

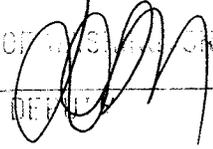
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COURT OF APPEALS  
DIVISION II

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No. 37282-7-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON



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GRACE GROUP, INC., a Washington corporation, EDWARD C.  
BECKER, III; THEODORE R. COLLINS, JR., and MICHELLE E.  
COLLINS; PIERCE COUNTY, a Washington municipal corporation,

Appellants,

v.

WILLIAM SYLVESTER and BETTY SYLVESTER,

Respondents.

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APPELLANTS' OPENING BRIEF

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[http://www.co.pierce.wa.us.pc/abtus/ourorg/council/habitat%nodirections.  
htm](http://www.co.pierce.wa.us.pc/abtus/ourorg/council/habitat%nodirections.htm)..... 24

## I. INTRODUCTION

This appeal involves Appellants Theodore and Michelle Collins and Edward Becker's (Collins and Becker) ability to construct personal single-family residences on their property. The Pierce County Code prohibits development of the property because of the presence of wetlands and their associated buffers that cover the property.

The Pierce County Code does, however, provide an exception in cases such as these: where the application of the County Code deprives a landowner of reasonable use of his or her property. If and when the operation of the Pierce County Code deprives a property owner of all reasonable use of their property, like it undisputably does here, the County may issue the property owner a reasonable use exception. As its name implies, a reasonable use exception grants a landowner an exception from the offending code provisions so the landowner can make reasonable use of his or her property. The reasonable use exception is tailored towards avoiding constitutional challenges of county ordinances under either the substantive due process clause or takings clause of the U.S. and Washington Constitutions.

Becker and Collins through their agent Grace Group Inc. submitted applications for reasonable use exceptions so that they could build single-family homes on their property. Pierce County planning staff accepted

and reviewed the applications against the applicable criteria. The County Planning Staff concluded that the applications should be approved and forwarded that recommendation to the Pierce County Hearing Examiner. The Hearing Examiner then took the recommendation under advisement and conducted an open public hearing on the matter. After considering the testimony of staff, the applicants and the public, in addition to the 300-plus pages of documentation submitted into the record, the Hearing Examiner concurred with the recommendation of County Planning Staff and determined that Becker and Collins met all of the criteria for a reasonable use exception.

The Respondents William and Betty Sylvester appeal of the Hearing Examiner's decision contests two of the eight criteria: 1) the development is located on a lot that existed or vested prior to March 1, 2005 and 2) that Becker and Collins did not create their own hardship by dividing the property. The Respondents argue, despite a survey dated February 22, 2005 that depicts the existing, legal lots, that the lots were not created prior to March 1, 2005 and thus, did not vest. The Respondents reach this conclusion based upon an interpretation of the County Code that is contrary to the interpretation of the County Staff and the County Hearing Examiner, both of whom are charged with applying and interpreting the County Code. Second, the Respondents argue that there is not substantial evidence in the record to support the Hearing

Examiner's factual finding that Becker and Collins did not divide the property they presently own. Yet in making this argument, the Respondents ask the Court to ignore the substantial evidence in the record that supports the Hearing Examiner's finding on this issue and perhaps more perplexing, to ignore that there is no evidence in the record to support their contention.

This appeal arises under the Land Use Petition Act and this Court stands in the shoes of the trial court. The Superior Court's decision below, while adverse to Becker and Collins, has no bearing here and this Court directly reviews the Pierce County Hearing Examiner's decision based only on the administrative record. Accordingly, the burden rests with the Respondents to demonstrate that the Hearing Examiner erred in reaching his decision. This Court should find that Respondents William and Betty Sylvester have not met their burden of proving that the Pierce County Hearing Examiner erred in reviewing the evidence, interpreting the Pierce County Code and reaching his decision. This Court should reverse the Superior Court and reinstate the well-reasoned decision of the Hearing Examiner.

## **II. ASSIGNMENTS OF ERROR**

Appellants Collins and Becker assign error to the trial court's December 7, 2007 Order reversing the Hearing Examiners decision in its

entirety and its January 11, 2008 Order denying Becker and Collins motion for reconsideration including the following:

1. The trial court erred in reversing the Pierce County Hearing Examiner's decision to approve Appellants' application for a reasonable use exception.

2. The trial court erred by refusing to admit supplemental declarations submitted by Becker and Collins attesting to the fact that they did not divide the property.

3. In the alternative, the trial court erred by refusing to remand the matter back to the County Hearing Examiner to consider other relevant evidence to rebut Respondents' arguments raised for the first time on appeal.

### **III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Are the Examiner's Findings of Fact that the respondent did not divide the property at issue supported by substantial evidence?

2. Did the Pierce County Hearing Examiner properly interpret and apply the Pierce County Code when it concluded that the proposed developments were located on lots that vested prior to March 1, 2005?

3. May the Respondents challenge the Hearing Examiner's decision on issues they failed to raise or contest during the public hearing?

#### IV. STATEMENT OF THE CASE<sup>1</sup>

##### A. Legal and Regulatory Background.

##### 1. Reasonable Use Exceptions and the Application Process.

This appeal involves a reasonable use exception (RUE). An RUE is a land use tool used by jurisdictions to avoid constitutional challenges to their ordinances under either the takings clause or the substantive due process clauses of the United States and Washington Constitutions.<sup>2</sup> While RUEs are used to avoid constitutional challenges to ordinances a given ordinance does not have to actually violate the constitution before an RUE is granted. *See e.g.* Pierce County Code (PCC) 18.020.050(C)(2) (establishing RUE criteria and not requiring that an applicant prove that application of the ordinance would be unconstitutional). Instead, an RUE provides a local jurisdiction with regulatory flexibility to resolve those potential constitutional issues before they arise.

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<sup>1</sup> The record before this Court consists of the pleadings of the parties before the trial court, the administrative record, and the verbatim record of the proceedings before the Hearing Examiner. The Clerk has only numbered the pleadings before the trial court. Accordingly, where clerk's papers have been marked as such they will be cited to as (CP) with reference to the page number. References to the administrative record were not given numbers by the clerk and will be cited to as (AR) with the appropriate page number. Finally the verbatim transcript will be cited to as (Vrbt. Trans.) with page(s) and line(s) as appropriate.

<sup>2</sup> A thorough explanation of the tests for a takings or substantive due process claim is beyond the scope of this limited introduction. Nevertheless, a *per se* taking of property occurs when a government regulation deprives the owner of all economically viable use of the property. *See e.g., Lucas v. South Carolina Coastal Comm.*, 505 U.S. 1003 (1992). In addition to the takings clause, the Washington Supreme Court has held that landowners are protected from unduly oppressive regulation by the substantive due process clause in the Fourteenth Amendment of the United States Constitution. *See Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907, *cert denied*, 222 S. Ct. 284 (1990); *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993).

The criteria for RUEs are jurisdiction specific. Pierce County requires that an applicant meet the following criteria in order to obtain an RUE:

**a. The proposed development is located on a lot that was vested (see Chapter 18.160) prior to March 1, 2005 and there is no other reasonable use or feasible alternative to the proposed development with less impact on the critical area(s) and/or associated buffers including phasing or project implementation, change in timing of activities, buffer averaging or reduction, setback variance, relocation of driveway, or placement of structure.**

b. The development cannot be located outside the critical area and/or its associated buffer due to topographic constraints of the parcel or size and/or location of the parcel in relation to the limits of the critical area and/or its associated buffer and a building setback variance or road variance has been reviewed, analyzed, and rejected as a feasible alternative.

c. The proposed development does not pose a threat to the public health, safety, or welfare on or off the site, nor shall it damage nearby public or private property.

d. Any alteration of the critical area(s) shall be the minimum necessary to allow for reasonable use of the property.

**e. The inability of the applicant to derive reasonable use of the property is not the result of actions by the applicant in**

**subdividing the property or adjusting a boundary line thereby creating the undevelopable condition after the effective date of this Title.**

f. The proposal mitigates the impacts on the critical area(s) to the maximum extent possible, while still allowing reasonable use of the site.

g. The proposed activities will not jeopardize the continued existence of species listed by the State or Federal government as endangered, threatened, sensitive, or documented priority species or priority habitats.

h. The proposed activities will not cause significant degradation of groundwater or surface water quality.

PCC 18E.20.050(C)(2) (emphasis added to highlight those criteria challenged by the Respondents in their appeal). A reasonable use exception for wetlands and their associated buffers must also demonstrate that proposed activity will result in "minimum feasible alteration or impairment" to the wetlands functional and habitat attributes. PCC 18E.020.050(C)(3).

Applicants for an RUE submit an application along with documentation that supports each of the above-referenced criteria to County Planning Staff. PCC 18E.020.050(B). County Planning Staff then review the application in light of their technical expertise and experience to determine whether the applicable criteria have been met. The County

Planning Staff summarize their findings in a written report that contains a recommendation for approval, approval with conditions, or a denial. PCC 18E.20.050(B) (AR 29-40).

The County Planning Staff then submit their report and recommendation to the County Hearing Examiner who holds a public hearing on the request. PCC 18E.20.050(C)(1); 1.22. The Examiner takes testimony of the interested parties, asks questions of staff and/or the applicant, and admits exhibits into the record. The Hearing Examiner then considers all of the information and issues a final written decision that contains findings of fact and conclusions of law. The Examiner either approves the application, approves the application with additional requirements, or denies the application. PCC 18E.20.050(C)(8). The Examiner's decision is final and may be appealed pursuant to the Land Use Petition Act (LUPA), chapter 36.70C.

## **2. Testamentary Divisions.**

Chapter 58.17 RCW governs the subdivision of land. It was enacted in 1969 to "regulate the subdivision of land and to promote the public health, safety and general welfare in accordance with standards established by the state to prevent the overcrowding of land; to lessen congestion in the streets and highways; to provide for adequate light and air; to facilitate adequate provision for water, sewerage, parks and recreation areas, sites for schools and schoolgrounds and other public

requirements; to provide for proper ingress and egress; and to require uniform monumenting of land subdivisions and conveyancing by accurate legal description." Chapter 271, Sec. 1, Laws of 1969, Ex. Sess., now codified as RCW 58.17.010. Accordingly, most divisions of land are required to be approved by local government to ensure the division satisfies the aforementioned goals.

Nevertheless, in spite of this all-encompassing goal, the Legislature carved out several exemptions to the subdivision approval process. Those exceptions are set forth in RCW 58.17.040:

(1) Cemeteries and other burial plots while used for that purpose;

....

(3) Divisions made by testamentary provisions, the laws of descent.<sup>3</sup>

Accordingly, an estate may divide property in proportion to the amount of heirs without complying with the subdivision requirements and procedures set forth in chapter 58.17 RCW or its municipal equivalent. *Dykstra v. Skagit County*, 97 Wn. App. 670, 678, 985 P.2d 424 (1999) *review denied* 140 Wn.2d 1016 (2000). The estate is not required to survey the new lots to divide the property. *See* RCW 58.17.040(3).

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<sup>3</sup> Although the exemption refers to both testamentary divisions and divisions occurring by the laws of descent, the exemption is commonly referred to as the "testamentary exemption."

### **3. Vested Rights Doctrine.**

The Vested Rights Doctrine really does not have any application to this appeal. Yet, because it is relied upon by the Respondents in support of their appeal below we briefly address its purpose.

The Vested Rights Doctrine serves to protect a property owner's development expectations by providing the property owner a date certain where he can fix the rules that will govern development of a proposal. The Vested Rights Doctrine is a common law creation that finds its basis in the Washington Constitution. *Erickson & Assocs. v. McLerran*, 123 Wn.2d 864, 870, 872 P.2d 1090 (1994) (stating "our vesting doctrine is rooted in constitutional principles of fundamental fairness. . . . Our vested rights cases thus establish the constitutional minimum: a 'date certain' standard that satisfies due process requirements."). Similarly, the Legislature has determined that submitting applications for building permits and subdivisions vests or fixes the rules that will govern development of property. RCW 19.27.095 (property owner has a vested right at time of submission of a building permit application); RCW 58.17.033 (property owner has a vested right at the time application is submitted to divide property).

#### **B. Property Characteristics and History.**

Becker and Collins purchased the property at issue on May 31, 2005 from the Personal Representative of the Estate of William and Ethel

Hunter. (AR 303). The property consists of three lots<sup>4</sup> located at 8203 - 259<sup>th</sup> Avenue East (Lot 3), 8113 - 259<sup>th</sup> Avenue East (Lot 4) and 8112 - 259<sup>th</sup> Avenue Lot East (Lot 5). (AR 31). The lots were created by testamentary division sometime prior to February 22, 2005. (AR 101). A survey depicting the lots was completed at the request of Grace Group on that date reflects the divided lots. (AR 101). After being divided Pierce County Deputy Prosecuting Attorney, Jill Guernsey, reviewed the testamentary division and authorized the County Auditor to segregate the lots for tax purposes in April of 2005. (AR 301, 307)<sup>5</sup> The lots were then sold by the personal representative of the estate to Becker and Collins.

After purchasing the property, Becker and Collins submitted Master Applications to the County to begin the permit process to develop the property. (AR 11, Finding 7). As part of their Master Application, Becker and Collins had to review the property for wetlands. Accordingly, they hired a consultant to conduct a wetland delineation. (AR 11-12, Findings 9-12). The delineation revealed that the three lots are situated within a Category IV Wetland, the lowest quality of wetland, and its associated buffer.<sup>6</sup> (AR 36). Wetlands and buffers make up

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<sup>4</sup> Michelle and Theodore Collins own Lot 5 and Edward Becker owns Lots 3 and 4. (AR 2.)

<sup>5</sup> Division of property and segregation of property are two different concepts. The division of property results in the alteration of the legal boundaries of property. It does not create separate tax parcels. Segregation, on the other hand, is the process used by the County to recognize new tax parcels.

<sup>6</sup> Pierce County classifies its wetlands based on value from Category I (highest value) to Category IV (lowest value). *Compare* PCC 18E.030.020(A) ("Category I wetlands are

approximately 97 percent of Lots 4 and 5, and 50 percent of Lot 3. (AR 36). After reviewing the applications and conducting their own independent inquiry, County staff concluded that "there is no room for a building envelope outside of the wetland and buffer areas [and] an application for a Reasonable Use Exception will be required for each of these lots in order to proceed with the project." (AR 207). In short, the County concluded that these lots cannot be developed unless the buffers are reduced and impacts to wetlands are allowed. (AR 36, 207.)

**C. Becker and Collins Application for an RUE.**

On August 8, 2006, Collins and Becker submitted applications for reasonable use exceptions for the three lots. (AR 32). The applications reflected significant changes from their initial development proposal in order to best minimize impacts to wetlands and their buffers:

[T]he footprints of the proposed residences were moved toward the perimeter of the critical areas, and a proposed shop was removed from Lot 4. Septic easements were proposed for Lots 3 and 5, moving these systems further to the perimeter of the critical areas, and removing the septic system from the wetland area within Lot 4 (this revised septic design is acceptable).

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those regulated wetlands of exceptions resource value base on their functional value and diversity, wetlands communities of infrequent occurrence, association with documented habitat for sensitive, threatened or endangered animal species, and other attributes which may not be adequately replication through creation or restoration.") *with* PCC 18E.30.020(D) ("Category IV wetlands are those regulated wetlands of ordinary resource value based on monotypic vegetation of similar age and class, lack of special habitat features, and isolation from other aquatic systems.")

The access turn around was moved further south as requested. Revisions to storm water plans have not been received. Extensive mitigation is proposed, which includes restoring wetland and buffer areas.

(AR 32). After reviewing the application and the additional material submitted by Becker and Collins and comparing the information against the applicable criteria the County Planning Staff recommended that the Reasonable Use Exception be approved subject to a number of additional conditions directed at ensuring consistency with other provisions of the Pierce County Code. (AR 39-40).

**D. During the Public Hearing the Respondents Did Not Contest Becker and Collins' Ability to Meet the Criteria Respondents Challenge on Appeal.**

On March 21, 2007, the Hearing Examiner opened the public hearing on the application. Notice of the application and the hearing was provided two weeks prior to the hearing in accordance with the Pierce County Code. (AR 30). At the Hearing, Lisa Spurrier, the Environmental Biologist for Pierce County presented the County Staff's Report on the application recommending approval of the RUEs with certain conditions. (Verb. Trans. 3-9.) The Hearing Examiner carefully questioned her with respect to the various criteria. (Verb. Trans. 9 and 13.) Of particular importance to the present appeal is the colloquy that occurred between Ms. Spurrier and the Examiner with respect to the division and vesting of the lots:

**Deputy Examiner:** Can you tell me when the property was segregated? I'm looking at the record of survey that appears to have been done back in June or July of 2005. Was the segregation prior to that, I take it?

**Ms. Spurrier:** Well, I'm also a little confused about that. There were two dates. The other date on there is February 22nd, 2005.

**Deputy Examiner:** Are both of these dates within the vesting period?

**Ms. Spurrier:** The second date is not. The recording date is not.

**Deputy Examiner:** Is there a problem with that?

**Ms. Spurrier:** Not that I know of. I talked with Jill Guernsey, Prosecuting Attorney.

(Verb. Trans. 10-11). Ms. Spurrier further confirmed the propriety of the division and the applicant's ability to meet the RUE criteria in a supplemental memorandum dated April 12, 2007 to the Examiner:

I met with Jill Guernsey on April 12, 2007 to verify the date of the subdivision that included the lots in this case (as I mentioned, I had met with her previously as well). Her research showed that the lots were legally created through a testamentary division which is exempt from the need to comply with state and local subdivision regulations (*see* RCW 58.17.040(3)). Jill approved the exempted division in April of 2005, and then the lots were deeded by the personal representative in May 2005 (AFN 10050606573).

(AR 301).

The Respondents Sylvester also participated at the hearing. The Sylvesters' sole concern with the proposal was that septic systems proposed for the sites would not perc.<sup>7</sup> (AR 220-223, 276-279)<sup>8</sup> Notably, neither the Sylvesters, nor any other party at the hearing, raised an issue with the division of the property.<sup>9</sup> Accordingly, Becker and Collins focused on the fact that the sites had passed perc tests in their response to the opponent's argument. (Verb. Trans. pg. 48 lns. 5-12, pg 52 lns. 6-11). The Hearing Examiner then concluded the hearing and took the matter under advisement.

**E. The Hearing Examiner Conditionally Approved the Reasonable Use Exception.**

The Hearing Examiner concluded that Becker and Collins' applications for RUEs met the applicable criteria. (AR 1-23). The Examiner carefully considered the evidence and compared it against the applicable criteria.

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<sup>7</sup> A "perc" test, or percolation test, consists of digging holes below a proposed leach field and filling them with water to determine how fast water percolates through the ground. It is used to determine the absorption rate of soil.

<sup>8</sup> Sometime after the hearing the Sylvesters retained counsel to review the Appellants' application. On April 11, 2007, after the Hearing Examiner closed the open record, the Sylvesters submitted additional information after that date the Hearing Examiner properly excluded it from the record. (AR 7).

<sup>9</sup> The testimony of the opponents to the project is located on pages 16 to 46 of the verbatim transcript. The Respondents did not provide any oral testimony during the hearing.

With respect to the lots having vested prior to March 1, 2005, the Examiner interpreted the County Code as requiring that the lots actually exist prior to March 1, 2005. The Hearing Examiner found that the lots were effectively divided when title vested with the heirs. (AR 10, Finding 5). This interpretation is consistent with the purpose of RUEs which is to avoid takings claims. Nevertheless, the Examiner also concluded that even if the criteria required that the applicants have "vested rights" within the meaning of the vested rights doctrine that the criteria would still be satisfied. (AR 21, Conclusion 8). The Examiner concluded that because the lots were divided prior to March 1, 2005 that they also had vested rights within the meaning of the vested rights doctrine. (*Id.*)

With respect to the actual division of the property, the Examiner accepted Becker and Collins representation that they did not divide the property. (AR 10, Finding 5). The Hearing Examiner found that the lots were created by a testamentary division that was reviewed and approved by the Prosecuting Attorney's Office. (AR 10, Finding 5). The Examiner further relied on the lack of any evidence in the record that Becker and Collins subdivided the property. (*Id.*).

**F. Proceeding Before the Superior Court.**

Respondents filed a timely appeal of the Examiner's decision under the Land Use Petition Act, chapter 36.70C RCW. The Honorable Sergio

Armijo reversed the Hearing Examiner's decision and subsequently denied Becker and Collins' Motion for Reconsideration. (CP 75-58, 128-129).

Apparently ignoring the standard of review under LUPA, which requires that the trial court review the Examiner's factual findings under the substantial evidence standard, the trial court reversed the Examiner because it believed Becker was involved in dividing the property from "day one". (CP 94, 110-111). Becker and Collins filed a Motion for Reconsideration pointing to the evidence that supported the Hearing Examiner's finding and specifically calling attention to the lack of any evidence in the record that would lead to a contrary finding. (CP 95-98). In the alternative Becker and Collins again requested at a minimum, that the trial court remand the matter back to the Examiner so that they could submit additional evidence due to the fact that Respondents had not raised this issue before the Examiner and thus Becker and Collins were deprived of an opportunity to respond with additional evidence. (CP 101-102). The trial court denied the motion. (CP 128-129). Becker and Collins timely appealed the trial court's decision.

## **V. ARGUMENT**

### **A. Standard of Review and Burden.**

This appeal is governed by the Land Use Petition Act (LUPA), chapter 36.70C RCW. Under LUPA a party seeking relief from an administrative decision (in this case the Respondents) bears the burden of

proving that the Hearing Examiner erred. *North Pacific Union Conference Ass'n. of Seventh Day Adventists v. Clark County*, 118 Wn. App. 22, 28, 74 P.3d 140 (2003); RCW 36.70C.130(1). When considering administrative decisions on appeal from the trial court, this Court reviews the Hearing Examiner's findings and decision. Thus, this Court stands in the same shoes as the superior court. *Id.*; *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 47, 52 P.3d 522 (2002); *Pinecrest Homeowner's Ass'n. v. Cloninger & Associates*, 151 Wn.2d 279, 688, 87 P.3d 1176 (2004).

The standards relevant to this appeal are set forth in RCW 36.70C.130, which provides in relevant part:

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief **only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met.** The standards are:

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(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;  
[or]

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

( .) The Hearing Examiner is the decision-maker that the County has charged to "receive and examine available relevant information, including environmental documents, conduct public hearings, cause preparation of the official record thereof, prepare and enter findings of fact and conclusions of law, and issue final decisions for land use matters." PCC § 1.22.080(1)(B). The Hearing Examiner is the highest County decision-maker authorized to resolve issues related reasonable use exceptions. *See* PCC § 1.22.080(B)(1)(p).

The Court's review of factual findings under the substantial evidence test is deferential. It requires the Court "to view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the fact finder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences." *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217, review denied, 120 Wn.2d 1008 (1992). *See also, Department of Corrections v. City of Kennewick*, 86 Wn. App. 521, 529, 937 P.2d 1119 (1997). Here, the Examiner was the highest forum to exercise fact-finding

authority. PCC § 1.22. Thus, this Court's review is based on the record before the Examiner, and it views the evidence and reasonable inferences therefrom in the light most favorable to Becker and Collins since they prevailed below. *See, Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-372, 859 P.2d 610 (1993).

LUPA also requires that this Court give deference to the Hearing Examiner's interpretation of the Pierce County Code, since he is the appointed local expert on issues involving land use regulations. PCC § 1.22. The statutory standard of review is supported by the common law:

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

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

**B. The Hearing Examiner Correctly Determined That Becker and Collins Satisfied the Criteria for a Reasonable Use Exception.**

Following an open hearing, the Pierce County Hearing Examiner – the County's highest fact-finding decision-maker on reasonable use exceptions – determined that Becker and Collins met all of the criteria for reasonable use exceptions. During the public hearing, the Respondents' sole argument was that the septic systems would not perc and thus the

RUE should be denied. In their appeal to the trial court, however, Respondents did not pursue that issue and instead argued that Becker and Collins failed to meet other criteria that they did not contest below. Mainly, that the lots purchased by Becker and Collins were not divided prior to March 1, 2005 and that Becker and Collins actually divided them. Becker and Collins maintain that any appeal of the Examiner's decision is limited to those issues specifically raised and contested by Respondents during the public hearing. *See* Section C, *infra*. Nevertheless, Becker and Collins address those criteria challenged by Respondents before the trial court.

**1. The Proposed Development is Located on a Lot That was Vested Prior to March 1, 2005 and There is no Other Reasonable Use or Feasible Alternative to the Proposed Development With Less Impact on the Critical Area.**

Contrary to the Hearing Examiner's interpretation of this section, Respondents argued before the trial court that Becker and Collins must have vested rights in order to satisfy this criterion. (CP 51). The Respondents further asserted that Becker and Collins did not have vested rights until they submitted their building permit applications. (CP 51). Yet, as Pierce County confirmed during oral argument, the Vested Rights Doctrine has absolutely nothing to do with this case. (CP 98-99, 116-117). The term "vested," as it is used in the ordinance, is a recognition that the lots existed prior to March 1, 2005, not that applicants have vested

rights. The plain wording is that the "development is located on a lot that was vested" not that the applicants have vested rights. PCC 18E.020.050(C)(2)(a); *see State v. Chapman*, 140 Wn.2d 436, 450, 998 P.2d 282 (2000) (noting the well stated rule that courts must interpret ordinance in accordance with their plain meaning). Moreover, even if the criteria required that the applicants have vested rights, Respondent's argument still fails because the lots were divided prior to March 1, 2005 and thus, Becker and Collins obtained vested rights. *See* RCW 58.17.033.

**a. The Hearing Examiner Interpreted PCC 18E.020.050.(c)(2)(a) to Require that the Lots Exist Prior to March 1, 2005 in Order to Obtain an RUE.**

To begin with, courts must give considerable deference to the construction of ordinances by those officials charged with their enforcement. *Friends of the Law v. King County*, 63 Wn. App. 650, 654, 824 P.2d 539 (1991); *see also Hama Hama v. Shoreline Hearings Board*, 85 Wn.2d 441, 448, 536 P.2d 441 (1975). The Hearing Examiner is charged with interpreting and applying the RUE criteria. In exercising that authority the Examiner determined that the lots vested at the death of the legal owner because that is when title vested in the heirs giving each heir a divided interest in the property. RCW 11.04.250; (AR 10). The lots were effectively created at that point since the heirs did not have to go

through the formal subdivision process to divide the property.  
RCW 58.17.040(3).

Ultimately, the Respondents confuse the "Vested Rights Doctrine" which vests building applications and subdivision applications under the rules that existed at the time of the application with when lots become "vested" or "protected." See *Rhod-A-Zalea v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998) (explaining the difference between the Vested Rights Doctrine and when lots are "protected" or "vested" simply because they exist.). A plain reading of this section clearly demonstrates that the County does not require that the applicants have vested rights prior to March 1, 2005. Had the County wanted to impose such a requirement it would have required that the applicants demonstrate they have vested rights prior to March 1, 2005, not that the development be "located on a lot that was vested" prior to March 1, 2005.

The Vested Rights Doctrine fixes the rules that will govern future development; it prevents jurisdictions from enforcing subsequently enacted ordinances on a development after a certain date. Here, Becker and Collins are not arguing that their proposal is exempt from these provisions of the Pierce County Code because they have vested rights. To the contrary, Becker and Collins sought a RUE because their lots are subject to these particular provisions of the Pierce County Code. The applicability of the provisions, however, deprive Becker and Collins of all

reasonable use of their property. Accordingly, they sought a RUE. Notably, if Becker and Collins had vested rights prior to March 1, 2005, the set of regulations that restrict development of their property would not even apply as they became effective March 1, 2005. Pierce County Ordinance, 2004-56s.<sup>10</sup>

Similarly, Respondent's interpretation of this criterion could render the County wetland ordinance unconstitutional under the current set of facts. This Court should not interpret an ordinance in a manner that could yield unconstitutional results. *See In re Personal Restraint of Matteson*, 142 Wn.2d 298, 307, 12 P.3d 585 (2000) (noting that courts should strive to interpret statutes so as not to render them unconstitutional). As noted earlier, reasonable use exceptions protect the County ordinances from constitutional challenges. This central purpose is eviscerated if it only applies to lots that have vested rights pursuant to the Vested Rights Doctrine. The County has already conceded that wetlands and buffers occupy the site to the extent that "[n]o development can occur on the subject parcels without the proposed wetland impacts and buffer reductions." (AR 36). Accordingly, if the Court were to read this criterion as requiring that the applicants have vested rights it would open

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<sup>10</sup> The wetland regulations that restrict the development of Becker and Collins' property became effective on March 1, 2005. The regulations were part of a broader overhaul called the "Directions Package." <http://www.co.pierce.wa.us.pc/abtus/ourorg/council/habitat%nodirections.htm> (last visited April 3, 2007).

the County up to takings and substantive due process claims because the County has admitted that operation of the Pierce County Code prevents all development. (AR 36).

**b. Even if This Court Concludes Vested Rights are Required, Which it Should Not, Becker and Collins' Rights Vested Before March 1, 2005.**

Nevertheless, even if this Court were to interpret the Pierce County Code as requiring that the applicants have Vested Rights, which would be contrary to the interpretation reached by County Planning Staff, the County Hearing Examiner, and the County Deputy Prosecutor, Becker and Collins would still meet the criterion.<sup>11</sup>

The Legislature has codified two dates it deems sufficient to vest rights: (1) building permit application; and (2) an application to divide property. RCW 19.27.095; 58.17.033. Becker and Collins acknowledge that they did not submit building applications until November 2005, however, the property was divided by the estate prior to March 1, 2005. (AR 101). No Washington Court has affirmatively decided whether a testamentary division creates vested rights. *But see Dykstra v. Skagit County*, 97 Wn. App. 670, 679, 985 P.2d 424 (1999) (noting *in dicta* that

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<sup>11</sup> The Hearing Examiner, while ultimately concluding that the Vested Rights Doctrine did not apply, provided a brief analysis to the extent it did. (AR 21). He concluded that even if the Vested Rights Doctrine applied that Becker and Collins did have a vested right prior to March 1, 2005.

the applicants could not claim vested rights because they had not applied for development permits, but not addressing whether the testamentary division in and of itself was sufficient to vest rights). Yet, if the Legislature has determined that the submission of an application to divide property gives the applicant vested rights, then surely the actual division of property through the laws of descent confers the same rights. *See* RCW 58.17.033.

Moreover, if the Court were to conclude that a testamentary division does not fall under RCW 58.17.033 it would still vest under the constitutional principles. The Vested Rights Doctrine is a common law creation premised upon constitutional principles of due process and fundamental fairness. *See e.g. West Main Assocs. v. Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986) (holding that city ordinance which required permits prior to vesting violated applicants due process rights); *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 638, 733 P.2d 182 (1987) (finding that Washington's vested rights doctrine protects a developer's due process rights); *Erickson & Assocs. v. McLerran*, 123 Wn.2d 864, 870, 872 P.2d 1090 (1994) (stating "our vesting doctrine is rooted in constitutional principles of fundamental fairness. . . Our vested rights cases thus establish the constitutional minimum: a 'date certain' standard that satisfies due process requirements."). Accordingly, the Washington Constitution provides a "date certain" where an individual has

a constitutional right to rely on certain rules that will govern his or her future use of the property.<sup>12</sup>

The constitutional test for arriving at the date where a landowner has Vested Rights is determined by finding that point that represents the balance between:

[P]rivate property and due process rights against the public interest by selecting a vesting point which prevents "permit speculation", and which demonstrates substantial commitment by the developer, such that the good faith of the applicant is generally assured.

*Erickson & Assoc. v. McLerran*, 123 Wn.2d 864, 874, 872 P.2d 1090 (1994). The submission of a plat application to divide property is acknowledged by the Legislature as a point that effectuates that constitutional balance in favor of the landowner. See RCW 58.17.033. This makes sense as land is divided in accordance with laws that exist at the time. If property did not acquire Vested Rights at that time it could be rendered undevelopable by subsequent land use laws. These same

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<sup>12</sup> The basic rationale for the vested rights doctrine is perhaps best described as certainty. See *State ex. rel. Ogden v. Bellevue*, 45 Wn.2d 492, 496, 275 P.2d 492 (1954)" (rationalizing the vested rights doctrine by stating that the process of passing new zoning ordinances and filing for injunctions gets parties nowhere). The vested rights doctrine recognizes development rights are a valuable property right, and that citizens should have the ability to fix the rules that govern their land. *West Main*, 106 Wn.2d at 51.

Once a developer has demonstrated a substantial commitment to the proposal he is assured that he can continue to develop his property under the rules in existence at the time the demonstration was made. The Legislature found that a property owner demonstrates such a commitment at the time he or she submits a building permit application or an application to divide property. See also *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958).

principles apply with equal force to testamentary divisions and thus, lots divided by testamentary division should also vest at the time they are divided. RCW 58.17.033<sup>13</sup> Since the property was physically divided prior to March 1, 2005, the Becker and Collins acquired vested rights.

**2. Becker and Collins are not Responsible for Their Present Situation; They did not Divide the Property.**

The Respondents' primary argument before the trial court was that Becker and Collins divided the property and thus, they created their own hardship. (CP 52). Nothing could be further from the truth. Notably, the Respondents did not raise this argument during the public hearing and provided no evidence to support this theory. Instead, Respondents attempt to recharacterize the evidence submitted by Becker and Collins to suit their needs. Mainly, Respondents argue that a survey made at the request of one of one of the Appellants demonstrates that Becker and Collins were responsible for dividing property that they did not own. (*Id.*).

Whether Becker and Collins divided the property is a factual finding reviewed under the substantial evidence standard. RCW 36.70C.130(c). That standard requires that the Court uphold the Hearing Examiner's decision if there is "a sufficient quantity of evidence

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<sup>13</sup> While there is no evidence in the record that affirmatively states when the lots were divided, the survey completed by Ed Becker of the pre-divided lots is dated prior to March 1, 2005. This establishes that the heirs did divide the lots prior to March 1, 2005. (AR 101).

to persuade a fair minded person of the truth or correctness of the order." *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999). The Court is required to "view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences." *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217, *review denied*, 120 Wn.2d 1008 (1992) (emphasis added). Under this standard of review, the Court does not reweigh the evidence, draw its own inferences, or substitute its judgment for that of the fact finder, which in this case is the Hearing Examiner:

This court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it. The inferences to be drawn from the evidence are for the jury and not for this court. The credibility of witnesses and the weight to be given to the evidence are matters within the obvious province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.

*Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994) (explaining the substantial evidence standard in a non-LUPA context where the jury served as the fact finder). Thus, if after reviewing the record, this Court finds that there is evidence that could support the Hearing Examiner's finding it is required to uphold that finding even if it would have reached a different conclusion.

The criterion at issue here states:

The inability of the applicant to derive reasonable use of the property is not the result of actions by the applicant in subdividing the property or adjusting a boundary line thereby creating the undevelopable condition after the effective date of this Title.

PCC 18.E.020.050(c)(2)(e). The only evidence in the record related to this issue supports the Hearing Examiner's finding that Becker and Collins did divide the property:

- A letter submitted on behalf of the Respondents stating "[t]he lots proposed for development have not been created by the applicant. Lots resulted from testamentary division of original parcel" (AR 62);
- The statutory warranty deed noting that Becker and Collins did not obtain possession of the property until May

31, 2005 and thus, could not have legally divided it (AR 303); and

- The County Auditor's parcel summaries that indicated the property was approved for segregation<sup>14</sup> in April of 2005 before Becker and Collins obtained title (AR 307-309).

There was absolutely no evidence, argument, or testimony presented by the Respondents or any other party for that matter that would suggest that Becker and Collins divided the property. Accordingly, the Hearing Examiner, after reviewing the testimony and evidence, found that:

[T]here is no evidence before the hearings examiner that the subdivision of the lots was as a result of actions of the applicant.

(AR 10). The Hearing Examiner then concluded that:

The segregation was created by a testamentary segregation prior to March 1, 2005. The current owners are not responsible for the segregation.

(AR 18). These findings are supported by the uncontradicted evidence in the record.

The Petitioner's objection to the Hearing Examiner's finding on this criterion is based on a single survey. Through pure speculation and conjecture the Respondents allege that because Becker surveyed property

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<sup>14</sup> As noted earlier, segregation describes when the Pierce County assessor assigns tax parcel numbers to a lot. It is different from when lots are divided, which is when the legal boundaries are changed.

that was for sale to determine the boundaries and that he intended to purchase, he must have also divided it.<sup>15</sup> (CP 51). Yet, there is no evidence in the record to support this inference, and even if there were, this Court is required to defer to those competing inferences reached by the Hearing Examiner. *State ex rel. Lige & Wm. B. Dickson Co*, 65 Wn. App. at 618.

In the present case, there is a letter submitted on behalf of the applicants stating that Becker and Collins did not divide the property. (AR 62). There is also the evidence demonstrating that the applicants did not acquire legal title until May 31, 2005; one full month after the property was segregated by the County Assessor. (AR 303, 307-309). From these uncontradicted facts, the Hearing Examiner found that the applicants did not divide the property. This is a reasonable inference supported by the evidence in the record.

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<sup>15</sup> Moreover, a survey is not required for the heirs to divide property. RCW 58.17.040(3). They can simply draw lines on a map indicating their intent to divide it. *Id.*

**C. The Issues and Arguments Raised by the Respondents Before the Trial Court Were Not Raised Before the Hearing Examiner and Therefore, the Court Should Not Consider Them On Appeal.**

**1. Participants are Obligated to Raise all Objections and Issues at the Administrative Level and are Barred from Raising New Objections on Appeal.**

The Respondents' LUPA Petition objected to the Hearing Examiner's decision on two grounds: (1) that Respondents created their own hardship by dividing the property and (2) that the lots had not vested prior to March 1, 2005. It is undisputed that the Petitioners did not object to these criteria during the hearing below.<sup>16</sup> The Respondents presented no testimony that these criteria had not been met, nor did they present any documentary evidence that would support their arguments on appeal.<sup>17</sup> Thus, the Petitioners are barred from challenging the Hearing Examiner's decision on these criteria on a closed-record appeal because they did not raise an objection to them below. *See e.g. Leschi Improvement Council v. State Highway Comm'n.*, 84 Wn.2d 271, 525 P.2d 774 (1974) (reciting the general rule that "objections or questions which have not been raised or urged in the proceeding before the administrative agency or body will not

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<sup>16</sup> In fact, Petitioners attempted to object to those criteria after the Hearing Examiner closed the record. Accordingly, the Hearing Examiner did not consider the material submitted. AR (7). More importantly, since Petitioners submitted their material after the record was closed the Respondents were deprived of the opportunity to respond to the material and the objections.

<sup>17</sup> Petitioners only challenged whether the proposal would cause a significant degradation of groundwater or surface water quality on account of the septic systems. The entirety of their testimony and evidence was directed towards the ability of lots to pass perc tests. Notably, they did not raise an objection to Hearing Examiner's findings on those issues.

be considered by the court on review of the order of such agency or body."); *see also Safir v. Kreps*, 179 U.S. App. D.C. 261 (D.C. Cir. 1977) (noting that a party must affirmatively place an objection into the administrative record in order to raise that objection on appeal).

This rule is more than a technical rule. The rule is founded on due process principals and serves important public policies aimed at insuring the integrity of the administrative process and the promotion of judicial economy by:

- (1) discouraging the frequent and deliberate flouting of administrative processes;
- (2) protecting agency autonomy by allowing an agency the first opportunity to apply its expertise, exercise its discretion, and correct its errors;
- (3) aiding judicial review by promoting the development of facts during the administrative proceeding;
- and (4) promoting judicial economy by reducing duplication, and perhaps even obviating judicial involvement.

*King County v. Wash. State Boundary Review Board*, 122 Wn.2d 648, 669, 850 P.2d 1024 (1993) (emphasis added)(quoting *Fertilizer Inst. v. United States Environmental Protec. Agency*, 935 F.2d 1303, 1312-13 (D.C. Cir. 1991)). Moreover, the rule furthers the purpose of LUPA itself:

The purpose of this chapter is to reform the judicial process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for

reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.

RCW 36.70C.010 (emphasis added). Allowing appealing parties to contest criteria that they did not contest at the administrative level compromises the integrity of the administrative process, subsequent appellate review and the important public policies LUPA aims to achieve.

For instance, permitting Respondents to raise new arguments on appeal allows participants to circumvent the administrative process. The purpose of a proceeding before a hearing examiner, like that of a trial court, is to get all of the issues and objections of the participants out and on the record. This allows for the development of a complete and accurate factual record that represents the parties' concerns voiced at the administrative level. It also gives the Hearing Examiner the first opportunity to address the arguments and weigh the relevant evidence. If participants are not charged with the obligation to voice their objections at the administrative level then there is no incentive for them to actively participate. Opponents to any permit may simply show up, stay quiet, and then attack the Hearing Examiner's decision on appeal. Moreover, allowing parties to assert issues for the first time on appeal would force parties seeking administrative approvals to unnecessarily load the record with excessive documentation. It would compel lengthy and unnecessary testimony to guard against any conceivable argument that might be raised

on appeal. Records that are now in the hundreds of pages would swell significantly to guard against every potential unasserted argument that might be raised on appeal.

This case is an excellent example. Becker and Collins, as an offer of proof before the superior court, submitted sworn declarations that unequivocally state that they did not have a hand in dividing the property. (CP 85-86, 89-90). They have also submitted the declaration of a realtor involved in the transaction, Dave Walker, stating the same. (CP 83-84). Had the Respondents raised the objections they now seek to prevail upon, Becker and Collins could have submitted additional information to support a finding that they did not divide the property. This did not occur because Petitioners did not object to this criterion at the administrative level. Whether Becker and Collins divided the property was not contested at the administrative level and thus, there was no need to add additional evidence beyond their plain statement that they did not divide it.<sup>18</sup> Instead, as the record reflects, the majority of the testimony and analysis involved the ability of the sites to accommodate septic systems.<sup>19</sup>

Simply, because the applicant, or the Hearing Examiner, addresses criteria it is obligated to consider does not relieve the appellant from

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<sup>18</sup> The only evidence that affirmatively discusses this issue is the letter sent on behalf of Becker and Collins stating that they did not divide the property. (AR 62).

<sup>19</sup> Notably, this was Petitioners' only concern at the administrative level, and yet they do not raise that issue here.

affirmatively raising its objections during the open record proceeding. In *Boehm v. City of Vancouver*, 111 Wn.App. 711, 76, 47 P.2d 137 (2002), the Washington Supreme Court dealt with a similar issue. The issue in that case involved the hearing examiner's approval of a local jurisdiction's decision to issue a Mitigated Determination of Nonsignificance under the State Environmental Policy Act. Like the present case before this Court, the hearing examiner held a public hearing and even left the record open to allow for additional public comment. The Appellants appeared and testified during the public hearing but never asserted the issue they sought to have the decision reversed upon appeal. The Supreme Court stated:

The [Appellants] claim that they raised this issue below and cite to several pages in the record. But the cited pages never refer to piecemealing. Indeed, the [Appellants'] LUPA petition "SEPA Comment" and "Comment & Notice of SEPA Appeal" do not mention this issue. *See Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1028 (1997) (applying to LUPA the requirement under the Administrative Procedure Act that for remedies to be exhausted issues must first be raised before the administrative agency). Furthermore, "[i]n order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record." *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993).

*Id.* at 722.

*See also Safir v. Kreps*, 179 U.S. App. D.C. 261 (D.C. Cir. 1977) (noting that a party must affirmatively place an objection into the administrative record in order to raise that objection on appeal). A similar result is required here. To rule otherwise allows a person to lay in wait during the administrative process only to spring new arguments on a closed-record appeal where the applicant does not have the ability to add evidence into the record. This is not, nor can it be, the law.

**2. Allowing Objections to be Raised on Appeal for the First Time Deprives Applicants of their Due Process Rights.**

Perhaps more importantly, permitting an appealing party to raise new issues on a closed-record appeal deprives the prevailing party below of their constitutional due process rights. The opportunity to respond to argument of an opposing party with counter arguments or rebuttal evidence is a hallmark of due process. *See e.g. State v. Cozza*, 71 Wn. App. 252, 254-255, 858 P.2d 270 (1993) ("Due process means notice and an opportunity to respond that is useful."). Our entire judicial system is set up around this most basic premise. Those seeking relief or approval present their case, the opposing party responds, and the moving party has the opportunity to reply. If the parties do not voice their objections to specific issues the applicant is deprived of its most fundamental due process right – to respond to the arguments of those in opposition. *See id.*

Permitting Respondents to raise issues on appeal that were not contested below deprives Becker and Collins of this most basic right.

### CONCLUSION

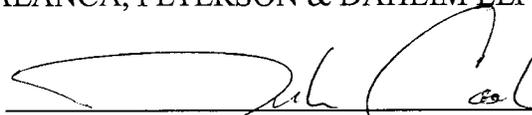
The Hearing Examiner made a well-reasoned decision that was supported by the evidence in the record and consistent with applicable law. This Court should reverse the trial court and reinstate and uphold that decision of the Hearing Examiner.

Dated this 7<sup>th</sup> day of April, 2008.

Respectfully submitted,

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By



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**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on this 7<sup>th</sup> day of April, 2008, I did serve via ABC Legal Messengers (or other method indicated below), true and correct copies of the foregoing by addressing and directing for delivery to the following:

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