 159 Wn.2d 868, 890, 154 P.3d 891 (2007) (agency

estopped from contradicting long-standing policy and practice and bound by its prior practice which established precedent); *see also Bosteder v. City of Renton*, 155 Wn.2d 18, 39, 117 P.3d 316 (2005).

The Code does not require a new application to change the mix of uses consistent with the underlying permit – that is precisely what the major amendment procedure is intended to accomplish. *See* PCC § 18A.85.040.C. The process for seeking an amendment to a previously granted Unclassified Use Permit is found at PCC § 18A.85.040C. Amendments that cannot meet the definition of “minor,” per PCC § 18A.85.040C.1, must turn to PCC § 18A.85.040C.2 (major), which requires review under the same procedure required for the *initial application*. Indeed, the County used that procedure in 1991 to approve the residential portion of the project as a Major Amendment to UP 9-90. *See* Decision at CL 3.

The Hearing Examiner disagreed, attempting to re-interpret what occurred and what was decided to characterize the First Major Amendment as something other than a UP amendment. Based on this re-characterization of the amendment, the Examiner concluded that the Code requires that Moore submit a new plat application that meets all current development regulations before the County will consider a request to amend the mix of approved uses under the UP. The Examiner’s decision

in this regard misinterprets and misapplies applicable Code provisions, is clearly erroneous, and is unsupported by substantial evidence.

The Hearing Examiner also failed to follow a prescribed procedure when he refused to consider Moore's Third Major Amendment application. (Conclusion No. 13, AR 14-61, -62) The Examiner compounded this error by affirming PALS' First Administrative Decision, in which the County refused to process the amendment application based on PALS' interpretation of the Code and case history. The County Code is unambiguous in its grant of sole subject matter jurisdiction to the Hearing Examiner to consider an application for a major amendment:

In the context of Title 18A, Examiner Review is utilized when processing applications for ... Major Amendments, and variances. ... Examiner Review is subject to the procedures outlined in Chapter 1.22 PCC.

PCC § 18A.85.020.E.2. *See also Maranatha Min., Inc. v. Pierce Cty.*, 59 Wn. App. 795, 801, 801 P.2d 985 (1990) (holding that a UP decision that fails to follow the Code is void). The Code requires that PALS "shall" forward a complete application to the Examiner. *Id.* ("After all requests for additional information or plan correction have been satisfied, the Department **shall** set a date for a public hearing before the Examiner.") (emphasis added); *Erection Co. v. Dep't of Labor & Indus. of State of*

Wash., 121 Wn.2d 513, 518, 852 P.2d 288 (1993) (“It is well settled that the word ‘shall’ in a statute is presumptively imperative and operates to create a duty.”).

Moore’s 2014 major amendment proposal should have followed the exact procedure both PALS and the Examiner employed in 1991. The Code provisions governing major amendments remain the same now as then. The Examiner’s conclusion that Moore needs to use a substantively different permit procedure for this amendment proposal is inexplicable and wholly unsupported by the Code.

In addition to the law, sound policy considerations supported direct review by the Examiner. Issuance of a UP creates vested property rights. In the land use permitting process, a hearing examiner typically is the first independent person to consider a land-use proposal. *See* Stuart Meck & Rebecca Retzlaff, THE ZONING HEARING EXAMINER AND ITS USE IN IDAHO CITIES AND COUNTIES: IMPROVING THE EFFICIENCY OF THE LAND USE PERMITTING PROCESS, 43 Idaho L. Rev. 409, 413-16 (2007) (detailing evolution of hearing examiner system); *see generally* Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1269 (1975) (noting trend to “judicialize” administrative procedures); *cf.* *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed.2d 494 (1985) (state procedures are subject to federal constitutional law of due

process); *Vitek v. Jones*, 445 U.S. 480, 491, 100 S. Ct. 1254, 63 L. Ed.2d 552 (1980) (same). Indeed, in adopting a Code provision requiring Hearing Examiner review of major amendments, Pierce County expressly recognized that the “Examiner stands as an impartial body to which information is presented.” PCC Chapter 1.22. And in this regard, the Code provides that “[n]o Councilmember, County official, or any other person shall interfere or attempt to interfere with the Examiner or Deputy Examiners in the performance of their designated duties.” PCC § 1.22.070.B. Yet, here the County refused to send the application to the hearing examiner.

Under RCW 36.70C.130(1)(a), PALS cannot act as a “gatekeeper” to block submission of a major amendment application so that it cannot be considered by the Hearing Examiner. Nor can it tip the scales on the standard of review by issuing an order pre-determining factual and legal questions that fall within the sole jurisdiction of the Examiner. Neither PCC § 18A.85.020.E nor PCC § 18.40.020 grants the Director any “preliminary” authority on an application for a major amendment of an Unclassified Use Permit. Rather, the Director has authority to review a permit prior to its issuance – not prior to application – to determine whether it is consistent with the Code. *See* PCC § 18A.85.020(A). However, the Director lacks authority to make any determination on the

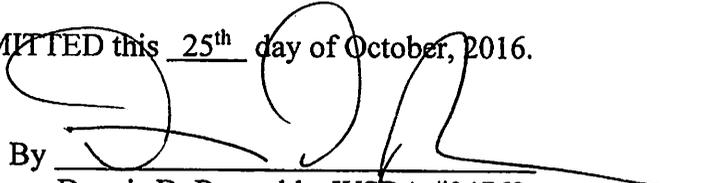
issues within the subject matter jurisdiction of the appointed, unbiased Hearing Examiner. *See* RCW 36.70.970. The Director’s actions herein violated these provisions. The type of impartiality required by due process and the County Code cannot be achieved if PALS is allowed to issue an administrative order precluding the Hearing Examiner from reviewing the merits of a Major Amendment application.

Because the UP established vested property rights, due process demands that a hearing examiner review the matter *de novo*. *Marshall*, 446 U.S. at 247 (explaining that plaintiffs are entitled to “de novo hearing before an administrative law judge”); *Tumey v. Ohio*, 273 U.S. 510, 522, 47 S. Ct. 437, 71 L. Ed. 749 (1927). Moreover, an appeal to a hearing examiner must comport with due process – including the impartiality requirement – because a constitutional defect at the hearing examiner stage cannot be cured later in court. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61-62, 93 S. Ct. 80, 34 L. Ed.2d 267 (1972); *see Schweiker v. McClure*, 456 U.S. 188, 195, 102 S. Ct. 1665, 72 L. Ed.2d 1 (1982) (impartiality requirement applies to quasi-judicial officials); *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S. Ct. 1456, 43 L. Ed.2d 712 (1975) (same); *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S. Ct. 1689, 36 L. Ed.2d 488 (1973) (same). These legal requirements were unmet in these proceedings.

VI. CONCLUSION

This Court should reverse the Superior Court and the Hearing Examiner and conclude that the County approved UP 9-90 as a PDD/Rezone to create a mixed-use planned development district for the entire site, which was accordingly rezoned "UP9-90" at a special residential density. The Court should direct that Moore has a right to apply for a Third Major Amendment and subsequent amendments, and that the County must process such application under the laws in effect at the time of the UP 9-90 approval and remand accordingly. Alternatively, this Court should rule that the PDD/Rezone application was incorrectly rejected by PALS and was not "abandoned" or is otherwise defunct, and remand this matter so that the application be placed before the Hearing Examiner for *de novo* consideration.

RESPECTFULLY SUBMITTED this 25th day of October, 2016.

By 

Dennis D. Reynolds, WSBA #04762
DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777 Phone
(206) 780-6865 Fax
E-mail: dennis@ddrlaw.com
*Counsel for Appellant RMG
Worldwide, LLC, Michael H. Moore,
its Manager*

LIST OF APPENDICES

- A-1 The 1995 Pierce County Zoning Map (CP 143) (AR 15-755)
- A-2 PCC § 18.10.610 (AR 15-812 – 15-817)
- A-3 The Examiner’s First Decision, dated August 5, 2014
(AR 14-32 – 14-64)
- A-4 Barb LeMay letter dated September 11, 1990 (“Reactivation
Letter) (AR 14-277)
- A-5 Local ordinances cited
- A-6 Motion to Reconsider dated August 14, 2014 (AR 14-13 – 14-24)
- A-7 The Examiner’s Second Decision, dated August 6, 2015
(AR 15-1 – 15-15)
- A-8 Order on Reconsideration dated September 22, 2014
(AR 14-1 – 14-5)
- A-9 County Principal Planner Robert ‘Doc’ Hansen letter dated
June 26, 1990 (AR 15-311, -312)

CERTIFICATE OF SERVICE AND MAILING

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I further certify that the original of the foregoing brief was timely filed on October 25, 2016 pursuant to RAP 18.6(c), as follows:

Washington State Court of Appeals, Division I
One Union Square
600 Union Street
Seattle, WA 98101-4170

Via Court's JIS-Link Electronic Filing System

I further certify that I caused a true and correct copy of the foregoing brief to be served this date, in the manner indicated, to the parties listed below:

David B. St.Pierre, Deputy Prosecuting Attorney, WSBA #7583 Pierce County Prosecuting Attorney's Office 955 Tacoma Avenue South, #301 Tacoma, WA 98402-2160 (253) 798-6503, tel / (253) 798-6713, fax dstpier@co.pierce.wa.us, email jander1@co.pierce.wa.us, email <i>Attorneys for Respondent Pierce County</i>	<input type="checkbox"/> <i>Legal Messenger</i> <input type="checkbox"/> <i>Hand Delivered</i> <input type="checkbox"/> <i>Facsimile</i> <input type="checkbox"/> <i>First Class Mail</i> <input type="checkbox"/> <i>Express Mail, Next Day</i> <input checked="" type="checkbox"/> <i>Email</i>
--	--

DATED at Bainbridge Island, Washington, this 25th day of October, 2016.



Jon Brenner
Paralegal

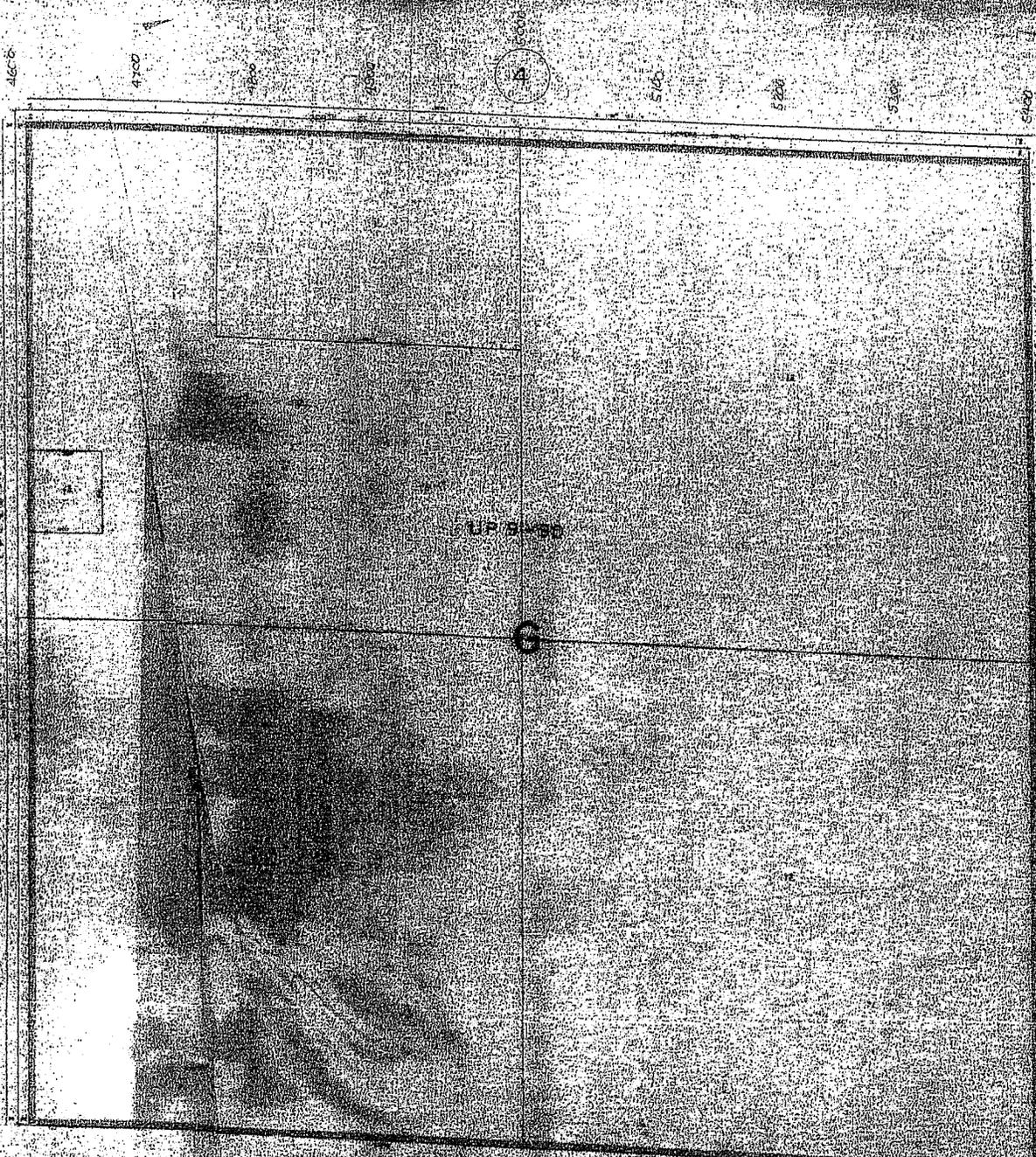
Moore – Opening Brief

APPENDIX A-1

NE 12

T18

R3E



46

4

48

NE 12

T 18

R 3 E

45

CRADA PLANNING MAP
 ADDED TO THE PLANNING MAP

Hearing Examiner _____
 Case No.: _____
 Exhibit No.: 10

15-775

A

Moore – Opening Brief

APPENDIX A-2

allowed to create an outside maintenance yard. A contractor yard is a commercial-scale use requiring a commercial occupancy permit.

13. Any repair of a vehicle or vehicles owned by a resident shall provide for the storage and disposal of oil, paint, chemical wastes, batteries, or other like substances to a permitted solid waste or recycling facility and no such materials shall be dumped onto the ground; into rivers, creeks, or streams; or into storm drains, sewers, or septic tanks.

14. There shall be no outside display of merchandise except horticultural and floricultural products. Produce stands must meet the requirements listed in appropriate zones.

15. The use of commercial vehicles by the home occupation for the delivery of materials to or from the premises shall be limited to one (1) vehicle, not to exceed a payload of one and one-half (1-1/2) tons, owned, leased, or rented by the home occupation operator. It is not the intention to limit the use of residents' vehicles. It is the intention of this standard to prevent a fleet of vehicles to be used in the business which generates an intensity of use disturbing the residential character of the neighborhood.

16. No vacant residential structure shall be used for a commercial or industrial business under the guise of the home occupation definition. A residential structure must be used primarily as a residence by the home occupation owner and only secondarily as a home occupation accessory use.

17. A home occupation day nursery shall meet the standards prescribed in each zone for number of children and location of play equipment.

18. Home occupations with produce stands for agricultural products, livestock pens and kennels, or greenhouses must meet the individual zone requirements for these activities.

(Ord. 89-172 § 1 (part), 1990; Ord. 88-72S § 1 (part), 1988; Ord. 87-220 § 1 (part), 1988; prior Code Chapter 9.85)

→ 18.10.600 PERMITS, HEARINGS, AND PROCEDURES.

18.10.610 Planned Development District.

- A. Purpose.
- B. Classifications of Planned Development Districts.
- C. Initiation of a PDD.
- D. Permitted Location of a PDD.
- E. PDD - Minimum Area Required.
- F. PDD - Staging.
- G. Redevelopment - Street Vacations.
- H. Uses Permitted in a PDD.
- I. Use Permit Exceptions.
- J. PDD - Procedure for Approval.
- K. PDD Approval - Findings Required.

- L. Examiner's Actions are Final - Appeals.
- M. Motion - Effect.
- N. Building Permits - Issuance.
- O. Change of Zone is Required.
- P. Subdivisions.
- Q. Final Development Plan - Time Limitation.
- R. Final Development Plan - Changes.
- S. Permissive Variation from Standard Requirements.
- T. Prior Existing Planned Unit Developments.
- U. Parties Bound by PDD District.

A. Purpose. A PDD is intended to be a flexible zoning concept; it will provide the Examiner, and if appealed, the Council, a chance to mold a district so that it creates more desirable environments, and results in as good or better use of land than that produced through the limiting standards provided in the regular zone classifications. The uses within the PDD depend on the uses in the underlying or the Potential Zone. The residential densities within the PDD may vary depending upon how the land is developed with general aesthetics, natural areas, and open space being an incentive.

B. Classifications of Planned Development Districts. Planned Developments shall be classified as one of two types: Residential or Non-Residential. A Residential PDD shall mean that the principal purpose of the PDD is to provide one or more types of housing at densities of dwellings the same as densities permitted by the underlying zone and where all other uses shall be considered accessory, supportive, or adjunct to housing. A Non-Residential PDD shall mean a development where the preponderance of uses are intended for purposes other than housing and shall include, but are not necessarily limited to: retail, service, industrial, and manufacturing, and where residential uses as are allowed by the underlying zone shall be minor and secondary in purpose to intended use of the district.

C. Initiation of a PDD. An application for an amendment to the Official Map proposing a Planned Development District may be initiated by the property owner(s), contract purchaser(s) of property involved in a proposed PDD, or a public agency.

D. Permitted Location of a PDD.

1. **Residential:** Only in RE, SR, ST, RR, SA, RML, RM, RMH, G, and FR zones.
2. **Non-Residential:** Only in a zone district permitting outright the heaviest use intended in the proposed PDD.

E. PDD - Minimum Area Required.

1. **Residential PDD:** Not less than five (5) times the minimum lot area required for a single-family detached dwelling under the minimum standards of the underlying zone.
2. **High Density Residential PDD or Non-Residential PDD:** No minimum area.
3. **Potential Zones:** The minimum area for implementation of a Potential Zone or portion thereof shall be as required by the action establishing the Potential Zone.

The Examiner, in order to protect the public health, safety,

welfare, and general interest may limit or restrict development in a PDD or any portion thereof in relationship to the size of the area being developed or redeveloped with the nature of uses intended, lot coverage, parking and loading requirements, provisions for open space, adequacy of roads and utility systems to accommodate the use as well as to minimize the impact the development will have on the existing or intended development of adjacent lands and the general neighborhood.

F. PDD - Staging. The applicant may elect, or the Examiner may require that the development of a PDD be accomplished or constructed in stages provided that when a residential PDD is developed in stages, the first and each succeeding and accumulation of stages thereafter shall not be developed at a greater density of dwelling units than would be allowed under conventional platting techniques under the same zone as that underlying the PDD for the same size tract of land.

G. Redevelopment - Street Vacations. When deemed necessary, prior to development of a PDD, the Examiner may require the removal of all or portions of existing structures. It is the further purpose of this Chapter to encourage development of a PDD upon contiguous land and property. When deemed appropriate and necessary, the Examiner may require the vacation of all or portions of existing streets within the PDD. The Examiner may, as an alternative to vacation of streets, permit the inclusion of existing rights-of-way within a PDD, when it can be shown that the existing rights-of-way serve a functional purpose for the PDD and does not act to separate or divide a PDD into noncontiguous units. Rights-of-way within the context of this Section shall not include freeways, limited access roads, or major arterial highways.

H. Uses Permitted in a PDD.

1. **Residential:** Housing concepts of all types limited only by the density commensurate with the underlying zone and bonus when authorized upon land either subdivided into two or more ownerships or held in common, unified, or single ownership.
 - a. Condominiums and townhouses.
 - b. Customary accessory uses and structures common to individual or group dwellings.
 - c. Group residence.
 - d. Incidental retail and service uses primarily for the convenience of and supported by the residences within the PDD containing not less than one hundred (100) acres or four hundred (400) dwelling units provided incidental retail or service uses may be authorized on a final development plan only upon completion and occupancy of at least fifty percent (50%) of the total dwelling units intended within the total group.
 - e. Manufactured home subdivisions.
 - f. Non-residential uses such as schools, churches, libraries as authorized in the PDD.
2. **Non-Residential:** Uses permitted by the underlying

zone and Potential Zone as authorized in the development plan.

3. **Unclassified Uses and Conditional Uses**, if permitted in the underlying zone and as specifically authorized by the final development plan.

I. Use Permit Exceptions. When an Unclassified Use or Conditional Use is authorized as part of a development plan and when said uses are permitted by the underlying or Potential Zone as requiring a permit from the Examiner, said procedure for obtaining the permit shall be waived.

J. PDD - Procedure for Approval. The approval of a PDD shall be considered an amendment to the Official Maps and, except as provided in this Section, shall be processed as is any other amendment with respect to notice, hearings, and appeals pursuant to Section 18.10.680 of this Code. A two step procedure shall be followed in the approval of a PDD as follows:

1. The conditional approval of a preliminary development plan by the Examiner after public notice and hearing.
2. The conditional approval by the Examiner shall not become final and effective until the date the final development plan is approved by the Planning Director and at such date the final development plan shall be deemed to be adopted. The final development plan may be approved and adopted by stages. The final development plan shall be approved by the Planning Director after he is convinced that it conforms with the specific guidelines set forth by the Examiner.

K. PDD Approval - Findings Required. The action by the Examiner to approve a preliminary development plan for a proposed PDD with or without modifications shall be based upon the following findings:

1. That the proposed development is in substantial conformance with the Comprehensive Plan for the County.
2. That exceptions from the standards of the underlying district are warranted by the design and amenities incorporated in the development plan and program.
3. That the proposal is in harmony with the surrounding area or its potential future use.
4. That the system of ownership and means of developing, preserving, and maintaining open space is suitable.
5. That the approval will result in a beneficial effect upon the area which could not be achieved under other zoning districts.
6. That the proposed development or units thereof will be pursued and completed in a conscientious and diligent manner.

L. Examiner's Actions are Final - Appeals. The action of the Examiner in conditionally approving or denying a preliminary development plan shall be final and conclusive unless a written appeal is filed pursuant to Section 18.10.680.

M. Motion - Effect. The conditional approval by the Examiner approving a preliminary development plan shall mean approval by the Examiner in principal with the PDD concept. The effective date of the amending action shall be the date

the Planning Director approves the final development plan. When a part of the approval of a PDD, applications for change of zone or subdivision approval shall become effective on the date the final development plan is approved.

N. Building Permits - Issuance. Building Permits shall be issued for only those portions of a PDD for which a final development plan has been approved by the Planning Director.

O. Change of Zone is Required. Uses desired within a proposed PDD which are not permitted by the underlying zone or Potential Zone, the applicant may file application for, and the Examiner shall take action upon, an application for change of zone prior to taking action upon a development plan. The Examiner may, however, consider an application for PDD approval and change of zone concurrently. Requests for approval of a preliminary development plan and a change of zone shall be filed and considered as separate applications.

P. Subdivisions. When it is the intention of an applicant to subdivide or resubdivide all or portions of property within a proposed PDD, application for approval of a preliminary subdivision may be filed and considered concurrently with an application for approval of a preliminary development plan. Subject to density of dwelling units, the minimum area, width, and yard requirements for subdivision lots proposed within a PDD may be less than the minimum specified in the underlying zone district if the design of the subdivision is in accordance with the intent and purpose of this Section. Except for necessary roads the balance of the total tract intended for subdivision shall be devoted to open space.

Q. Final Development Plan - Time Limitation. Within three (3) years from the date of conditional approval of a preliminary development plan by the Examiner, the applicant shall submit a final development plan for the PDD or a stage thereof for approval. When deemed reasonable and appropriate, the Examiner may grant an extension of one (1) year for such submittal. If at the date of expiration of the time period provided herein a final development plan has not been filed for approval or at any time after a final plan has been approved it appears that the project is not progressing in a reasonable and consistent manner or the project has been abandoned, action may be initiated pursuant to Section 18.10.690 of this Code to revoke the PDD. When revocation has been enacted upon a PDD, the land and the structures thereon may be used only for a lawful purpose permissible within the zone in which the PDD is located.

R. Final Development Plan - Changes. Major changes to a final development plan before or after approval shall be considered to be an amendment to the proposed PDD and shall be subject to application, notice, hearings, and appeals in the same manner as the original application. Minor changes to a final development plan may be approved by the Planning Director provided that the changes do not increase density, change boundaries, change any use, and do not change the location or amount of land devoted to specific land uses. A change shall not be considered to be minor if it alters or in any way changes the conditions or specifications set forth by

the Examiner.

S. Permissive Variation from Standard Requirements. In considering a proposed development plan, the approval may involve modifications in the regulations, requirements, and standards of the underlying zone in which the project is located so as to appropriately accomplish the purpose of this Section. In making such modifications as are deemed appropriate, the following, except for item 1. which may not be exceeded, guidelines shall apply:

1. Number of residential dwelling units:

- a. Residential low density: The basic number of dwelling units permitted shall be equal to the number of dwelling units that can be produced on the same site if the site were subdivided in terms of the minimum requirements of the underlying zone as evidenced by a preliminary plan sketch. "Bonus" - When warranted by clearly exemplary design, provisions for open space and adaptation to site amenities the County may authorize additional dwelling units to any extent up to the maximum hereinafter provided. The maximum number of dwelling units shall be determined by dividing the net development area by the minimum lot area per dwelling unit required by the zone in which the area is located. Net development area shall be determined by subtracting the area set aside for non-residential uses and subtracting fifteen percent (15%) of the remainder. Special housing as hereinafter provided shall not be considered residential uses for the purpose of determining the net development area.
- b. Residential high density: The maximum number of dwelling units permitted in a PDD situated in a zone permitting high density residential uses shall not exceed the maximum number of dwelling units permitted by the underlying zone or potential zone.
- c. Special housing: Resident density of group residences shall be determined by the Examiner at the time of consideration of a preliminary development plan, provided that in no event may the resident density exceed thirty (30) persons per acre devoted to such use.

2. Off-street parking and loading: The total required off-street parking facilities should not be less than the sum of the required parking facilities for the various uses computed separately. Special requirements contained in Section 18.10.530 I. shall not apply in a PDD.

3. Common walls: In projects receiving final approval where units will have common walls, the Building Department may issue Building Permits for construction of those units prior to approval of a final plat.

4. Height of buildings: The height of buildings and structures within a PDD should be limited to the height permitted by the underlying zone, potential zone, or as required by the County as a special limitation. The height of buildings and structures may be increased in

relationship to provisions for greater open space and separation between buildings on the same or adjoining property and when adequate provision is made for light, air, and safety.

5. Lot area coverage: The maximum lot coverage within a PDD or any portion thereof shall be determined by the Examiner at the time of consideration of a preliminary development plan.

6. Yards: The requirement for yards in a PDD should be same as required by the underlying zone for those yards abutting the exterior boundary of the PDD. Yard requirements for any yard not abutting or adjoining an exterior boundary of a PDD shall be as authorized in the preliminary development plan.

T. Prior Existing Planned Unit Developments. Planned Unit Developments previously authorized by Unclassified Use Permit, prior to the effective date of this Section, shall be repealed and reclassified to Planned Development Districts pursuant to this Section as is now in effect. Except for the reclassification of a prior Unclassified Use Permit to a Planned Development District, all prior Planned Unit Developments may continue to develop on the basis of controls contained in the resolution establishing the development provided that subsequent changes, additions, or modifications to an existing Planned Unit Development shall be processed under this current Section.

U. Parties Bound by PDD District. Once the preliminary development plan is approved by the Examiner, all persons and parties, their successors, and heirs who own or have any interest in the real property within the proposed PDD, are bound by the Examiner's action.

(Ord. 88-72S § 1 (part), 1988; Ord. 87-151 § 1 (part), 1987; Res. 22895 § 1 (part), 1981; Res. 22130 (part), 1980; Res. 20633 § 1 (part), 1978; Res. 16686, 1973; prior Code Chapter 9.77)

18.10.620 Unclassified Uses.

- A. Purpose.
- B. Bulk Regulations.

A. Purpose. The following uses are found to possess characteristics relating to their size, numbers of people involved, the traffic generated, and their immediate impact on the area which makes impractical their being identified exclusively with any particular zone classification as herein defined. In order to determine that the location of these uses will not be unreasonably incompatible with uses permitted in the surrounding areas; and to permit the Examiner to make further stipulations and conditions as may reasonably assure that the basic intent of this Code will be served, these uses will be subject to review by the Examiner and the issuance of an Unclassified Use Permit. Unclassified Use Permits shall be processed as specified in Section 18.10.680.

- 1. Airports, landing fields, and heliports.
- 2. Booster stations or conversion plants with the necessary building, apparatus or appurtenances incidental

- thereto of public utilities or utilities operated by mutual or cooperative agencies.
3. Cemeteries, columbariums, crematories, and mausoleums.
 4. Commercial establishments or enterprises involving large assemblages of people or automobiles, such as:
 - a. Amusement parks.
 - b. Boxing and wrestling arenas.
 - c. Ball parks.
 - d. Fairgrounds.
 - e. Golf driving ranges.
 - f. Open-air theatres.
 - g. Race tracks and rodeos.
 - h. Recreational centers privately operated.
 - i. Stadiums.
 5. Correctional institutions.
 6. Drag strips, go-cart tracks, race courses, and driving school course.
 7. Fire stations.
 8. Golf courses.
 9. Hydro-electric generating plants.
 10. Jail farms or honor farms, publicly-owned and used, for the rehabilitation of prisoners.
 11. Outdoor Public Music Festivals as defined in Chapter 70.108 RCW and Chapter 50.32 of the Pierce County Code (as adopted or thereafter revised).
 12. Planned Unit Developments.
 13. Public parks.
 14. Public utility power generating plants.
 15. Radio or television transmitters and towers.
 16. Recreational areas (commercial), including yacht clubs, beach clubs, tennis clubs, and similar activities.
 17. Scaled-model hobby shops, subject to the following:
 - a. The building, electrical wiring, and telephone wiring shall be designed to prevent electrical, radio interference from traveling outside of the building's enclosure.
 - b. A report by a certified electrical engineer, radio/phone operator, or other radio technician shall accompany any permit request for development of a scaled-model hobby shop which involves radio-controlled mechanisms. Said report shall assure that radio transmissions will not interfere with or be received by adjoining property owners and will show the expected pattern of electro-magnetic radiation expected from operation of the facility.
 18. Sewage treatment plants.
 19. Surface mining together with necessary buildings and appurtenances incidental thereto.
 20. Surface mining, together with the allied uses of rock crushing and screening and necessary buildings and appurtenances incidental thereto; provided: That no sand or gravel shall be imported from sources other than the premises for which the permit is granted.
 21. Surface mining, together with the allied uses of rock crushing, screening, operation of asphalt processing

Moore – Opening Brief

APPENDIX A-3

August 5, 2014

RMG Worldwide LLC
Attn: Michael H. Moore, Manager
4908-208th Street East
Spanaway, WA 98387

**RE: Administrative Appeal: AA5-14
Application Number: 774811**

Dear Mr. Moore:

Transmitted herewith is the Report and Decision of the Hearing Examiner regarding your request for the above-entitled matter.

Very truly yours,

STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

SKC/jjp

cc: Parties of Record

1X

PIERCE COUNTY PLANNING
& LAND SERVICES

AUG 15 2014

14-32

OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

REPORT AND DECISION

CASE NO.: **Administrative Appeal: AA5-14**
 Application Number: 774811

APPELLANT: RMG Worldwide LLC
 Attn: Michael H. Moore, Manager
 4908-208th Street East
 Spanaway, WA 98387

AGENT: Carl E. Halsan
 Halsan Frey, LLC
 P.O. Box 1447
 Gig Harbor, WA 98335

PLANNER: Jeffrey D. Mann, AICP, Associate Planner

SUMMARY OF REQUEST:

Appeal of a Planning and Land Services Administrative Official's Decision of March 24, 2014, requiring the appellant to submit both a major amendment application to Unclassified Use Permit 9-90 and a preliminary plat application that meets current development regulations in order to subdivide the Classis Golf Course into residential lots. Appellant asserts that a major amendment application to UP 9-90 is all that is required and that such application is reviewed pursuant to the General Use zone that was in effect in 1990. The site is located on 208th Street East, Graham, in the Reserve 5 (Rsv5) zone classification, in Council District #3.

SUMMARY OF DECISION: Appeal denied.

DATE OF DECISION: August 5, 2014

COURT REPORTER: Tami Lynn Vondran, CCR, RPR

PUBLIC HEARING:

After reviewing the Planning and Land Services Staff 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 July 3, 2014, at 9:00 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" - Department of Planning and Land Services Staff Report with Attachments**
- EXHIBIT "2" - Dennis Reynold's Brief with Attachments**
- EXHIBIT "3" - Letter from James Halmo with Attachments dated June 9, 2014**
- EXHIBIT "4" - Title 18 Excerpts**

No synopsis of testimony is provided due to the presence at the hearing of a court reporter and the preparation of a transcript of proceedings.

The Hearing Examiner took the matter under advisement and concluded the hearing at 11:32 a.m.

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

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 Appeal is exempt from review pursuant to the State Environmental Policy Act (SEPA).
3. Notice of this request was advertised in accordance with Chapter 1.22 of the Pierce County Code. Notice of the date of time of hearing was published in the official County newspaper (Puyallup Herald) on May 28, 2014.
4. Appellant, RMG Worldwide, LLC, appeals an Administrative Decision issued by a Pierce County Planning and Land Services (PALS) Administrative Official on March 24, 2014 (Exhibit 1J). Said decision determined that the appellant, in order to change the use of its parcel from the Classic Golf Course approved in 1990 pursuant to Unclassified Use Permit (UP) 9-90 to a single-family residential subdivision, must submit an application for a major amendment to the UP and an application for preliminary plat approval. The Administrative Decision also

determined that the UP does not vest the density of a proposed subdivision of the golf course to that allowed by the zone classification in effect at the date of approval of the UP. The Administrative Decision requires that a subdivision application for the golf course parcel meet the density requirements of the zone classification in effect at the date of submittal of a completed application therefor. For the reasons set forth hereinafter, appellant has not shown that the PALS' Administrative Decision is clearly erroneous. A UP was a special use permit that authorized implementation of a use listed by the previous zoning code as unclassified. However, approval of a UP did not vest the parcel(s) covered by the UP for either new uses or residential density should zoning of the parcel(s) change.

5. Appellant owns and operates several golf courses within the Pierce County area to include the Classic Golf Course and promotes the game of golf by encouraging participation by both youth and adults. Appellant and one of its members, Ryan Moore, a professional golfer that plays on the PGA tour, sponsor youth golfing tournaments to include First Tee and junior golf such as the National American Golf Association Championship that it recently hosted at the Classic and Oakbrook Golf Courses. According to appellant, the downturn in the economy dramatically impacted the game of golf, and some golf courses no longer provide an economic return. Many golf courses have been and are being converted to other uses. Appellant desires the opportunity to convert all or part of the Classic Golf Course to a single-family residential subdivision at the same density as the existing, 96 lot subdivision on two parcels covered by UP 9-90. While this decision is binding on the appellant, it may not bind the other 96 parcel owners covered by the UP, since they are not parties to the appeal.
6. Prior to development of the Classic Golf Course, a previous owner (predecessor) owned an unimproved, 157 acre parcel of property that included the golf course parcel. The overall parcel was located at the southeast quadrant of the intersection of 208th Street East and 46th Avenue East in the Graham area of unincorporated Pierce County. The parcel abutted 46th Avenue for 2,604 linear feet and 208th Street East for 2,702 linear feet (Exhibit 1F). In the mid 1980s predecessor began exploring the possibilities of developing the parcel and consulted with its own experts and with Pierce County. Following such consultations predecessor decided to improve a portion of the parcel with a golf course and the balance with single-family residential dwellings and a small commercial area. The County advised predecessor that it could construct a golf course by obtaining a filling and grading permit. In February, 1989, predecessor applied for and received such permit and began construction of the golf course to include bunkers, water features, and greens (Document 1 to Staff Report). On May 18, 1990, predecessor submitted an application for "Classic Estates, a PDD" that proposed "creation of 96 single-family lots, an 18 hole championship public golf course, and commercial reserve area on a 157.6 acre parcel of vacant land" (Document 2 to Staff Report). The application also included a zone reclassification "from G to SA-PDD, C-2-PDD". Chapter 18.10.600 of the Pierce County Zoning Code (PCZC) in effect in 1990 set forth the

criteria for a planned development district (PDD). A PDD consisted of a multiple use development that, when approved, created its own, flexible zone classification and also amended the County zoning map. Section 18.10.600(A) PCZC provides in part:

A PDD is intended to be a flexible zoning concept...The uses within the PDD depend on the uses in the underlying or the Potential Zone. The residential densities within the PDD may vary depending upon how the land is developed with general aesthetics, natural areas, and open space being an incentive.

Section 18.10.600(B) PCZC provides that PDDs are of two types: residential or nonresidential. Said section then provides:

...A residential PDD shall mean that the principal purpose of the PDD is to provide one or more types of housing at densities of dwellings the same as densities permitted by the underlying zone....

PDD approval would bind the parcel for development in accordance with a site plan approved by a hearing examiner. As set forth in PCZC 18.10.600(U):

U. Parties Bound by PDD District. Once the preliminary development plan is approved by the Examiner, all persons and parties, their successors, and heirs who own or have any interest in the real property within the proposed PDD, are bound by the Examiner's action [approving a preliminary development plan].

Future subdivisions of property within a PDD were subject to the density and bulk regulations specified in the underlying zoning district (in this case the General Use zone since a zone reclassification to SA or C-2 was not granted). Thus, predecessor in its PDD application of May 16, 1990, proposed a golf course that at the time was virtually complete and scheduled for opening in August, 1990; a residential subdivision; a commercial area that included professional offices and/or services and associated uses; and a zone reclassification (Document 2 to Staff Report).

7. According to the uncontradicted testimony of Mr. Michael Moore, an owner of the appellant, Mr. Grant Griffin of the Pierce County Planning Department called him shortly after application submittal and advised that the zoning code lists a golf course as an unclassified use. Mr. Griffin advised that while a golf course is an authorized use in all Pierce County zone classifications, it requires a UP before it can operate. Mr. Moore could not remember the date of the phone conversation but knows that it occurred shortly after submittal of the PDD application.

8. Subsequent to Mr. Griffin's phone call, in a letter to predecessor dated June 26, 1990, Robert (Doc) Hansen, principal planner, Pierce County Planning and Natural Resource Management, referred to a meeting with predecessor and then wrote:

I first presented you last year an[d] at this meeting with two options. The course's construction could be open with the approval of either a Planned Development District (PDD) or with an Unclassified Use Permit (UP), both requiring a public hearing before a Hearing Examiner. A PDD was suggested if uses other than the golf course were to be proposed. However, a PDD was likely to take more time to complete since more factors will be examined in a multiple use project. Therefore, it was determined by your group to have an Unclassified Use Permit requesting only the golf course with land set aside for future development. It was understood that a Major Amendment to the Unclassified Use Permit could be requested in the future and would be necessary if future land development is to take place (Document 4 to Staff Report). (emphasis added)

Thus, appellant's assertion in paragraph 2 on page 3 of its Request for an Administrative Decision that the County (over predecessor's objection) processed the PDD/preliminary plat application as a UP is incorrect. On the same day as the letter (June 26, 1990), predecessor submitted an application for an unclassified use permit proposing the following:

"Request an unclassified use permit be issued to allow construction of an 18-hole golf course with clubhouse, parking and related facilities to be located along the northerly portion of the site adjacent to 208th Street East. Portions of the site along the west boundary and at the northeast corner will be retained for future development "(Document 3 to Staff Report).

Supporting documents referred to commercial uses of a restaurant and pro shop. The submittal of the UP application implemented one of the options set forth in Mr. Hansen's letter.

9. By Report and Decision dated October 2, 1990, Pierce County Deputy Hearing Examiner Keith McGoffin approved a UP that allowed continued construction and operation of the 18-hole golf course and clubhouse on the 157 acre site (Document 5 to Staff Report). Approximately four months thereafter on March 5, 1991, Deputy Examiner McGoffin approved a major amendment to the UP and also granted preliminary plat approval to Fairway Estates, a 96 lot, single-family residential subdivision, and for a water tower site. The PCZC also listed a water tower as an unclassified use and approval therefore it required a UP. Because a UP (UP 9-90) already covered the entire 157 acre parcel, predecessor did not need to file a new UP application for the water tank (See Document 7 to Staff Report). Since predecessor did not submit a new, separate application for preliminary plat approval the County apparently considered the plat as a major amendment to the UP.

However, while the March 5, 1991, Decision approved a major amendment to the UP, it did not approve either a PDD or zone reclassification. Furthermore, Pierce County zoning maps were not changed. Subsequent to Deputy Examiner McGoffin's March 5, 1991, Decision, the County approved minor amendments to the UP to relocate the temporary clubhouse (August 7, 1991); construct an 1,800 square foot, tournament pavilion (June 29, 1999); and move the location of the temporary clubhouse (August 7, 1991). The County also approved conversion of the water tower site to a residential lot as part of the 5th year time extension for the Fairway Estates preliminary plat (Documents 14 and 15 to Staff Report).

10. Subsequent to Mr. McGoffin's Decisions, predecessor applied for and received approval of a large lot subdivision that divided the 157 acre parcel into three parcels. Predecessor recorded the subdivision on May 3, 1993 (Exhibit 1F). Lot 2 of the subdivision contains 124.83 acres and supports the Classic Golf Course. Lot 3 extends along the west property line adjacent to 46th Avenue East, contains 26.51 acres, and is improved with 85 single-family residential lots. Lot 1, in the northeast corner of the parcel, contains 6.25 acres and is improved with 11 single-family lots. The most recent site plan shows an 18-hole golf course, practice driving range, parking spaces, and a clubhouse located on Lot 2, the golf course parcel. The clubhouse and parking spaces are located adjacent to 208th Street East and along the west side of Lot 2. All three parcels are completely built-out.
11. Appellant acquired a possessory ownership interest in the Classic Golf Course in 2005 and has continued its operation. Since acquiring the golf course appellant has unsuccessfully attempted to process an amendment to the Pierce County Comprehensive Plan that would place both the golf course and the residential subdivision within the urban growth area. Following its latest attempt, the County advised appellant that it would be many years before the parcel would be placed into the urban growth area despite its Rsv-5 designation. The appellant then requested the present Administrative Determination. Appellant asserts that PALS should allow it to submit a major amendment to UP 9-90 and a preliminary plat application for the purpose of subdividing all or part of the golf course.
12. Appellant asserts for a variety of reasons that approval of the UP that covered both the golf course and the residential subdivision, together with subsequent approvals and amendments thereto, authorize it to submit a new major amendment to the UP and a preliminary plat application to convert the golf course to a residential subdivision. Appellant also asserts that the density of the subdivision can equal the density approved for the previous subdivision (Fairway Estates) that was in accordance with the applicable General Use zone. PALS asserts that the predecessor exercised all development rights granted by the UP, namely the golf course and preliminary/final plat approval. PALS advises that while appellant may apply for minor amendments to the UP, any change that triggers the need for a major amendment requires the filing of a new application. Such application would have to comply with the zoning and land use ordinances in effect on the date of

application. At the present time all parcels covered by the UP are located in the Reserve 5 (Rsv-5) zone classification effective in the Graham Community Plan area. The Rsv-5 classification authorizes single-family residential homes on minimum five acre lot sizes.

CONCLUSIONS:

1. The Hearing Examiner has the jurisdiction to consider and decide the issues presented by this request.
2. Predecessor's acquisition of a grading and filling application to develop the golf course and submittal of a separate, complete application for a PDD and zone reclassification establishes predecessor's intent to improve the original, 157 acre parcel with a golf course, residential subdivision, commercial uses, and associated accessory uses to the golf course. Upon notification by Pierce County that the golf course required a UP, the predecessor was faced with two procedural alternatives. Alternative One was to continue processing the PDD. Such alternative would take longer to process and would result in a delayed opening of the golf course. Alternative Two was to apply for a UP that would cover the golf course and reserve the balance of the site for future development. The predecessor chose Alternative Two and applied for and received approval of a UP that covered the entire ownership. The predecessor made no further efforts to process the PDD application but did not withdraw it.
3. The County approved UP 9-90 that allowed the golf course. A major amendment to UP 9-90 was approved to allow a 96 lot, single-family residential subdivision and water tower on the balance of the 157 acre parcel. Predecessor constructed both the golf course and the subdivision, which constituted the major uses allowed by the UP. Because the entire site was covered by the UP, predecessor was able to obtain approval for a water tower by utilizing the major amendment process as opposed to filing a new UP application. The County apparently processed the subdivision as a major amendment to the UP because of the water tower. In a letter dated January 10, 1991, (Document 7 to Staff Report) Grant Griffin, senior planner, wrote to predecessor's representative in part as follows:

...I will be processing the residential portion of this proposal as a Major Amendment to the already adopted and approved Classic Golf Course Unclassified Use Permit, UP 9-90. In this way, the potential for an establishment of a water tower to provide potable and fire fighting flows for the residential subdivision and golf course building can be addressed....
4. Unlike a PDD, a UP is not a zone reclassification and cannot establish different bulk regulations or allow land uses different from those authorized in the underlying

zone. Sections 18.10.221.005 and .010 PCZC define an unclassified use and a UP as follows:

“Unclassified Use” shall mean a use possessing characteristics of such unique and special form as to make impractical its being made automatically and consistently permissible in any defined classification or zone as set forth in this code. (emphasis added)

“Unclassified Use Permit” shall mean a limiting authority granted by the Examiner and the documented evidence thereof, to locate an unclassified use at a particular location, and which limiting authority is required to modify the controls stipulated in this code. (emphasis added)

Section 18.10.620 PCZC addresses UPs and in Subsection (A) sets forth the purpose of an unclassified use and UP in part as follows:

The following uses are found to possess characteristics relating to their size...and their immediate impact on the area which makes impractical their being identified exclusively with any particular zone classification as herein defined. In order to determine that the location of these uses will not be unreasonably incompatible with the uses permitted in the surrounding area; and to permit the Examiner to make further stipulations and conditions as may reasonably assure that the basic intent of this code will be served, these uses will be subject to review by the Examiner and the issuance of an unclassified use permit.... (emphasis added)

5. The PCZC clearly states that an unclassified use permit is needed prior to locating any use listed as unclassified. The PCZC allowed unclassified uses in any zone classification subject to a finding that such uses would not be “unreasonably incompatible with uses permitted in the surrounding areas”. Section 18.10.620 PCZC set forth the list of unclassified uses that included cemeteries, race tracks, rodeos, drag strips, correctional institutions, sewage treatment plants, and surface mines. Unclassified uses also included golf driving ranges and golf courses. However, no section of the PCZC contemplated that approval of a UP was anything more than an authorization to locate an unclassified use on a specific site. In the present case, predecessor evidently gained approval for three unclassified uses on the 157 acre site, namely a golf driving range, a golf course, and a water tower. The residential subdivision did not require a UP as such use was allowed pursuant to plat approval in the underlying General Use zone. However, according to Mr. Griffin’s January 12, 1991, letter, the County elected to process the subdivision as a major amendment to UP 9-90 to accommodate the water tower that also required a UP. Unlike a PDD that included a site specific zone reclassification, the UP did not. The UP was simply the permitting process for locating a listed unclassified use on a site, similar to a conditional use permit or other special use permit. Once permitted and built, the unclassified use was established just as any other permitted use. If

the zoning code changed (as in the present case) and no longer authorized the unclassified use, such use would become nonconforming. A UP, the same as any other permit, can be amended, but is subject to the minor/major amendment process set forth in Section 18A.05.040 of the present Pierce County Code (PCC).

6. On pages 7 and 8 of Appellant's Response to Pierce County Staff Report (Exhibit 2), appellant's attorney, Dennis D. Reynolds, provides a synopsis of the arguments in favor of the appeal. Conclusions on said arguments are made hereinafter.
7. Appellant cites PCC 18A.05.060(B) as authority for its position that the UP authorizes residential densities previously approved for the Fairway Estates subdivision in 1991. The introductory portion of said section reads:
 - B. Uses previously established. Any previously granted permit or approval that establishes a legally existing use and/or activity, which existed prior to the effective date of these regulations, is hereby acknowledged as follows:....

Said section then sets forth a Table for previously granted "use permit(s)" and whether said permit's status is "Prohibited," "Outright," or "Use Permit". In the present case, the golf course was approved in 1990 as a UP, but is now a "prohibited" use in the applicable Rsv-5 zone classification. The Table provides in such circumstances:

Use is nonconforming with specific conditions. The use is still controlled by conditions of approval. Minor changes are not considered nonconforming, however, major changes are subject to nonconforming standards and original conditions.

Thus, the appellant may continue to use the parcel for a golf course as allowed by the UP. The golf course is still controlled by conditions imposed in the original UP approval. The appellant may make minor changes to the golf course and has done so (tournament pavilion and temporary clubhouse). However, according to said section, if a major change to the UP is proposed, such as changing the use of the golf course to a single-family residential subdivision, then the nonconforming use is subject to nonconforming standards. Approval of a subdivision would change the use from a nonconforming golf course to a use allowed outright in the applicable Rsv-5 zone classification, namely single-family residential homes. In such case PCC 18A.35.130(E) provides in part:

A nonconforming use may change to a conforming use allowed within the zone classification in which the use is located or to another nonconforming use of equal or lesser intensity....

Thus, the appellant could apply for a subdivision that meets the regulations and density requirements of the Rsv-5 zone classification. However, PCC

18A.05.060(B) provides no authority for approval of a subdivision that meets densities previously approved pursuant to previous zones.

8. Appellant refers to PCC 18A.85.040.C.2. that addresses amendments to permits or uses on a site. Appellant asserts that contrary to PALS' position, said section does not require that an application for a "new permit type" "meet all current development regulations" (density). Appellant asserts that such requirement is not found in the PCC and cannot be added via staff's "interpretation". Section 18A.85.040 PCC, entitled "Amendments", provides in Subsection A as follows:

A. Purpose. The purpose of this section is to define types of amendments to use permits and to identify procedures for those actions.

Subsection C provides the amendment standards for use permits and sets forth a list of requirements that a minor amendment (approved administratively) to a previously issued use permit (such as a UP) must meet. Subsection C also provides the standards for major amendments as follows:

(C)(2). Major Amendments

- a. Any modification exceeding any of the provisions of Section 18.A.85.040C.1.D.[criteria for minor amendments] shall follow the same procedure required for the initial application.
- b. A finding that addresses the applicability of any specific conditions of approval for the original permit shall be required.
- c. Any modification that requires a discretionary permit other than the type granted for the initial application shall require the new permit type. (emphasis added)

In the present case, the change of use from a golf course to a single-family residential subdivision exceeds many of the requirements for a minor amendment and therefore requires a major amendment. Furthermore, a preliminary plat application is a discretionary land use permit as its approval involves judgment and discretion and is determined on a case-by-case basis within certain parameters. While PCC 18A.85.040 does not provide a specific definition of major or minor amendment, such definitions are found in PCC 18.25.030 as follows:

"Minor amendment" means a limited change of a land use, administrative use, or Use Permit that is reviewed and approved by the Director without public notice or public participation.

“Major amendment” means any change of a land use, administrative use, or Use Permit that is beyond the scope of a minor amendment and requires the same review and approval procedure as the initial permit. (emphasis added)

The appellant proposes both a major change in land use and a major change to the UP. Both are beyond the scope of a minor amendment and require the same review and approval procedure as an initial permit. Therefore, both the definition of “major amendment” and PCC 18A.85.040 require a major amendment for the appellant’s proposal. The review and approval procedure requires an applicant to show that the proposed major amendment is consistent with uses allowed in the applicable zone classification, its bulk regulations, and its maximum density.

9. Appellant argues that a UP is a vested property right that runs with the land and that amendments thereto are controlled not by the zoning code, but by other code provisions that recognize the validity of and amendments to the permit. The appellant is correct that the UP is a vested property right, as such is acknowledged by PCC 18A.05.060. The appellant is also correct that PCC 18A.85.040 authorizes minor amendments to a UP, to include those previously processed for UP 9-90. However, the PCC sections quoted in Conclusion 8 above clearly require a major amendment for the changes proposed by the appellant. Said sections also clearly require consideration of a major amendment application in accordance with the development regulations in effect on the date of application. No interpretation of the PCC is required as the code is unambiguous. See Cement Products v Kittitas County, 171 Wn. App. 691 (2012), and Grays Harbor Energy v County, 175 Wn. App. 578 (2013).

10. Appellant asserts that approval of the UP also included approval of a residential subdivision, and that the density approved for the subdivision established the density for all properties covered by the UP to include the golf course. The only uses proposed for the parcel that required a UP were the golf course and the water tower. The preliminary plat was an allowed use in the applicable General Use zone classification. One can question why the Planning Department and the Deputy Examiner in the early 1990’s approved a UP for the entire site and required a major amendment of the UP for the preliminary plat application. The answer is found in Mr. Griffin’s January 10, 1991, letter and in subsequent actions by the predecessor in processing minor amendments to the golf course. Because the UP covered the subdivision parcels predecessor was able to obtain approval of a water tower without having to file a new UP application and integrated conditions of approval to cover both uses. Predecessor could also have expanded the golf course into the preliminary plat area by utilizing the minor amendment process as opposed to applying for a new UP (depending on the size of the amendment). The UP was simply a permit that authorized listed land uses to locate in every zone classification subject to requirements of compatibility. The UP did not include a zone reclassification nor did it establish a density for future residential development. UP 9-90 approved a golf course and was placed over the balance of the 157 acre site

to accommodate future development. The predecessor could have applied for and received subdivision approval independent of the UP.

11. Appellant raises procedural issues regarding the need to relinquish UP 9-90 if it desires to subdivide the golf course parcel. Regardless of whether the appellant formally relinquishes the UP or not, the appellant may submit an application for a preliminary plat for the golf course parcel in accordance with the Rsv-5 classification. Such would change a nonconforming use to a conforming use, thereby bringing the golf course parcel into compliance with the Rsv-5 classification. Again, however, appellant and the County may need to consider other owners within the 157 acres covered by the UP.
12. Appellant asserts that the original 96 lot subdivision was not approved by the platting process but was accomplished through a major amendment of the UP. A review of the Deputy Hearing Examiner's Decision and the Staff Report provided for the hearing clearly shows that regardless of how the Deputy Hearing Examiner referred to the application, he approved a preliminary plat. See also Mr. Griffin's January 10, 1991, letter. Furthermore, time extensions for the preliminary plat were granted in 1995, 1996, and 1997. Predecessor submitted an application for final plat approval that the Examiner granted on July 28, 1998. Accepting appellant's position that a subdivision can be approved through an amendment to a UP would violate the State Subdivision Act set forth in RCW 58.17, which provides in RCW 58.17.030 as follows:

Every subdivision shall comply with the provisions of this chapter...

See also HJS Development, Inc., v. Pierce County, 148 Wn. 2nd 451 (2003). Finally, any request to subdivide the golf course parcel must meet the requirements of RCW 58.17.033 that provide in part:

- (1) A proposed division of land, as defined in RCW 58.17.020 shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official.

A UP under the previous Pierce County Zoning Code had no legislatively adopted processes, criteria, or controls for subdivisions of property.

13. Appellant requests that the Examiner require PALS to submit for consideration at a public hearing its application for a major amendment to the UP. Appellant argues that the PALS director cannot operate as a "gate keeper" and block the Examiner's consideration of a major amendment application. By doing so, the director exceeds his authority by preventing the Examiner from considering matters within his

jurisdiction. Based upon the decision in this matter, appellant's request is moot since a major amendment to the UP does not in and of itself authorize subdivision of the golf course. A major amendment to the UP coupled with a preliminary plat application that meets current zoning requirements is required to establish a single-family subdivision on the golf course parcel.

14. The appellant has raised constitutional arguments regarding substantive and procedural due process. The Examiner has no jurisdiction to consider constitutional remedies. According to the Washington State Court of Appeals in Chaussee v. Snohomish County Council, 38 Wn. App. 630 (1984), a hearing examiner's determination is:

...limited to an administrative proceeding to determine whether or not a particular piece of property is subject to a county land ordinance. Hence, he was strictly limited to determine whether SCC 20A was applicable to those portions of Chaussee's property included in the final three survey sheets filed on August 28, 1979. 38 Wn. App. 630 @ 638

See also Yakima County Clean Air Authority v. Glascam Builders, Inc., 85 Wn. 2d 255 (1975).

15. The Pierce County Hearing Examiner Code is found at Chapter 1.22 PCC. Section 1.22.090 PCC sets forth rules addressing "Appeals of Administrative Decisions to the Examiner". Subsection G provides the burden of proof as follows:

- G. Burden of Proof. A decision of the Administrative Official shall be entitled to substantial weight. Parties appealing a decision of the Administrative Official shall have the burden of presenting the evidence necessary to prove to the Hearing Examiner that the Administrative Official's decision was clearly erroneous.

In the present case, the appellant has not presented evidence necessary to show that the PALS' Administrative Decision of March 24, 2014, was clearly erroneous.

DECISION:

The appeal of RMG Worldwide, LLC, of an Administrative Decision issued by Pierce County Planning and Land Services dated March 24, 2014, is hereby denied.

ORDERED this 5th day of August, 2014.

STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

TRANSMITTED this 5th day of August, 2014, to the following:

APPELLANT: RMG Worldwide LLC
Attn: Michael H. Moore, Manager
4908-208th Street East
Spanaway, WA 98387

AGENT: Carl E. Halsan
Halsan Frey, LLC
P.O. Box 1447
Gig Harbor, WA 98335

OTHERS:

Ryan Moore
7708 Walnut Street
Lakewood, WA 98498

Bud Rehberg
3802-232nd Street East
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
PIERCE COUNTY CODE ENFORCEMENT

**CASE NO.: Administrative Appeal: AA5-14
Application Number: 774811**

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.

**CASE NO.: Administrative Appeal: AA5-14
Application Number: 774811**

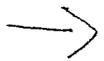
NOTICE

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.



Pierce County

Office of the Pierce County Hearing Examiner

902 South 10th Street
Tacoma, Washington 98405
(253) 272-2206

STEPHEN K. CAUSSEAU, JR.
Pierce County Hearing Examiner

August 5, 2014

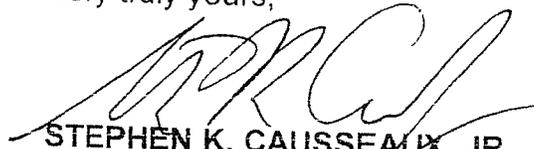
RMG Worldwide LLC
Attn: Michael H. Moore, Manager
4908-208th Street East
Spanaway, WA 98387

RE: Administrative Appeal: AA5-14
Application Number: 774811

Dear Mr. Moore:

Transmitted herewith is the Report and Decision of the Hearing Examiner regarding your request for the above-entitled matter.

Very truly yours,


STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

SKC/ijp

cc: Parties of Record

1X

OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

REPORT AND DECISION

CASE NO.: **Administrative Appeal: AA5-14**
 Application Number: 774811

APPELLANT: RMG Worldwide LLC
 Attn: Michael H. Moore, Manager
 4908-208th Street East
 Spanaway, WA 98387

AGENT: Carl E. Halsan
 Halsan Frey, LLC
 P.O. Box 1447
 Gig Harbor, WA 98335

PLANNER: Jeffrey D. Mann, AICP, Associate Planner

SUMMARY OF REQUEST:

Appeal of a Planning and Land Services Administrative Official's Decision of March 24, 2014, requiring the appellant to submit both a major amendment application to Unclassified Use Permit 9-90 and a preliminary plat application that meets current development regulations in order to subdivide the Classis Golf Course into residential lots. Appellant asserts that a major amendment application to UP 9-90 is all that is required and that such application is reviewed pursuant to the General Use zone that was in effect in 1990. The site is located on 208th Street East, Graham, in the Reserve 5 (Rsv5) zone classification, in Council District #3.

SUMMARY OF DECISION: Appeal denied.

DATE OF DECISION: August 5, 2014

COURT REPORTER: Tami Lynn Vondran, CCR, RPR

PUBLIC HEARING:

After reviewing the Planning and Land Services Staff 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 July 3, 2014, at 9:00 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" - Department of Planning and Land Services Staff Report with Attachments
- EXHIBIT "2" - Dennis Reynold's Brief with Attachments
- EXHIBIT "3" - Letter from James Halmo with Attachments dated June 9, 2014
- EXHIBIT "4" - Title 18 Excerpts

No synopsis of testimony is provided due to the presence at the hearing of a court reporter and the preparation of a transcript of proceedings.

The Hearing Examiner took the matter under advisement and concluded the hearing at 11:32 a.m.

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

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 Appeal is exempt from review pursuant to the State Environmental Policy Act (SEPA).
3. Notice of this request was advertised in accordance with Chapter 1.22 of the Pierce County Code. Notice of the date of time of hearing was published in the official County newspaper (Puyallup Herald) on May 28, 2014.
4. Appellant, RMG Worldwide, LLC, appeals an Administrative Decision issued by a Pierce County Planning and Land Services (PALS) Administrative Official on March 24, 2014 (Exhibit 1J). Said decision determined that the appellant, in order to change the use of its parcel from the Classic Golf Course approved in 1990 pursuant to Unclassified Use Permit (UP) 9-90 to a single-family residential subdivision, must submit an application for a major amendment to the UP and an application for preliminary plat approval. The Administrative Decision also

determined that the UP does not vest the density of a proposed subdivision of the golf course to that allowed by the zone classification in effect at the date of approval of the UP. The Administrative Decision requires that a subdivision application for the golf course parcel meet the density requirements of the zone classification in effect at the date of submittal of a completed application therefor. For the reasons set forth hereinafter, appellant has not shown that the PALS' Administrative Decision is clearly erroneous. A UP was a special use permit that authorized implementation of a use listed by the previous zoning code as unclassified. However, approval of a UP did not vest the parcel(s) covered by the UP for either new uses or residential density should zoning of the parcel(s) change.

5. Appellant owns and operates several golf courses within the Pierce County area to include the Classic Golf Course and promotes the game of golf by encouraging participation by both youth and adults. Appellant and one of its members, Ryan Moore, a professional golfer that plays on the PGA tour, sponsor youth golfing tournaments to include First Tee and junior golf such as the National American Golf Association Championship that it recently hosted at the Classic and Oakbrook Golf Courses. According to appellant, the downturn in the economy dramatically impacted the game of golf, and some golf courses no longer provide an economic return. Many golf courses have been and are being converted to other uses. Appellant desires the opportunity to convert all or part of the Classic Golf Course to a single-family residential subdivision at the same density as the existing, 96 lot subdivision on two parcels covered by UP 9-90. While this decision is binding on the appellant, it may not bind the other 96 parcel owners covered by the UP, since they are not parties to the appeal.
6. Prior to development of the Classic Golf Course, a previous owner (predecessor) owned an unimproved, 157 acre parcel of property that included the golf course parcel. The overall parcel was located at the southeast quadrant of the intersection of 208th Street East and 46th Avenue East in the Graham area of unincorporated Pierce County. The parcel abutted 46th Avenue for 2,604 linear feet and 208th Street East for 2,702 linear feet (Exhibit 1F). In the mid 1980s predecessor began exploring the possibilities of developing the parcel and consulted with its own experts and with Pierce County. Following such consultations predecessor decided to improve a portion of the parcel with a golf course and the balance with single-family residential dwellings and a small commercial area. The County advised predecessor that it could construct a golf course by obtaining a filling and grading permit. In February, 1989, predecessor applied for and received such permit and began construction of the golf course to include bunkers, water features, and greens (Document 1 to Staff Report). On May 18, 1990, predecessor submitted an application for "Classic Estates, a PDD" that proposed "creation of 96 single-family lots, an 18 hole championship public golf course, and commercial reserve area on a 157.6 acre parcel of vacant land" (Document 2 to Staff Report). The application also included a zone reclassification "from G to SA-PDD, C-2-PDD". Chapter 18.10.600 of the Pierce County Zoning Code (PCZC) in effect in 1990 set forth the

criteria for a planned development district (PDD). A PDD consisted of a multiple use development that, when approved, created its own, flexible zone classification and also amended the County zoning map. Section 18.10.600(A) PCZC provides in part:

A PDD is intended to be a flexible zoning concept... The uses within the PDD depend on the uses in the underlying or the Potential Zone. The residential densities within the PDD may vary depending upon how the land is developed with general aesthetics, natural areas, and open space being an incentive.

Section 18.10.600(B) PCZC provides that PDDs are of two types: residential or nonresidential. Said section then provides:

...A residential PDD shall mean that the principal purpose of the PDD is to provide one or more types of housing at densities of dwellings the same as densities permitted by the underlying zone....

PDD approval would bind the parcel for development in accordance with a site plan approved by a hearing examiner. As set forth in PCZC 18.10.600(U):

U. Parties Bound by PDD District. Once the preliminary development plan is approved by the Examiner, all persons and parties, their successors, and heirs who own or have any interest in the real property within the proposed PDD, are bound by the Examiner's action [approving a preliminary development plan].

Future subdivisions of property within a PDD were subject to the density and bulk regulations specified in the underlying zoning district (in this case the General Use zone since a zone reclassification to SA or C-2 was not granted). Thus, predecessor in its PDD application of May 16, 1990, proposed a golf course that at the time was virtually complete and scheduled for opening in August, 1990; a residential subdivision; a commercial area that included professional offices and/or services and associated uses; and a zone reclassification (Document 2 to Staff Report).

7. According to the uncontradicted testimony of Mr. Michael Moore, an owner of the appellant, Mr. Grant Griffin of the Pierce County Planning Department called him shortly after application submittal and advised that the zoning code lists a golf course as an unclassified use. Mr. Griffin advised that while a golf course is an authorized use in all Pierce County zone classifications, it requires a UP before it can operate. Mr. Moore could not remember the date of the phone conversation but knows that it occurred shortly after submittal of the PDD application.

8. Subsequent to Mr. Griffin's phone call, in a letter to predecessor dated June 26, 1990, Robert (Doc) Hansen, principal planner, Pierce County Planning and Natural Resource Management, referred to a meeting with predecessor and then wrote:

I first presented you last year an[d] at this meeting with two options. The course's construction could be open with the approval of either a Planned Development District (PDD) or with an Unclassified Use Permit (UP), both requiring a public hearing before a Hearing Examiner. A PDD was suggested if uses other than the golf course were to be proposed. However, a PDD was likely to take more time to complete since more factors will be examined in a multiple use project. Therefore, it was determined by your group to have an Unclassified Use Permit requesting only the golf course with land set aside for future development. It was understood that a Major Amendment to the Unclassified Use Permit could be requested in the future and would be necessary if future land development is to take place (Document 4 to Staff Report). (emphasis added)

Thus, appellant's assertion in paragraph 2 on page 3 of its Request for an Administrative Decision that the County (over predecessor's objection) processed the PDD/preliminary plat application as a UP is incorrect. On the same day as the letter (June 26, 1990), predecessor submitted an application for an unclassified use permit proposing the following:

"Request an unclassified use permit be issued to allow construction of an 18-hole golf course with clubhouse, parking and related facilities to be located along the northerly portion of the site adjacent to 208th Street East. Portions of the site along the west boundary and at the northeast corner will be retained for future development "(Document 3 to Staff Report).

Supporting documents referred to commercial uses of a restaurant and pro shop. The submittal of the UP application implemented one of the options set forth in Mr. Hansen's letter.

9. By Report and Decision dated October 2, 1990, Pierce County Deputy Hearing Examiner Keith McGoffin approved a UP that allowed continued construction and operation of the 18-hole golf course and clubhouse on the 157 acre site (Document 5 to Staff Report). Approximately four months thereafter on March 5, 1991, Deputy Examiner McGoffin approved a major amendment to the UP and also granted preliminary plat approval to Fairway Estates, a 96 lot, single-family residential subdivision, and for a water tower site. The PCZC also listed a water tower as an unclassified use and approval therefore it required a UP. Because a UP (UP 9-90) already covered the entire 157 acre parcel, predecessor did not need to file a new UP application for the water tank (See Document 7 to Staff Report). Since predecessor did not submit a new, separate application for preliminary plat approval the County apparently considered the plat as a major amendment to the UP.

However, while the March 5, 1991, Decision approved a major amendment to the UP, it did not approve either a PDD or zone reclassification. Furthermore, Pierce County zoning maps were not changed. Subsequent to Deputy Examiner McGoffin's March 5, 1991, Decision, the County approved minor amendments to the UP to relocate the temporary clubhouse (August 7, 1991); construct an 1,800 square foot, tournament pavilion (June 29, 1999); and move the location of the temporary clubhouse (August 7, 1991). The County also approved conversion of the water tower site to a residential lot as part of the 5th year time extension for the Fairway Estates preliminary plat (Documents 14 and 15 to Staff Report).

10. Subsequent to Mr. McGoffin's Decisions, predecessor applied for and received approval of a large lot subdivision that divided the 157 acre parcel into three parcels. Predecessor recorded the subdivision on May 3, 1993 (Exhibit 1F). Lot 2 of the subdivision contains 124.83 acres and supports the Classic Golf Course. Lot 3 extends along the west property line adjacent to 46th Avenue East, contains 26.51 acres, and is improved with 85 single-family residential lots. Lot 1, in the northeast corner of the parcel, contains 6.25 acres and is improved with 11 single-family lots. The most recent site plan shows an 18-hole golf course, practice driving range, parking spaces, and a clubhouse located on Lot 2, the golf course parcel. The clubhouse and parking spaces are located adjacent to 208th Street East and along the west side of Lot 2. All three parcels are completely built-out.
11. Appellant acquired a possessory ownership interest in the Classic Golf Course in 2005 and has continued its operation. Since acquiring the golf course appellant has unsuccessfully attempted to process an amendment to the Pierce County Comprehensive Plan that would place both the golf course and the residential subdivision within the urban growth area. Following its latest attempt, the County advised appellant that it would be many years before the parcel would be placed into the urban growth area despite its Rsv-5 designation. The appellant then requested the present Administrative Determination. Appellant asserts that PALS should allow it to submit a major amendment to UP 9-90 and a preliminary plat application for the purpose of subdividing all or part of the golf course.
12. Appellant asserts for a variety of reasons that approval of the UP that covered both the golf course and the residential subdivision, together with subsequent approvals and amendments thereto, authorize it to submit a new major amendment to the UP and a preliminary plat application to convert the golf course to a residential subdivision. Appellant also asserts that the density of the subdivision can equal the density approved for the previous subdivision (Fairway Estates) that was in accordance with the applicable General Use zone. PALS asserts that the predecessor exercised all development rights granted by the UP, namely the golf course and preliminary/final plat approval. PALS advises that while appellant may apply for minor amendments to the UP, any change that triggers the need for a major amendment requires the filing of a new application. Such application would have to comply with the zoning and land use ordinances in effect on the date of

application. At the present time all parcels covered by the UP are located in the Reserve 5 (Rsv-5) zone classification effective in the Graham Community Plan area. The Rsv-5 classification authorizes single-family residential homes on minimum five acre lot sizes.

CONCLUSIONS:

1. The Hearing Examiner has the jurisdiction to consider and decide the issues presented by this request.
2. Predecessor's acquisition of a grading and filling application to develop the golf course and submittal of a separate, complete application for a PDD and zone reclassification establishes predecessor's intent to improve the original, 157 acre parcel with a golf course, residential subdivision, commercial uses, and associated accessory uses to the golf course. Upon notification by Pierce County that the golf course required a UP, the predecessor was faced with two procedural alternatives. Alternative One was to continue processing the PDD. Such alternative would take longer to process and would result in a delayed opening of the golf course. Alternative Two was to apply for a UP that would cover the golf course and reserve the balance of the site for future development. The predecessor chose Alternative Two and applied for and received approval of a UP that covered the entire ownership. The predecessor made no further efforts to process the PDD application but did not withdraw it.
3. The County approved UP 9-90 that allowed the golf course. A major amendment to UP 9-90 was approved to allow a 96 lot, single-family residential subdivision and water tower on the balance of the 157 acre parcel. Predecessor constructed both the golf course and the subdivision, which constituted the major uses allowed by the UP. Because the entire site was covered by the UP, predecessor was able to obtain approval for a water tower by utilizing the major amendment process as opposed to filing a new UP application. The County apparently processed the subdivision as a major amendment to the UP because of the water tower. In a letter dated January 10, 1991, (Document 7 to Staff Report) Grant Griffin, senior planner, wrote to predecessor's representative in part as follows:

...I will be processing the residential portion of this proposal as a Major Amendment to the already adopted and approved Classic Golf Course Unclassified Use Permit, UP 9-90. In this way, the potential for an establishment of a water tower to provide potable and fire fighting flows for the residential subdivision and golf course building can be addressed....
4. Unlike a PDD, a UP is not a zone reclassification and cannot establish different bulk regulations or allow land uses different from those authorized in the underlying

zone. Sections 18.10.221.005 and .010 PCZC define an unclassified use and a UP as follows:

“Unclassified Use” shall mean a use possessing characteristics of such unique and special form as to make impractical its being made automatically and consistently permissible in any defined classification or zone as set forth in this code. (emphasis added)

“Unclassified Use Permit” shall mean a limiting authority granted by the Examiner and the documented evidence thereof, to locate an unclassified use at a particular location, and which limiting authority is required to modify the controls stipulated in this code. (emphasis added)

Section 18.10.620 PCZC addresses UPs and in Subsection (A) sets forth the purpose of an unclassified use and UP in part as follows:

The following uses are found to possess characteristics relating to their size...and their immediate impact on the area which makes impractical their being identified exclusively with any particular zone classification as herein defined. In order to determine that the location of these uses will not be unreasonably incompatible with the uses permitted in the surrounding area; and to permit the Examiner to make further stipulations and conditions as may reasonably assure that the basic intent of this code will be served, these uses will be subject to review by the Examiner and the issuance of an unclassified use permit.... (emphasis added)

5. The PCZC clearly states that an unclassified use permit is needed prior to locating any use listed as unclassified. The PCZC allowed unclassified uses in any zone classification subject to a finding that such uses would not be “unreasonably incompatible with uses permitted in the surrounding areas”. Section 18.10.620 PCZC set forth the list of unclassified uses that included cemeteries, race tracks, rodeos, drag strips, correctional institutions, sewage treatment plants, and surface mines. Unclassified uses also included golf driving ranges and golf courses. However, no section of the PCZC contemplated that approval of a UP was anything more than an authorization to locate an unclassified use on a specific site. In the present case, predecessor evidently gained approval for three unclassified uses on the 157 acre site, namely a golf driving range, a golf course, and a water tower. The residential subdivision did not require a UP as such use was allowed pursuant to plat approval in the underlying General Use zone. However, according to Mr. Griffin's January 12, 1991, letter, the County elected to process the subdivision as a major amendment to UP 9-90 to accommodate the water tower that also required a UP. Unlike a PDD that included a site specific zone reclassification, the UP did not. The UP was simply the permitting process for locating a listed unclassified use on a site, similar to a conditional use permit or other special use permit. Once permitted and built, the unclassified use was established just as any other permitted use. If

the zoning code changed (as in the present case) and no longer authorized the unclassified use, such use would become nonconforming. A UP, the same as any other permit, can be amended, but is subject to the minor/major amendment process set forth in Section 18A.05.040 of the present Pierce County Code (PCC).

6. On pages 7 and 8 of Appellant's Response to Pierce County Staff Report (Exhibit 2), appellant's attorney, Dennis D. Reynolds, provides a synopsis of the arguments in favor of the appeal. Conclusions on said arguments are made hereinafter.

7. Appellant cites PCC 18A.05.060(B) as authority for its position that the UP authorizes residential densities previously approved for the Fairway Estates subdivision in 1991. The introductory portion of said section reads:

B. Uses previously established. Any previously granted permit or approval that establishes a legally existing use and/or activity, which existed prior to the effective date of these regulations, is hereby acknowledged as follows:....

Said section then sets forth a Table for previously granted "use permit(s)" and whether said permit's status is "Prohibited," "Outright," or "Use Permit". In the present case, the golf course was approved in 1990 as a UP, but is now a "prohibited" use in the applicable Rsv-5 zone classification. The Table provides in such circumstances:

Use is nonconforming with specific conditions. The use is still controlled by conditions of approval. Minor changes are not considered nonconforming, however, major changes are subject to nonconforming standards and original conditions.

Thus, the appellant may continue to use the parcel for a golf course as allowed by the UP. The golf course is still controlled by conditions imposed in the original UP approval. The appellant may make minor changes to the golf course and has done so (tournament pavilion and temporary clubhouse). However, according to said section, if a major change to the UP is proposed, such as changing the use of the golf course to a single-family residential subdivision, then the nonconforming use is subject to nonconforming standards. Approval of a subdivision would change the use from a nonconforming golf course to a use allowed outright in the applicable Rsv-5 zone classification, namely single-family residential homes. In such case PCC 18A.35.130(E) provides in part:

A nonconforming use may change to a conforming use allowed within the zone classification in which the use is located or to another nonconforming use of equal or lesser intensity....

Thus, the appellant could apply for a subdivision that meets the regulations and density requirements of the Rsv-5 zone classification. However, PCC

18A.05.060(B) provides no authority for approval of a subdivision that meets densities previously approved pursuant to previous zones.

8. Appellant refers to PCC 18A.85.040.C.2. that addresses amendments to permits or uses on a site. Appellant asserts that contrary to PALS' position, said section does not require that an application for a "new permit type" "meet all current development regulations" (density). Appellant asserts that such requirement is not found in the PCC and cannot be added via staff's "interpretation". Section 18A.85.040 PCC, entitled "Amendments", provides in Subsection A as follows:

A. Purpose. The purpose of this section is to define types of amendments to use permits and to identify procedures for those actions.

Subsection C provides the amendment standards for use permits and sets forth a list of requirements that a minor amendment (approved administratively) to a previously issued use permit (such as a UP) must meet. Subsection C also provides the standards for major amendments as follows:

(C)(2). Major Amendments

- a. Any modification exceeding any of the provisions of Section 18.A.85.040C.1.D.[criteria for minor amendments] shall follow the same procedure required for the initial application.
- b. A finding that addresses the applicability of any specific conditions of approval for the original permit shall be required.
- c. Any modification that requires a discretionary permit other than the type granted for the initial application shall require the new permit type. (emphasis added)

In the present case, the change of use from a golf course to a single-family residential subdivision exceeds many of the requirements for a minor amendment and therefore requires a major amendment. Furthermore, a preliminary plat application is a discretionary land use permit as its approval involves judgment and discretion and is determined on a case-by-case basis within certain parameters. While PCC 18A.85.040 does not provide a specific definition of major or minor amendment, such definitions are found in PCC 18.25.030 as follows:

"Minor amendment" means a limited change of a land use, administrative use, or Use Permit that is reviewed and approved by the Director without public notice or public participation.

“Major amendment” means any change of a land use, administrative use, or Use Permit that is beyond the scope of a minor amendment and requires the same review and approval procedure as the initial permit. (emphasis added)

The appellant proposes both a major change in land use and a major change to the UP. Both are beyond the scope of a minor amendment and require the same review and approval procedure as an initial permit. Therefore, both the definition of “major amendment” and PCC 18A.85.040 require a major amendment for the appellant’s proposal. The review and approval procedure requires an applicant to show that the proposed major amendment is consistent with uses allowed in the applicable zone classification, its bulk regulations, and its maximum density.

9. Appellant argues that a UP is a vested property right that runs with the land and that amendments thereto are controlled not by the zoning code, but by other code provisions that recognize the validity of and amendments to the permit. The appellant is correct that the UP is a vested property right, as such is acknowledged by PCC 18A.05.060. The appellant is also correct that PCC 18A.85.040 authorizes minor amendments to a UP, to include those previously processed for UP 9-90. However, the PCC sections quoted in Conclusion 8 above clearly require a major amendment for the changes proposed by the appellant. Said sections also clearly require consideration of a major amendment application in accordance with the development regulations in effect on the date of application. No interpretation of the PCC is required as the code is unambiguous. See Cement Products v Kittitas County, 171 Wn. App. 691 (2012), and Grays Harbor Energy v County, 175 Wn. App. 578 (2013).
10. Appellant asserts that approval of the UP also included approval of a residential subdivision, and that the density approved for the subdivision established the density for all properties covered by the UP to include the golf course. The only uses proposed for the parcel that required a UP were the golf course and the water tower. The preliminary plat was an allowed use in the applicable General Use zone classification. One can question why the Planning Department and the Deputy Examiner in the early 1990’s approved a UP for the entire site and required a major amendment of the UP for the preliminary plat application. The answer is found in Mr. Griffin’s January 10, 1991, letter and in subsequent actions by the predecessor in processing minor amendments to the golf course. Because the UP covered the subdivision parcels predecessor was able to obtain approval of a water tower without having to file a new UP application and integrated conditions of approval to cover both uses. Predecessor could also have expanded the golf course into the preliminary plat area by utilizing the minor amendment process as opposed to applying for a new UP (depending on the size of the amendment). The UP was simply a permit that authorized listed land uses to locate in every zone classification subject to requirements of compatibility. The UP did not include a zone reclassification nor did it establish a density for future residential development. UP 9-90 approved a golf course and was placed over the balance of the 157 acre site

to accommodate future development. The predecessor could have applied for and received subdivision approval independent of the UP.

11. Appellant raises procedural issues regarding the need to relinquish UP 9-90 if it desires to subdivide the golf course parcel. Regardless of whether the appellant formally relinquishes the UP or not, the appellant may submit an application for a preliminary plat for the golf course parcel in accordance with the Rsv-5 classification. Such would change a nonconforming use to a conforming use, thereby bringing the golf course parcel into compliance with the Rsv-5 classification. Again, however, appellant and the County may need to consider other owners within the 157 acres covered by the UP.
12. Appellant asserts that the original 96 lot subdivision was not approved by the platting process but was accomplished through a major amendment of the UP. A review of the Deputy Hearing Examiner's Decision and the Staff Report provided for the hearing clearly shows that regardless of how the Deputy Hearing Examiner referred to the application, he approved a preliminary plat. See also Mr. Griffin's January 10, 1991, letter. Furthermore, time extensions for the preliminary plat were granted in 1995, 1996, and 1997. Predecessor submitted an application for final plat approval that the Examiner granted on July 28, 1998. Accepting appellant's position that a subdivision can be approved through an amendment to a UP would violate the State Subdivision Act set forth in RCW 58.17, which provides in RCW 58.17.030 as follows:

Every subdivision shall comply with the provisions of this chapter...

See also HJS Development, Inc., v. Pierce County, 148 Wn. 2d 451 (2003). Finally, any request to subdivide the golf course parcel must meet the requirements of RCW 58.17.033 that provide in part:

- (1) A proposed division of land, as defined in RCW 58.17.020 shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official.

A UP under the previous Pierce County Zoning Code had no legislatively adopted processes, criteria, or controls for subdivisions of property.

13. Appellant requests that the Examiner require PALS to submit for consideration at a public hearing its application for a major amendment to the UP. Appellant argues that the PALS director cannot operate as a "gate keeper" and block the Examiner's consideration of a major amendment application. By doing so, the director exceeds his authority by preventing the Examiner from considering matters within his

jurisdiction. Based upon the decision in this matter, appellant's request is moot since a major amendment to the UP does not in and of itself authorize subdivision of the golf course. A major amendment to the UP coupled with a preliminary plat application that meets current zoning requirements is required to establish a single-family subdivision on the golf course parcel.

14. The appellant has raised constitutional arguments regarding substantive and procedural due process. The Examiner has no jurisdiction to consider constitutional remedies. According to the Washington State Court of Appeals in Chaussee v. Snohomish County Council, 38 Wn. App. 630 (1984), a hearing examiner's determination is:

...limited to an administrative proceeding to determine whether or not a particular piece of property is subject to a county land ordinance. Hence, he was strictly limited to determine whether SCC 20A was applicable to those portions of Chaussee's property included in the final three survey sheets filed on August 28, 1979. 38 Wn. App. 630 @ 638

See also Yakima County Clean Air Authority v. Glascam Builders, Inc., 85 Wn. 2d 255 (1975).

15. The Pierce County Hearing Examiner Code is found at Chapter 1.22 PCC. Section 1.22.090 PCC sets forth rules addressing "Appeals of Administrative Decisions to the Examiner". Subsection G provides the burden of proof as follows:

- G. Burden of Proof. A decision of the Administrative Official shall be entitled to substantial weight. Parties appealing a decision of the Administrative Official shall have the burden of presenting the evidence necessary to prove to the Hearing Examiner that the Administrative Official's decision was clearly erroneous.

In the present case, the appellant has not presented evidence necessary to show that the PALS' Administrative Decision of March 24, 2014, was clearly erroneous.

DECISION:

The appeal of RMG Worldwide, LLC, of an Administrative Decision issued by Pierce County Planning and Land Services dated March 24, 2014, is hereby denied.

ORDERED this 5th day of August, 2014.



STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

TRANSMITTED this 5th day of August, 2014, to the following:

APPELLANT: RMG Worldwide LLC
Attn: Michael H. Moore, Manager
4908-208th Street East
Spanaway, WA 98387

AGENT: Carl E. Halsan
Halsan Frey, LLC
P.O. Box 1447
Gig Harbor, WA 98335

OTHERS:

Ryan Moore
7708 Walnut Street
Lakewood, WA 98498

Bud Rehberg
3802-232nd Street East
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
PIERCE COUNTY CODE ENFORCEMENT

**CASE NO.: Administrative Appeal: AA5-14
Application Number: 774811**

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.

Moore – Opening Brief

APPENDIX A-4



HAROLD LeMAY ENTERPRISES, INC.

13502 PACIFIC AVENUE

P.O. BOX 44459 — TACOMA, WA 98444-0459

Phone 537-8687

September 11, 1990

PLANNING AND NATURAL
RESOURCE MANAGEMENT

SEP 11 1990

PIERCE COUNTY

Mr. Grant Griffin
Pierce County Planning & Natural
Resource Management Department
2401 South 35th St.
Tacoma, Washington 98409-7490

Subject: "Classic Estates" preliminary plat/PDD, Application in
the NE 1/4, Sec 12, T 18N, R 3E, W.M.

Dear Mr. Griffin:

Please accept this letter as a formal request to reactivate the
above referenced project application.

As you are aware, this proposal was put "on hold" pending the
outcome of the unclassified use permit applications for the
golf course and clubhouse. However, we feel it is in our best
interest to move forward on this project at this time rather than
wait until spring of next year.

All review fees have been paid on this project, verification of
which is attached.

Sincerely,

Barb LeMay
Executive assistant

cc Larson & Associates
Michael Moore, Project Mgr.

Moore – Opening Brief

APPENDIX A-5

18A.75.010 Modification, Amendment, Extension and Relinquishment of Permits.

Procedures for application modification, review and amendment as well as permit extensions and relinquishment are outlined in Chapter 18A.85 PCC. For additional information about application requirements, see Chapter 18.40 PCC; for public hearing and appeal procedures, see Chapter 1.22 PCC; for the review process, see Chapter 18.60 PCC; for public notice, see Chapter 18.80 PCC; for fees, see Chapter 2.05 PCC; and for compliance, see Chapter 18.140 PCC. (Ord. 2009-98s § 4 (part), 2010)

Moore – Opening Brief

APPENDIX A-6



File Name or Number. AA5-14/UP 9-90
Parcel Number(s) 5002130991/5002130992

RECONSIDERATION OF DECISION
OF THE PIERCE COUNTY HEARING EXAMINER

TO: THE PIERCE COUNTY HEARING EXAMINER
COMES NOW RMG Worldwide, LLC on this 14th day of August 2014
(your name)
as an "aggrieved person" requesting reconsideration of the decision to deny
application for (approve/deny)

Administrative Appeal: AA5-14, Application No.774811.

WHEREAS, the Pierce County Hearing Examiner, after duly considering said matter, did on
August 5 2014 take said action to deny the request,
(decision date) (approve/deny)

THEREFORE BE IT KNOWN that Michael H. Moore, after review and
(your name)
consideration of findings, conclusions, and decision of the Pierce County Hearing Examiner does now,
under the provisions of the appropriate official regulations, give request for reconsideration of the
Examiner's decision and concisely specifies what errors of procedure or misinterpretation of fact which
the Examiner is asked to reconsider:

SEE attached "RMG Worldwide LLC's Motion for Reconsideration / Request to Reopen Record," by
reference made part of this Request for Reconsideration.

(if more space is needed, please attach additional sheets)

AND FURTHERMORE, requests that the Pierce County Hearing Examiner, having responsibility for final
determination in this matter, will upon review of the request for reconsideration, take certain action to the
request.

[Signature] 4908 - 208th Street East (253) 386-4045
Signature of Appellant Address or Appellant Phone
Spanaway, WA 98387

Filed with the Planning and Land Services Department this 14 day of August 2014

By Dennis Reynolds Law Office Received by PALS

Forwarded to the Hearing Examiner on August 18, 2014

NOTE: A request for reconsideration shall stay the 10-day appeal period until such a decision pursuant
to this request is rendered.

Rev 01/04/12

PIERCE COUNTY PLANNING
& LAND SERVICES

AUG 15 2014

14-13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

HEARING EXAMINER STEPHEN K. CAUSSEAUD, JR.

BEFORE THE PIERCE COUNTY
OFFICE OF THE HEARING EXAMINER

In Re:
RMG WORLDWIDE, LLC's Appeal of
Administrative Decision

No. AA5-14
RMG WORLDWIDE LLC'S MOTION
FOR RECONSIDERATION / REQUEST
TO REOPEN RECORD

I. INTRODUCTION

Pursuant to the Rules of Practice and Procedure of the Pierce County Office of Hearing Examiner, and the Pierce County Code (PCC § 1.22.130), Appellant/Applicant RMG Worldwide, LLC ("RMG") moves for (1) reconsideration of the Hearing Examiner's Report and Decision dated August 5, 2014 ("the Decision"), and (2) reopening of the record to receive limited testimony as set out herein. A true and accurate copy of the Decision is attached hereto, by reference made part of this Motion.

Before proceeding, the Appellant would like it understood that the matter before the Examiner is unique. This motion is submitted to aid – not chastise – the Examiner. Reconsideration should be granted because there is a misinterpretation of fact material to the Appellant/Applicant, and an irregularity in that the Examiner misapplied conceded facts and engaged in impermissible speculation. PCC § 1.22.130.A. The errors specified herein

RMG'S MOTION FOR RECONSIDERATION /
REQUEST TO REOPEN HEARING – 1 of 11

[90223-1]

PIERCE COUNTY PLANNING
& LAND SERVICES

AUG 15 2014

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

1 materially affect the rights of RMG. in that they establish an erroneous foundation for the
2 ruling as a whole. The record may be reopened pursuant to PCC § 1.22.130, which grants the
3 Examiner the ability to "take such further action as is deemed proper." in considering the
4 motion for reconsideration.
5

6 II. SUMMARY

7 The following chronology of events is relevant:

- 8 • May 18, 1990 applications for a Rezone/PDD/Preliminary Plat filed by RMG's
9 predecessor-in-interest, LeMay Enterprises and Otak, Inc. ("LeMay"). Fees
10 were paid and the case was assigned a number (Z14-90). The proposal was to
11 rezone the entire 160 acre site to a mixture of SA and C-2, with a PDD
12 overlaying the entire acreage.
- 13 • June 26, 1990 another application (the UP) was added to the mix so the golf
14 course could be opened "on time." Importantly, the Rezone/PDD/Preliminary
15 Plat was not withdrawn and replaced with the UP application. There is no
16 documentation that any of the three applications were ever withdrawn.
- 17 • September 11, 1990 LeMay formally asks the County to re-activate the May
18 1990 applications.
- 19 • October 2, 1990 the Hearing Examiner issues decision approving UP 9-90.
- 20 • March 5, 1991 the Examiner approves Major Amendment to UP 9-90.

21 The County's current position is that the March 5, 1991 decision is a *de facto* decision
22 approving only one of the three applications submitted in May of 1990, the plat application.¹

23 The problems with this position are not addressed by the Examiner. For one, why was a
24 Major Amendment application required to actually initiate some kind of a process that led to
25 the March 5, 1991 decision? The answer must be because the County was using the May
26 1990 applications as the basis for the March 1991 UP amendment approval. But then, why

¹ If the County contends that the UP application was to replace the Rezone/PDD, plat applications, then how could the Examiner take action on one of the three eight months later?

1 construe the Amendment Decision now as only a decision on one the three May 1990
2 applications? That is nonsensical. There is no basis other than to construe the situation that
3 what was approved and developed was a commercial and residential PDD. See RMG Exhibit
4 No. 10, letter to Grant Griffin dated October 29, 1990. An interpretation consistent with the
5 actual facts is that the March 1991 decision was a response to all three of the May 1990
6 applications. Thus, it is respectfully submitted that the Major Amendment must be construed
7 as a decision approving all three applications, especially given the September 11, 1990 letter
8 from LeMay.
9

10 If the County responds that the Examiner can only construe the March 1991 decision
11 as a Preliminary Plat decision since no findings were made for a rezone or PDD, there is a
12 problem because the March 1991 decision did not contain the required Preliminary Plat
13 findings either, a point made by Carl Halsan. Thus, the March 1991 decision either approved
14 all three applications submitted in May of 1990 or the other two applications (the rezone of
15 the site and the PDD) are still pending. See Appeal, Attachment A, p.7 ("In the alternative the
16 ... PDD/Rezone application has not lapsed."). Either the County agrees that the site is now
17 zoned with a combination of SA and C-2 with a PDD, or it must schedule the matter for
18 hearing on the open applications that have not yet been decided. In this regard, the PDD/
19 Rezone applications are vested under General Zoning.² See *Association of Rural Residents v.*
20 *Kitsap County*, 141 Wn.2d 185, 193-94, 4 P.3d 115 (2000);
21
22
23

24 ² A complete PDD/Preliminary plat application vested the entire property since the proposal was for the 157-acre
25 site and proposed uses were disclosed in the application. *E.g., Noble Manor Co. v. Pierce County*, 133 Wn.2d
26 269, 283-84, 943 P.2d 1378, (1997); RCW 58.17.033; PCC §18.160.020 ("This Chapter is intended to provide
property owners, permit applicants, and the general public assurance that regulations for project development
will remain consistent during the lifetime of the application"); PCC §18.160.030 (applicability to preliminary
plat applications); PCC §18.160.050.C and D ("An application described in PCC 18.160.030 that is deemed

RMG'S MOTION FOR RECONSIDERATION /
REQUEST TO REOPEN HEARING - 3 of 11

[90223-1]

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

1 The issue then is whether the vested rights doctrine applies to an
2 application that includes a PUD. We hold that a preliminary
3 plat application coupled with a PUD proposal creates a vested
4 right to have the entire application, including the PUD,
5 considered under the ordinances in effect at the time of filing

6 With respect to the PDD/Rezone applications, the following findings and conclusions
7 in the Examiner's Decision are of note.

8 First, Finding of Fact 6, which discusses the fact that the predecessor submitted a PDD
9 and rezone application on May 18, 1990.

10 Second, Finding of Fact 8, which states that the County did not process the
11 PDD/rezone applications as an unclassified use application and that LeMay filed the UP
12 application on June 26, 1990.

13 Third, Finding of Fact 9, which states that UP 9-90 was approved on October 2, 1990,
14 but that the PDD/rezone application were not approved (nor, impliedly, addressed).

15 Finally - Conclusion of Law 2 states that LeMay had submitted complete applications
16 for PDD and rezone. The County did not process these applications, and the predecessor did
17 not withdraw the applications.

18 Each of the stated Findings and Conclusions impermissibly assume without basis that
19 the County did not process all applications submitted, as requested by LeMay. However, in
20 the alternative, the PDD/Rezone applications can still be processed and approved.

21 PCC § 18.40.050 states, in relevant part:

22 Any application type described in PCC 18.160.030 that does not
23 contain all submittal items and required studies that are
24 necessary for a public hearing or has not been reviewed by the

25 complete is vested for the specific use, density, and physical development that is identified in the application
26 submittal").

RMG'S MOTION FOR RECONSIDERATION /
REQUEST TO REOPEN HEARING - 4 of 11
[90223-1]

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

1 Hearing Examiner in a public hearing shall become null and
2 void one year after registered notice is mailed to the applicant
3 and property owner.

4 The first part of this provision, concerning an incomplete application, does not apply
5 here because the County deemed the three applications complete. The question is whether
6 registered notice was ever mailed to the applicant and property owner giving the required one
7 year notice concerning the expiration of the PDD and rezone applications.³ There is no proof
8 of that, so the applications are still open, if the Major Amendment is not construed as an
9 approval.

10 III. SPECIFICATION OF GROUNDS FOR RECONSIDERATION

11 A. Appellant/Applicant's Predecessor-in-Interest did not make a Voluntary Choice.

12 In Finding No. 7, the Examiner states that RMG's predecessor-in-interest voluntarily
13 decided to "forego" a PDD/Rezone application previously submitted. *See also* Decision,
14 Finding No. 8 ("Thus, appellant's assertion in paragraph 2 on page 3 of its Request for an
15 Administrative Decision that the County (over predecessor's objection) processed the
16 PDD/preliminary plat application as a UP is incorrect."). Neither statement is correct.

17 Mr. Michael Moore represented RMG's predecessor-in-interest. Mr. Moore has
18 testimonial knowledge which shows that: (1) the PDD/Rezone applications were not foregone
19 by the predecessor-in-interest but in fact were processed and approved by Pierce County via a
20 Major Amendment to UP 9-90, and (2) no decision by the Appellant's predecessor-in-interest
21 in this regard was voluntary, although conceding that appears to be a collateral point. To the
22
23

24
25 ³ PCC § 18.100.010 pertains to processing of applications, and requires notice of final decision within 120 days
26 of County review time. None of the provisions in Chapter 18.100 applies to automatically void or "expire"
applications on which a decision has not been timely made. The Chapter is applicable to County actions and/or
failure to act, consistent with RCW 36.70B.

1 contrary, PALS controlled the process. Any choice was the County's, not the choice of the
2 predecessor-in-interest. The Examiner should reopen the record to take limited testimony on
3 these two stated matters, which form the foundation of the Examiner's erroneous decision.
4 The decision should be corrected on reconsideration.

5
6 **B. The Major Amendment can only be Construed as an Approval of the**
7 **PDD/Rezone Preliminary Plat application that was Submitted for the Residential**
8 **Component of the LeMay project.**

9 The Growth Management Act, RCW 36.70A, and the Local Project Review Act,
10 RCW 36.70B, require predictability. The Office of Hearing Examiner made the
11 determination and approved the LeMay proposal as amendments to UP 9-90. The Examiner
12 should not allow Staff to "interpret" what occurred and was decided. The Major Amendment
13 is properly construed in fact and law as a residential PPD/Rezone approval under the unique
14 facts and circumstances, as well as a plat approval.

15 1. The Applications.

16 The Examiner correctly acknowledges under "Findings" at pp.4-5 of his Decision,
17 Finding No. 6, that:

18 The application also included a zone reclassification "from G to
19 SA-PDD, C-2-PDD". Chapter 18.10.600 of the Pierce County
20 Zoning Code (PCZC) in effect in 1990 set forth the criteria for a
21 planned development district (PDD). A PDD consisted of a
22 multiple use development that, when approved, created its own,
flexible zone classification and also amended the County zoning
map.

23 On page 6 of the Decision, Finding No. 8, the Examiner quotes a portion of a June 26,
24 1990 letter from Robert (Doc) Hansen. However, the Examiner ignored the following
25 language from that quote:
26

RMG'S MOTION FOR RECONSIDERATION /
REQUEST TO REOPEN HEARING - 6 of 11
[90223-1]

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

14-19

1 It was understood that a Major Amendment to the Unclassified
2 Use Permit could be requested in the future and would be
3 necessary if future land development is to take place.

4 Document 4 to Staff Report.

5 2. Use of the Major Amendment Process to Approve the Applications for
6 Residential Use.

7 In Conclusion No. 3, at p.8 of his Decision, the Examiner quotes a January 10, 1991
8 letter from Grant Griffin, which states in part:

9 ...I will be processing the residential portion of this proposal as
10 a Major Amendment to the already adopted and approved
11 Classic Golf Course Unclassified Use Permit, UP 9-90. In this
12 way, the potential for an establishment of a water tower to
13 provide potable and fire fighting flows for the residential
14 subdivision and golf course building can be addressed....

15 Document 7 to Staff Report.

16 The quoted language from the Hansen and Griffin letters can only be construed as
17 supporting a finding that the County determined to use the UP Major Amendment process to
18 deal with the residential component of the proposal as requested in the three applications for
19 PDD/Rezone and preliminary plat approval.

20 The Examiner speculates that the Major Amendment was limited to a "water tower."
21 but the record not does support the statement. The Staff Report for the Major Amendment
22 states: "Applicant requests a Major Amendment to a previously approved Unclassified Use
23 Permit to establish a 96 lot single-family subdivision **and** a single 8-ft. high water tower...."
24 (emphasis supplied). *See also* Decision, Major Amendment (Staff Report, Document 9). The
25 Examiner may note use of the disjunctive.
26

RMG'S MOTION FOR RECONSIDERATION /
REQUEST TO REOPEN HEARING - 7 of 11
190223-11

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

1 It is undisputed that UP 9-90 was amended to include a residential component because
2 the County said it was using the amendment process to approve the residential component.
3 An unclassified use approval for an accessory water tower to serve the residential and
4 commercial components of the UP was not required under the Code in effect at that time, that
5 is, a water tower was not specified as a use that required approval via an unclassified use
6 permit. The Hearing Examiner's determinations to the contrary are unsupported by any
7 evidence in the record.
8

9 The Examiner uses the term "apparently" in an attempt to describe what happened.
10 Decision, Finding No. 9: "Since predecessor did not submit a new, separate application for
11 preliminary plat approval the County apparently considered the plat as a Major Amendment to
12 the UP.") See also Decision, Conclusion No. 3, p.8 ("The County apparently processed the
13 subdivision as a Major Amendment to the UP because of the water tower."). This is mere
14 speculation which cannot sustain a finding. See *Johnson v. Aluminum Precision Prods., Inc.*,
15 135 Wn. App. 204, 208-09, 143 P.3d 876 (2006) (mere speculation and conjecture will not
16 sustain a finding). In fact, there is nothing "apparent" at all, but rather only what actually
17 occurred. There is no basis to conclude that LeMay did anything but submit the three
18 applications for approval as it requested under the process the County employed. Since the
19 process was one of a "Major Amendment," under the Code, that process must still be followed.
20
21

22 With due respect, the Examiner has impermissibly acted as an advocate to try to make
23 sense of a procedure and process used by PALS, which was unusual. For instance, the
24 Examiner "finds" the following:

25 However, according to Mr. Griffin's January 12, 1991, letter,
26 the County elected to process the subdivision as a Major

RMG'S MOTION FOR RECONSIDERATION /
REQUEST TO REOPEN HEARING - 8 of 11
[90223-1]

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

1 Amendment to UP 9-90 to accommodate the water tower that
2 also required a UP. Unlike a PDD that included a site specific
3 zone reclassification, the UP did not.

4 Decision. Conclusion No. 5, p.9

5 The Examiner misconstrues the Hansen letter. The choice or options (“the two
6 options”) were: (1) stay only with a PDD or (2) add an unclassified use application: it was
7 not an “either/or” situation. Because of time constraints, LeMay went forward with a UP
8 application for the golf course element, deferring on the residential component. In other
9 words, the UP application was logically “in addition to” – not in lieu of – the three other
10 submitted applications. The County agreed to use the Major Amendment process as the
11 method to approve the PDD/Rezone and plat applications. No choice was offered to abandon
12 the PDD/Rezone applications, and no such choice was made.

13 The decision documents are controlling evidence; guesses or speculation cannot be the
14 foundation of a proper decision of the Examiner. The County cannot now take the position
15 that it can pick and choose what it approved or go back on its word. It approved a Major
16 Amendment for a residential subdivision. The label used for the approval does not control
17 over substance. The Major Amendment is properly construed in fact and law as a residential
18 PDD/Rezone approval under the unique facts and circumstances. The facts show that a PDD
19 type density was approved. On the last point, the Major Amendment approved a unique
20 density less than allowed under General Zoning. The holders of UP 9-90 reasonably relied
21 upon the Major Amendment decision even if the County failed to change the Zoning Map in
22 accord with the decision.
23
24
25
26

RMG'S MOTION FOR RECONSIDERATION /
REQUEST TO REOPEN HEARING – 9 of 11

190223-11

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

1 The Examiner states:

2 Future subdivisions of property within a PDD (are) subject to
3 the density and bulk regulations specified in the underlying
4 zoning district

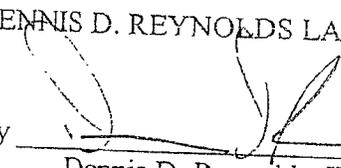
5 Thus, the Major Amendment properly construed does vest the Appellant to General
6 Zoning density requirements for all future residential development pursuant to UP 9-90. The
7 Examiner's determination to the contrary deprives RGM of its vested rights without due
8 process of law. *See, e.g., Erickson and Assocs. v. McLerran*, 123 Wn.2d 864, 870, 872 P.2d
9 1090, 1093 (1994); *Norco Constr., Inc. v. King County*, 97 Wn.2d 680, 684-685 (1982); *West*
10 *Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 50, 720 P.2d 782, 785 (1986); *Peter*
11 *Schroeder Architects v. City of Bellevue*, 83 Wn. App. 188, 920 P.2d 1216 (1996), *rev.*
12 *denied*, 131 Wn.2d 1011 (1997).

13
14 **IV. CONCLUSION**

15 For the reasons stated, Appellant's motion to reconsider/request to reopen should be
16 granted.

17 RESPECTFULLY SUBMITTED this 14th day of August, 2014.

18 DENNIS D. REYNOLDS LAW OFFICE

19
20 By 

21 Dennis D. Reynolds, WSBA #04762
22 *Attorneys for Appellant RMG Worldwide LLC*

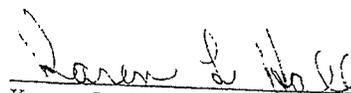
CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

Dennis Hanberg, Director Pierce County Planning and Land Services 2401 S. 35 th Street, #2 Tacoma, WA 98409 (253) 798-7210, tel dhanber@co.pierce.wa.us, email For Pierce County	<input type="checkbox"/> Legal Messenger <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Express Mail, Next Day <input checked="" type="checkbox"/> Email
Jeffrey D. Mann, AICP Pierce County Planning and Land Services 2401 S. 35 th Street, #2 Tacoma, WA 98409 (253) 298-2150, tel / (253) 625-1791, cell jmann@co.pierce.wa.us, email For Pierce County	<input type="checkbox"/> Legal Messenger <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Express Mail, Next Day <input checked="" type="checkbox"/> Email
Jill Guernsey, WSBA #9443 Pierce County Prosecutor's Office 955 Tacoma Avenue S., #301 Tacoma, WA 98402-2160 (253) 798-7742, tel jguerns@co.pierce.wa.us, email For Pierce County	<input type="checkbox"/> Legal Messenger <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Express Mail, Next Day <input checked="" type="checkbox"/> Email

DATED at Bainbridge Island, Washington, this 14th day of August, 2014.



Karen L. Hall
Legal Assistant

RMG'S MOTION FOR RECONSIDERATION /
REQUEST TO REOPEN HEARING - 11 of 11
[90223-1]

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

Moore – Opening Brief

APPENDIX A-7



Pierce County

Office of the Pierce County Hearing Examiner

902 South 10th Street
Tacoma, Washington 98405
(253) 272-2206

STEPHEN K. CAUSSEAU, JR.
Pierce County Hearing Examiner

August 6, 2015

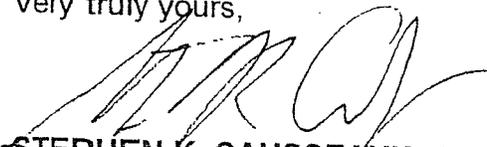
RMG Worldwide, LLC
Attn: Michael H. Moore, Manager
4908-208th Street East
Spanaway, WA 98387

RE: Administrative Appeal: AA3-15
Application Number: 797087

Dear Applicant:

Transmitted herewith is the Report and Decision of the Pierce County Hearing Examiner regarding your request for the above-entitled matter.

Very truly yours,



STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

SKC/jjp

cc: Parties of Record

1X

15-1

OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

REPORT AND DECISION

CASE NO.: **Administrative Appeal: AA3-15**
Application Number: 797087

APPELLANT: RMG Worldwide, LLC
Attn: Michael H. Moore, Manager
4908-208th Street East
Spanaway, WA 98387

AGENT: Carl E. Halsan
Halsan Frey, LLC
P.O. Box 1447
Gig Harbor, WA 98335

PLANNER: Jeffrey D. Mann, Senior Planner

SUMMARY OF REQUEST:

Appeal of a Planning and Land Services Administrative Official's Decision issued on January 23, 2015, that adopted a January 14, 2015, letter denying Appellant's request that the County process "pending rezone and Planned Development District (PDD) applications submitted in May of 1990". The site is located on 208th Street East, in the Reserve 5 (Rsv5) zone classification, in Council District #3.

SUMMARY OF DECISION: Appeal denied.

DATE OF DECISION: August 6, 2015

COURT REPORTER: Tami Lynn Vondran, CCR, RPR

PUBLIC HEARING:

After reviewing the Planning and Land Services Staff 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 May 19, 2015 at 1:01 p.m. and adjourned at 4:45 p.m. the

hearing reconvened on June 10, 2015, at 1:46 p.m. and adjourned at 3:59 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" - Department of Planning and Land Services Staff Report with Attachments
- EXHIBIT "2" - Appeal Application
- EXHIBIT "3" - Administrative Determination
- EXHIBIT "4" - Site Plans
- EXHIBIT "5" - Deed and Correspondence
- EXHIBIT "6" - Notice and Routing Documents
- EXHIBIT "7" - Reynolds Brief
- EXHIBIT 7AA - Errata for Reynold's Brief
- EXHIBIT "8" - Supplemental Brief from PALS
- EXHIBIT "9" - Ordinance 98-66S
- EXHIBIT "10" - Maps
- EXHIBIT "11" - Ordinance 95-132S
- EXHIBIT "12" - Decision from 8/5/14, Case AA5-14
- EXHIBIT "13" - Reconsideration Decision from 9/22/14 Case AA5-15
- EXHIBIT "14" - Notice from March 23, 2015
- EXHIBIT "15" - Sections 18.10.390, 620, and 630
- EXHIBIT "16" - Graham Community Plan
- EXHIBIT "17" - Supplemental Brief of PALS dated May 18, 2015
- EXHIBIT "18" - Appellants RMG Final List of Exhibits dated May 19, 2015
- EXHIBIT "19" - PALS Closing Argument dated June 24, 2015
- EXHIBIT "20" - Appellant Written Closing Argument dated June 25, 2015
- EXHIBIT "21" - PALS Reply dated July 1, 2015
- EXHIBIT "22" - Appellant Rebuttal dated July 1, 2015

No synopsis of testimony is provided due to the presence at the hearing of a court reporter and the preparation of a transcript of proceedings.

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

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 Administrative Appeal is exempt from environmental review pursuant to the State Environmental Policy Act (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 on April 15, 2015, in the official County newspaper (Puyallup Herald).
4. Appellant, RMG Worldwide, LLC, appeals an Administrative Decision issued on January 23, 2014, by Dennis Hanberg, Director, Pierce County Planning and Land Services (PALS), an Administrative Official. Mr. Hanberg's Decision incorporated a letter from Jeffrey D. Mann, senior planner, to Mr. Carl Halsan, appellant's consultant, dated January 14, 2015. By letter dated October 15, 2014, Mr. Halsan had requested Mr. Hanberg to process an application for a zone reclassification, planned development district (PDD), and preliminary plat that was submitted to the County on May 18, 1990. Mr. Hanberg's Administrative Decision determined that the original application did request approval of rezone/PDD/plat. However, he also determined that the original applicant, on June 26, 1990, decided to change the application and request an unclassified use permit (UP) to allow operation of a new golf course on a portion of the parcel and retain other portions of the parcel for future development. Therefore, Mr. Hanberg determined that PALS will not process the 1990 rezone/PDD/plat application.
5. Appellant submitted a timely appeal of the Administrative Decision on February 4, 2015. For the reasons set forth both hereinafter and in the Examiner's previous decisions concerning this matter dated August 5, 2014 and September 22, 2014, appellant's appeal is denied. When the original applicant (predecessor) made the decision to apply for the UP (UP9-90), it abandoned the previously submitted application for rezone/PDD/plat approval. All subsequent activities of Pierce County, predecessor, and predecessor's successors in title to include appellant are consistent with the decision to apply for the UP and abandon the rezone/PDD/ plat application.
6. The chronology of events concerning development applications for appellant's parcel and parcels subject to UP9-90 are set forth in the Examiner's August 5, 2014 Report and Decision. The Findings and Conclusion set forth in said Report and Decision are hereby incorporated by this reference as if set forth in full. However, the following facts are relevant to the resolution of the present appeal.
7. The appellant has a possessory ownership interest in the Classic Golf Course, an 18 hole facility that includes a driving range and clubhouse. The golf course is located on approximately 125 acres of a 157 acre site that is also improved with a 96 lot, single-family residential subdivision known as Fairway Estates. An area of the overall site located directly adjacent to the intersection of 208th Street East and 46th Avenue East remains unimproved. In the May 18, 1990, application for rezone/PDD/plat approval, the predecessor anticipated that it would eventually

propose commercial uses for the unimproved area.

8. Prior to applying for the rezone/PDD/plat, predecessor had previously acquired a filling and grading permit that the Pierce County Planning Department (Planning) advised would be the only permit necessary to construct the golf course. By May 18, 1990, predecessor had virtually completed the golf course and had scheduled it for opening in August, 1990. However, according to the uncontradicted testimony of Mr. Michael Moore, an owner of the appellant and agent of the predecessor, Mr. Grant Griffin, senior planner, called him shortly after the rezone/PDD/plat application submittal and advised that operation of the golf course requires a UP. Subsequent thereto, meetings (some contentious) occurred between the predecessor and Planning that resulted in a June 26, 1990, letter from Robert (Doc) Hansen, Principal Planner, to Barbara LeMay (an owner of predecessor) that included the following language:

I first presented you last year an[d] at this meeting with two options. The course's construction could open with the approval of either a Planned Development District (PDD) or with an Unclassified Use Permit (UP), both requiring a public hearing before a Hearing Examiner. A PDD was suggested if uses other than the golf course were to be proposed. However, a PDD was likely to take more time to complete since more factors will be examined in a multiple use project. Therefore, it was determined by your group to have an Unclassified Use Permit requesting only the golf course with land set aside for future development. It was understood that a Major Amendment to the Unclassified Use Permit could be requested in the future and would be necessary if further land development is to take place. (Exhibit 3B-C) (Emphasis added)

On the same date as Mr. Hansen's letter (June 26, 1990), predecessor submitted a completed application for a UP proposing the following:

Request an unclassified use permit be issued to allow construction of an 18-hole golf course with clubhouse, parking & related facilities to be located along the northerly portion of the site adjacent to 208th St. E. Portions of the site along the west boundary & at the northeast corner will be retained for future development. (Exhibit 3B-D)

9. Mr. Griffin's Planning Staff Report prepared for the August 2, 1990, public hearing to consider the UP for the golf course described the following proposed land use:

Subject: Unclassified Use Permit: UP9-90, Classic Golf Course

Proposal: Applicant requests an Unclassified Use Permit to allow continued construction of an 18-hole golf course with clubhouse on a 157.6 acre lot located south of 208th St. and east of 46th Ave. E.

Consistent with Mr. Hansen's letter that a "stand alone" UP application could be processed and proceed to hearing quicker than a PDD application, the Staff Report reflects that the applicant had not as yet provided a traffic study and needed to do so prior to permit approval for the golf course, and also had to temporarily limit the number of parking stalls to 50. Mr. Griffin recommended approval of a "temporary" clubhouse. Despite the above loose ends, the public hearing occurring only 5½ weeks subsequent to application submittal. It is therefore obvious that Planning followed through with Mr. Hanson's commitment that a "stand alone" UP for a golf course could be processed quicker than a PDD. Furthermore, the Staff Report notes the change in permit application:

...Although the project has changed somewhat with regard to the permitting process, Unclassified Use Permit rather than a Planned Development District, the project's design for the golf course component has not changed substantially....

Deputy Hearing Examiner Keith McGoffin conducted a public hearing to consider UP9-90 on August 2, 1990, and issued a Report and Decision dated October 2, 1990, approving the application. Mr. Michael Moore testified at the hearing and confirmed that the application had changed to a UP. He also testified that the applicant originally intended to process a PDD covering the entire parcel that would have included the golf course, residential subdivision, and area for future commercial development. However, he also understood that Planning had changed the process to an unclassified use permit.

10. Subsequent to the public hearing but prior to Mr. McGoffin's Decision, Barbara LeMay wrote a letter to Grant Griffin dated September 11, 1990, the subject of which was:

"Classic Estates" preliminary plat/PDD, Application....

Ms. LeMay wrote in part:

Please accept this letter as a formal request to reactivate the above referenced project application.

As you are aware, this proposal was put "on hold" pending the outcome of the unclassified use permit applications for the golf course and clubhouse. However, we feel it is in our best interest to move forward on this project at this time rather than wait until spring of next year....

The next correspondence concerning development of the site is a letter dated January 10, 1991, from Grant Griffin to Richard Larson, Larson & Associates,

predecessor's land use expert that was processing the preliminary plat. Mr. Griffin referenced the project as:

Classic Estates/Classic Golf Course/UP9-90

He then wrote:

As we discussed in our January 10, 1991 telephone conversation, I will be processing the residential portion of this proposal as a Major Amendment to the already adopted and approved Classic Golf Course Unclassified Use Permit, UP9-90. In this way, the potential for the establishment of a water tower to provide potable and fire fighting flows for the residential subdivision and the golf course building can be addressed.

The letter reflects that a copy was sent to Mr. Moore.

11. Subsequent thereto Mr. Griffin prepared a Staff Report dated February 14, 1991, for the preliminary plat of Classic View Estates and a Major Amendment for "UP9-90, Classic Golf Course". The Staff Report refers exclusively to the UP previously approved for the golf course and now proposed for a 96 lot, single-family residential subdivision and water storage tank on Lot 48. The Staff Report does not refer to the rezone/PDD/plat application, but instead notes the impact of the Examiner's Decision approving UP9-90 as follows:

The conditions of the October 2, 1990 Hearing Examiner's decision will guide development over the entire project site to include the proposed subdivision.
(p.3)(Emphasis added)

On February 19, 1991, Mr. McGoffin conducted a public hearing to consider the following:

CASE NO. UP9-90/Classic Estates
Major Amendment to Classic Golf Course
Unclassified Use Permit/Preliminary Plat

Neither the minutes of the testimony presented at the hearing nor Mr. McGoffin's findings and conclusions make any reference to the rezone/PDD/plat application. The minutes reflect that Mr. Moore testified that the hearing was part of a four year plan to develop the golf course and residential subdivision. Furthermore, Mr. Dennis Reynolds, attorney at law, testified that this application is an amendment to an unclassified use permit. Mr. McGoffin's March 5, 1991, Decision approved both a Major Amendment to UP9-90 and a preliminary plat. Following a number of time extensions for submitting the preliminary plat for final plat approval, Mr. McGoffin approved the "Final Plat of Fairway Estates at Classic Golf and Country Club / UP9-

90" on July 28, 1998. Kelly Nelson, Larson & Associates, predecessor's representative, appeared at the final plat hearing.

12. The letters of Grant Griffin and Robert "Doc" Hansen correctly set forth predecessor's options following the County Planning Department's acknowledgment that it had made a mistake in advising predecessor that it could open the golf course with only a filling and grading permit. Staff accurately advised predecessor that the Pierce County Code in effect in 1990 listed golf courses as an unclassified use. The code authorized unclassified uses in all zone classifications subject to obtaining an unclassified use permit.
13. Predecessor had previously applied for a rezone/PDD/plat on May 18, 1990. Section 18.10.610 of the Pierce County Zoning Code (PCZC) in effect on said date set forth the requirements for a PDD and provided in part as follows:

H. Uses permitted in a PDD

3. Unclassified uses and conditional uses, if permitted in the underlying zone and as specifically authorized by the final development plan.

I. Use permit exceptions

When an unclassified use or conditional use is authorized as part of a development plan and when said uses are permitted by the underlying or potential zone as requiring a permit from the Examiner, said procedure for obtaining the permit shall be waived. (emphasis added)

Thus, the PDD code authorized predecessor to include a golf course as part of the PDD development plan without the necessity of applying for and receiving approval of an unclassified use permit. Based upon the above, the two options described in Mr. Griffin's and Mr. Hansen's letters to predecessor were as follows:

- A. Continue with processing the PDD development plan that included the golf course, a residential preliminary plat, and a commercial area. However, such option would take more time to process because of the various uses proposed.
- B. Proceed with a "stand alone" UP covering the entire site, but initially apply only for the golf course and amend the UP later for residential and commercial uses. This option could be processed immediately.

Predecessor chose the second option and on the same date as Mr. Hanson's letter submitted a new application for an unclassified use permit that covered the entire site, but proposed only the golf course use for approval.

14. As previously found, predecessor had apparently not prepared a traffic study for the golf course, determined the location of parking areas, or determined the location of the clubhouse. (See Staff Report for UP9-90 and Examiner's Decision-Exhibits 3B-E and 3B-F). Approval of the PDD preliminary site plan needed to include the preliminary plat and the commercial area in addition to the golf course and would have taken much longer than 5½ weeks to process and get to a hearing.
15. Following predecessor's selection of option B above, neither the County nor predecessor ever referred again to the rezone/PDD/plat application until 2014 with the exception of Ms. LeMay's September 11, 1990, letter to Grant Griffin. Mr. Griffin responded to said letter by advising predecessor's representative, Rich Larson, in his letter dated January 10, 1991, that he would process the preliminary plat "as a Major Amendment to the already adopted and approved Classic Golf Course Unclassified Use Permit, UP9-90". Mr. Griffin referenced his letter to Mr. Larson as "Classic Estates/Classic Golf Course/UP9-90". No mention of the rezone/PDD/plat application was mentioned thereafter until 2014.
16. Between 1991 and 2014 the following events confirm predecessor's selection of the unclassified use permit option and abandonment of the rezone/PDD/plat application:
 - A. Following preliminary plat approval predecessor applied for and received a number of time extensions for the preliminary plat and also received final plat approval. None of the applications or decisions approving such applications mentioned the rezone/PDD. Neither predecessor nor appellant ever questioned why the rezone/PDD was not referenced or processed until 2014.
 - B. Section 18.10.610(J) PCZC provides in part:

The approval of a PDD shall be considered an amendment to the official maps...[zoning maps]

The Pierce County zoning maps were never amended to show a zone reclassification or PDD approval for the present site, and again, neither predecessor nor appellant questioned why.
 - C. No property owner from the Barbara LeMay letter in 1990 to 2014 made any effort to process the rezone/PDD. Even now in response to questioning, Mr. Moore testified that the present owners of the commercial parcel do not know what uses they want to propose on said parcel even if the PDD is approved. Furthermore, appellant does not own the commercial area as it remains under the ownership of LeMay Enterprises. No permit application process contemplates submitting an application for unknown commercial uses and a zone reclassification and then allowing said application to sit for many years with no attempt to finalize.

- D. In 1995 predecessor attempted to move the entire 157 acre parcel into Pierce County's Urban Growth Area. Pierce County Planning Commission minutes reflect that Mr. Moore testified as follows:

Mr. Moore is the developer of the golf course on this property. When he described this project to Planning, the planner said to do it under a PDD was a great idea. Another golf course in that area conceived at the same time didn't get a permit, but just built it. They were slapped with a fine. When his golf course was in process, the planner then said he couldn't do it under a PDD, so he pulled the commercial and residential use out and submitted a UP for the golf course. He tried to file an amendment, but was told he couldn't, and was told to segregate the property and his uses would be allowed outright under General zoning. The subdivision was approved, the golf course is open and doing well, but the commercial property slipped through the cracks. The UGA line was drawn at 208th. There's urban density growth around this property with sewers and all the amenities. He requested the RNC. He's dealt in good faith with the County. (Exhibit 11)

- E. When predecessor sold the golf course to appellant in 2005, no mention of the rezone/PDD/plat application appears in any of the sale documents. (Exhibits 7X, 7W, and 7D)
- F. Mr. Moore testified in the present hearing that at the time appellant purchased the property in 2005, they conducted no investigation of the status of the rezone/PDD/plat application (transcript pp 246, 247). Yet Mr. Moore was involved with the events surrounding approval of the UP golf course, and preliminary plat in 1990/1991.
- G. Appellant attempted to move the property into the Urban Growth Area several times subsequent to 2005 but never mentioned the rezone/PDD plat application as justification therefor.

Again, the actions of both parties subsequent to the predecessor's selection of the unclassified use permit option is consistent with abandonment of the rezone/PDD/plat application.

17. In its written closing argument appellant asks the following questions:

Where has PALS staff been for the past 25 years? Why have they not called the property owner? Why did PALS not send a letter or call regarding the status of the application when RMG inquired about amending the UP? Where was the "old dog" letter? (Page 5)

The answer is simple. Based upon their actions subsequent to 1990, both the County and the predecessor considered the application abandoned. Furthermore, the primary responsibility for processing a permit application is the applicant's, not the County's. The more relevant questions are: Where was the property owner for the past 25 years? Why did the owner not call the County? Why did the owner not send a letter? Why did the owner not inquire regarding the status of the rezone/PDD when it amended the UP; when it obtained preliminary plat time extensions; when it obtained final plat approval; when it obtained minor amendments to the UP; when it purchased the golf course; and when it attempted to move the parcel into the UGA on multiple occasions? The only logical answer is that the application was abandoned.

18. Appellant also cites previous ordinances, specifically PCC 18.160.080 that required the County to provide notice prior to terminating certain land use applications. However, said ordinance was not in effect in 1990 and is not in effect today. Said code section required registered notice to an applicant and property owner one year in advance of termination of a permit application based upon failure to submit expert studies and other items necessary to take the project to a public hearing.
19. Pierce County raises issues regarding the authority of predecessor to sign the application for the Classic Estates preliminary plat/rezone/PDD on May 18, 1990. The County asserts that predecessor did not have an ownership interest in the parcel at the time that it signed the application. However, the County did not assert this reason for denial of appellant's request to process the application. Furthermore, the signature issue occurred 25 years ago and involved entities not parties to the present appeal. The County considers the application abandoned since 1990, and the Examiner will not resurrect the application to determine its validity, especially with the parties unavailable.

CONCLUSIONS:

1. The Hearing Examiner has the jurisdiction to consider and decide the issues presented by this request.
2. The predecessor did not formally withdraw its application for the rezone/PDD/plat for the entire 157 acre parcel following its subsequent submittal of the "stand alone" application for an unclassified use permit for the golf course. However, by selecting the option offered by Robert Hansen, Principal Planner, of the quicker, "stand alone", UP process to allow a quicker opening of the golf course, the predecessor abandoned its original application. Pierce County, the predecessor, and all subsequent owners of all or a portion of the parcel acted in a manner consistent with abandonment of the original application and replacement with the unclassified use permit until 2014.

3. Allowing appellant now, after 25 years have elapsed, to replace the golf course with a preliminary plat pursuant to an application never even mentioned between 1990 and 2014 violates the spirit and intent of our courts' decisions and land use regulations that require counties to process land use applications in a timely manner and owners to timely exercise permits granted. Section 18.10.610(Q) PCZC required submittal of a final development plan for a PDD three years from the date of approval of a preliminary development plan. Section 18.10.690(F) PCZC authorized revocation, modification, or reclassification of a use "for which such approval was granted has ceased to exist or has been suspended for one (1) year or more" or "that the use for which the approval was granted is not being exercised". While neither of these code sections established a time limit for obtaining preliminary development plan approval, they do show the necessity of obtaining final development plan approval in a timely manner and to maintain the use once established. Attempting to gain approval of an initial application for a rezone/PDD after 25 years is totally inconsistent with timely processing and approval of a land use application. The rezone/PDD process does not authorize a property owner to submit an application, sit on it for 25 years, and vest it to a zoning code and development standards not applicable for many years.
4. Even assuming previous owners never intended to abandon the rezone/PDD application and maintained their intent to develop the property sometime in the future, the County still cannot process the application. Appellant cites no reason that prevented it or previous owners from processing the rezone/PDD application, and agrees that it never attempted to do so until recently. Courts in other jurisdictions have held that long periods of inactivity not beyond the control of the property owner show an intent to abandon a nonconforming use. In Halloway Redimix Company v Monfort, 474 SW 2d 80 (1968, KY), the court concluded that a ten year period of non-use of a premises for a rock quarry was sufficient to show an intention to abandon. Likewise, a ten year period of no activity to process a rezone/PDD application also shows an intent to abandon. In Larson v Halland, 124 NYS 2d 1954 (1953), a New York Court held that the lack of action on the part of the petitioner for a protracted period of time long after temporary conditions which would reasonably account for non-user had expired was not consistent with an intention to hold and assert a property right. Likewise, in the present case, holding but not processing an application for a PDD/rezone for the protracted period of 25 years with no reason preventing such processing is not consistent with the intent to maintain said application. Furthermore, postponing the exercise of the permit from 1990 to 2014 detrimentally impacts the public health and safety and the County's ability to implement its Comprehensive Plan and development regulations pursuant to the Growth Management Act. Such process also violates the finality in land use matters required by our Washington Supreme Court in cases such as Chelan County v Nykreim, et al., 146 Wn. 2d 904 (2002), and by our State Legislature in its enactment of the Land Use Petition Act (RCW 36.70C) that provides a 21 day

statute of limitations to challenge a land use decision. Predecessor needed to challenge the County's actions in 1990 if it disagreed with such.

5. The Pierce County Hearing Examiner Code is found in Chapter 1.22 PCC. Section 1.22.090 PCC sets forth rules addressing "Appeals of Administrative Decisions to the Examiner". Subsection G provides the burden of proof as follows:

G. Burden of Proof

A decision of the Administrative Official shall be entitled to substantial weight. Parties appealing a decision of the Administrative Official shall have the burden of presenting the evidence necessary to prove to the Hearing Examiner that the Administrative Official's decision was clearly erroneous.

In the present case, appellant has not presented the evidence necessary to show that the PALS' Administrative Official's decision of January 23, 2014, was clearly erroneous, and therefore the appeal should be denied.

DECISION:

Appellant's appeal is denied.

ORDERED this 6th day of August, 2015.


STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

TRANSMITTED this 6th day of August, 2015, to the following:

APPELLANT: RMG Worldwide, LLC
Attn: Michael H. Moore, Manager
4908-208th Street East
Spanaway, WA 98387

AGENT: Carl E. Halsan
Halsan Frey, LLC
P.O. Box 1447
Gig Harbor, WA 98335

OTHERS:

Scott Penner
3819-100th Street S.W., Suite 7D
Lakewood, WA 98499

Bill Lynn
P.O. Box 1157
Tacoma, WA 98401

Bud Rehberg
3802-232 Street East
Spanaway, WA 98387

James Halmo
9806-247th Street Court East
Graham, WA 98338

David Friscia dave@dmfriscia@info.com

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
PIERCE COUNTY CODE ENFORCEMENT

**CASE NO.: Administrative Appeal: AA3-15
Application Number: 797087**

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.

Moore – Opening Brief

APPENDIX A-8



Pierce County

Office of the Pierce County Hearing Examiner

902 South 10th Street
Tacoma, Washington 98405
(253) 272-2206

STEPHEN K. CAUSSEUX, JR.
Pierce County Hearing Examiner

September 22, 2014

RMG Worldwide LLC
Attn: Michael H. Moore, Manager
4908-208th Street East
Spanaway, WA 98387

**RE: Administrative Appeal: AA5-14
Application Number: 774811**

Dear Mr. Moore:

Transmitted herewith is the final decision of the Pierce County Hearing Examiner regarding the reconsideration filed in above-entitled matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "SKC" followed by a stylized flourish.

STEPHEN K. CAUSSEUX, JR.
Hearing Examiner

SKC/jjp

cc: Parties of Record

OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

DECISION ON RECONSIDERATION

CASE NO.: **Administrative Appeal: AA5-14**
 Application Number: 774811

APPELLANT: RMG Worldwide LLC
 Attn: Michael H. Moore, Manager
 4908-208th Street East
 Spanaway, WA 98387

AGENT: Carl E. Halsan
 Halsan Frey, LLC
 P.O. Box 1447
 Gig Harbor, WA 98335

PLANNER: Jeffrey D. Mann, AICP, Associate Planner

By Report and Decision dated August 5, 2014, the Examiner denied the appeal of RMG Worldwide, LLC, of an Administrative Decision issued by Pierce County Planning and Land Services dated March 24, 2014. On August 15, 2014, Dennis Reynolds, attorney at law representing the appellant, timely filed a request for reconsideration. The Examiner circulated the reconsideration request to parties of record on August 26, 2014. Pierce County Planning and Land Services responded by letter dated September 4, 2014, that it had no comment in response to the reconsideration request. Based upon the reconsideration request the following additional findings are hereby made as follows:

- 1R. The Examiner will adhere to the Findings, Conclusions, and Decision issued on August 5, 2014, but will address several points made in the reconsideration request hereinafter.
- 2R. Appellant raises an issue as to whether the originally submitted application for the Planned Development District (PDD) and zone reclassification are still valid applications. Appellant notes that the County considered the applications complete, the applicant did not withdraw the applications, and the County did not mail a notice to the applicant advising of the expiration of the application. Such issue is beyond the scope of the present Administrative Decision and is therefore not before the

Examiner for consideration. However, the documentary evidence introduced by both the appellant and Pierce County, makes no reference to the PDD/rezone application subsequent to Mr. Griffin's January 10, 1991 letter, a portion of which is quoted in Conclusion 3. Neither the Staff Reports for Mr. McGoffin's hearings, the synopsis of testimony for the hearings, nor the decisions themselves reference the PDD/zone reclassification application. Furthermore, in the sixth year time extension decision for the Classic Estates preliminary plat issued by this Examiner on June 13, 1996, Finding 3 refers to approval of UP9-90 and the major amendment thereto that allowed a 96 lot, single-family residential subdivision. No reconsideration request for clarification, or any other documents reference the PDD/zone reclassification application. Thus, the Examiner will not change the language in Conclusion 2 that provides:

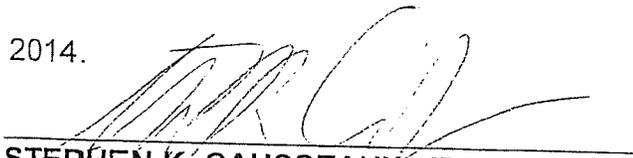
The predecessor made no further efforts to process the PDD application but did not withdraw it.

- 3R. To eliminate any confusion the Examiner will eliminate the word "apparently" from the fourth sentence of Conclusion 3 even though Conclusion 5 states specifically that "The County elected to process the subdivision as a major amendment to UP9-90 to accommodate the water tower that also required a UP".
- 4R. In Finding 8 the Examiner set forth a portion of a June 26, 1990, letter from Robert "Doc" Hanson. The appellant asserts that the Examiner ignored a subsequent portion of said letter. However, the portion of the letter quoted in said Finding includes the language that appellant asserts the Examiner ignored. Mr. Hanson's entire letter was considered in making the decision.
- 5R. The Decision does not misconstrue the letters of Mr. Hansen and Mr. Griffin but construes them in accordance with their plain language. Furthermore, actions taken by both the previous owner and the County subsequent to the dates of said letters were in accordance with their plain language.

DECISION:

The request for reconsideration is hereby denied.

ORDERED this 22nd day of September, 2014.



STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

TRANSMITTED this 22nd day of September, 2014, to the following:

APPELLANT: RMG Worldwide LLC
Attn: Michael H. Moore, Manager
4908-208th Street East
Spanaway, WA 98387

AGENT: Carl E. Halsan
Halsan Frey, LLC
P.O. Box 1447
Gig Harbor, WA 98335

OTHERS:

Ryan Moore
7708 Walnut Street
Lakewood, WA 98498

Bud Rehberg
3802-232nd Street East
Spanaway, WA 98387

Dennis Reynolds, attorney at law
200 Winslow Way West, Suite 380
Bainbridge, WA 98110

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
PIERCE COUNTY CODE ENFORCEMENT

CASE NO.: Administrative Appeal: AA5-14
Application Number: 774811

APPEAL OF EXAMINER'S DECISION:

The final decision by the Examiner may be appealed in accordance with Ch. 36.70C RCW.

Moore – Opening Brief

APPENDIX A-9



Pierce County

Planning and Natural Resource Management

JOSEPH A. SCORCIO
Director

2401 South 35th Street
Tacoma, Washington 98409-7490
Tel. 206. 591-7210
FAX 206. 591-3680

June 26, 1990

Ms. Barbara LeMay, Executive Assistant
Harold LeMay Enterprises
13502 Pacific Avenue
P. O. Box 44459
Tacoma, WA 98444-0459

Ottaka Inc.
% Isamu Nakashima
26392 Colma Drive
Mission Viejo, CA 92691

Subject: Classic Golf Course and Requirement for Unclassified Use Permit

Dear Ms. LeMay and Mr. Nakashima:

I wish to summarize our meeting last Tuesday in regard to the Classic Golf Course and what was necessary in order for the course to open.

I first presented you last year and at this meeting with two options. The course's construction could open with the approval of either a Planned Development District (PDD) or with an Unclassified Use Permit (UP), both requiring a public hearing before a Hearing Examiner. A PDD was suggested if uses other than the golf course were to be proposed. However, a PDD was likely to take more time to complete since more factors will be examined in a multiple use project. Therefore, it was determined by your group to have an Unclassified Use Permit requesting only the golf course with land set aside for future development. It was understood that a Major Amendment to the Unclassified Use Permit could be requested in the future and would be necessary if further land development is to take place.

It was my determination that the earliest the matter could be brought before the Hearing Examiner is Tuesday, August 2, 1990, if a site plan, application and filing fees were provided by Tuesday, June 25, 1990. I requested 14 copies of the site plan and two copies of the application. Once we have the site plans they will be distributed to the various departments for review. It was my indication that "envelopes" showing the position of the temporary clubhouse, the permanent clubhouse, and the overnight condominiums would be adequate for hearing and that if the envelopes' locations were not specific that we would place a recommended condition in the staff report for a final site plan showing specific locations.

PIERCE COUNTY PLANNING
& LAND SERVICES

15-311

FEB 04 2015

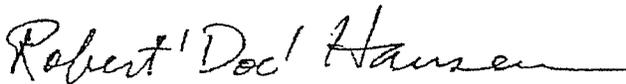
Ms. Barbara LeMay
Mr. Nakashima
June 25, 1990
Page 2

Decision upon the Unclassified Use Permit for the golf course would occur within two to four weeks depending upon the schedule of the Hearing Examiner and we will emphasize to the Examiner that we would like a decision on this matter as soon as possible.

Following the Examiner's written decision, a 10-working day period (2 calendar weeks) is necessary to allow any appeals before permits can be issued. This date will be indicated in the Hearing Examiner's decision.

This hopefully explains the process under which we are all working. If you have any questions, please call me at 591-3661. Thank you.

Sincerely,



Robert 'Doc' Hansen
Principal Planner

RH:dlh

cc. Joe Stortini, Pierce County Executive
Fred Anderson, Executive Director, Operations
Joe Scorcio, Director, Planning & Natural Resource Management
Rich Larson, Larson & Associates
✓ David Thorn, Davis, Wright, Tremaine