

TABLE OF CONTENTS

I. Introduction..... 1

II. Assignments of Error 4

III. Issues related to Assignments of Error 5

IV. Statement of the Case 6

 A. First Assembly’s Puyallup Property. 6

 B. The First Assembly / Sunrise Transaction..... 7

 C. The Sunrise Master Planned Community 9

 D. The Sunrise Development Agreement..... 10

 E. First Assembly’s Proposed Development and Applications 13

 1. Conditional Use Permit Application..... 13

 2. The Plat and Zoning Application at Issue in This Appeal..... 14

 F. The Examiner’s Decision and Appeal 17

 G. Appeal to Superior Court..... 19

V. Argument 20

 A. Standard of Review for LUPA Appeals. 20

 B. First Assembly Had Full Authority Under the County Code and the Development Agreement to Submit the Land Use Applications Without Sunrise’s Permission or Authorization. 22

 C. By Its Terms and Under Washington law, First Assembly Is Not Subject to the Sunrise Development Agreement. 26

 D. Sunrise Conveyed to First Assembly All its Rights and Interests Under the Terms of the Quit Claim Deed with No Reservation of Rights or Affirmative Obligations Under the Development Agreement. 29

E. If First Assembly Is Bound by the Development Agreement as a Successor, It Is Entitled to the Benefits of the Contract.	31
F. Upholding the County’s Interpretation of the Development Agreement Would Result in Absurd and Inequitable Consequences. ...	40
G. The Examiner Made Prejudicial Procedural Errors that Were Material to the Decision.....	44
1. The Examiner Erred in Refusing to Admit and Consider Evidence Relevant to First Assembly’s Status as a Successor in Interest Under the Development Agreement.	44
2. The Examiner Accorded Unreasonable Deference to the Planning Director.....	48
VI. Conclusion	50

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Alby v. Banc One Financial</i> , 119 Wn. App. 513, 82 P.3d 675 (2003).....	43
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990).....	36, 37, 41
<i>Britton v. Co-op Banking Group</i> , 4 F.3d 742 (9th Cir. 1993)	28
<i>Christal v. Farmers Ins. Co. of Washington</i> , 133 Wn. App. 186, 135 P.3d 479 (2006).....	40
<i>Citizens for Mount Vernon v. City of Mount Vernon</i> , 133 Wn.2d 861, 947 P.2d 1208 (1997).....	13
<i>Citizens to Preserve Pioneer Park, L.L.C. v. City of Mercer Island</i> , 106 Wn. App. 461, 24 P.3d 1079 (2001).....	21
<i>City of Seattle v. McCoy</i> , 101 Wn. App. 815, 4 P.3d 159 (2000).....	42
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	48, 49
<i>Cox v. Spangler</i> , 141 Wn.2d 431, 5 P.3d 1265 (2000).....	46
<i>Dickson v. United States Fid. and Guar. Co.</i> , 77 Wn.2d 785, 466 P.2d 515 (1970).....	41
<i>Fisher Properties v. Arden Mayfair Inc.</i> , 106 Wn.2d 826, 726 P.2d 8 (1986).....	40
<i>Freeburg v. City of Seattle</i> , 71 Wn. App. 367, 859 P.2d 610 (1993).....	21

<i>Grove v. Payne</i> , 47 Wn.2d 461, 288 P.2d 242 (1955).....	35
<i>Guimont v. Clarke</i> , 121 Wn.2d 586, 854 P.2d 1 (1993).....	41
<i>Hanson Indus., Inc. v. County of Spokane</i> , 114 Wn. App. 523, 58 P.3d 910 (2002).....	42
<i>Henry v. Assoc. Indem. Corp.</i> , 217 Cal. App. 3d 1405 (1990)	28
<i>HJS Dev., Inc. v. Pierce County</i> , 148 Wn.2d 451, 61 P.3d 1141 (2003).....	21
<i>Isla Verde Int'l Holdings, Inc. v. City of Camas</i> , 146 Wn.2d 740, 49 P.3d 867 (2002).....	21
<i>JJR Inc. v. City of Seattle</i> , 126 Wn.2d 1, 891 P.2d 720 (1995).....	44
<i>Kitsap County v. Allstate Ins. Co.</i> , 136 Wn.2d 567, 964 P.2d 1173 (1998).....	33
<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S. 1003, 112 S. Ct. 2886 (1992).....	42
<i>McCoy v. Lowrie</i> , 44 Wn.2d 483, 268 P.2d 1003 (1954).....	30
<i>Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.</i> , 69 Cal.2d 33, 442 P.2d 641 (1968).....	47
<i>Powell v. Sphere Drake Ins.</i> , 97 Wn. App. 890, 988 P.2d 12 (1999).....	28
<i>Roeder Co. v. K & E Moving & Storage Co., Inc.</i> , 102 Wn. App. 49, 4 P.3d 839 (2000).....	38
<i>Schofield v. Spokane County</i> , 96 Wn. App. 581, 980 P.2d 277 (1999).....	20

<i>Security Sav. and Loan Ass'n v. Busch</i> , 84 Wn.2d 52, 523 P.2d 1188 (1974).....	30
<i>Sleasman v. City of Lacey</i> , 159 Wn.2d 639, 151 P.3d 990 (2007).....	49
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997).....	48
<i>State v. Lord</i> , 161 Wn.2d 276, 165 P.3d 1251 (2007).....	47
<i>State v. Vaughn</i> , 101 Wn.2d 604, 682 P.2d 878 (1984).....	45
<i>Stender v. Twin City Foods, Inc.</i> , 82 Wn.2d 250, 510 P.2d 221 (1973).....	36, 37
<i>Universal/Land Const. Co. v. City of Spokane</i> , 49 Wn. App. 634, 745 P.2d 53 (1987).....	32
<i>Washington Cedar & Supply Co., Inc. v. State, Dept. of Labor & Indus.</i> , 119 Wn. App. 906, 83 P.3d 1012 (2003).....	46
<i>Washington Pub. Util. Districts' Utilities Sys. v. Public Util. Dist. No. 1</i> , 112 Wn.2d 1, 771 P.2d 701 (1989).....	40
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wn.2d 169, 4 P.3d 123 (2000).....	20

STATUTES AND CODES

RCW 36.70A.030(4).....	13
RCW 36.70A.070(1).....	23
RCW 36.70B.190.....	28
RCW 36.70C.020(1)(a).....	20
RCW 36.70C.130(1).....	20, 21

RCW 64.04.050	30, 33
PCC § 1.22.090(G)	46
PCC § 1.22.140(C).....	20
PCC § 18.40.020(B)(1).....	23
PCC § 18A.75.080(D)	22
PCC § 18A.75.080(F).....	23
PCC § 18A.75.080(P).....	23
PCC § 18A.75.080(P)(5)	24
PCC § 18A.85.040(D)(1)(d).....	24
PCC § 18A.95.030.....	23
PCC § 18F.10.060(2).....	26
PCC § 19A.30.130(E).....	23
PCC § 19C.045(A).....	23
PCC § 19C.10.020	23
PCC § 19C.10.030(A).....	23

OTHER AUTHORITIES

1 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING 3d § 1.13 (1986).....	13
BLACK’S LAW DICTIONARY 1283 (5th ed. 1979).....	33
WASHINGTON REAL PROPERTY DESKBOOK (3d ed.) § 32.3(4).....	29, 33

I. INTRODUCTION

This appeal under the Land Use Petition Act (“LUPA”) arises from the denial by the Pierce County Hearing Examiner of the opportunity for WGW Incorporated (“WGW”) to file applications for certain zoning amendments and plat approvals on behalf of First Assembly of God of Puyallup d/b/a Destiny Christian Center (“First Assembly”). The applications are to develop property owned by First Assembly located within the Sunrise Master Planned Community (“MPC”). The project is called the Destiny Christian Center and includes a church and multi-family housing priced to serve community needs.

First Assembly purchased the subject property from Sunrise Development Corporation (“Sunrise”) and its principal owner, Harry Corliss, in a complex transaction involving property exchanges and fair market remuneration between First Assembly, Sunrise, and third parties affiliated with Sunrise and Corliss. In short, First Assembly conveyed to Sunrise properties upon which it had been conducting its religious institution in exchange for land upon which that institution could expand. The transaction hinged on Sunrise’s representations that First Assembly could develop an expanded religious institution with facilities for worship, education, recreation and related uses in a campus-like setting on vacant property owned by Sunrise and located within the Sunrise MPC.

After completion of the transaction, Sunrise entered into a development agreement with Pierce County (“Development Agreement”) regarding the Sunrise MPC. According to a conceptual plan prepared by Sunrise and set out in the Development Agreement, the property now owned by First Assembly would be designated for park uses, although the underlying zoning is residential.

First Assembly filed applications with Respondent Pierce County (the “County”) for land use approvals required to develop its property. Once it learned of the applications, Sunrise sent letters of objection to the County, asserting that First Assembly had no right to file any applications without its permission. According to Sunrise, the plat application and request to change zoning on the property from one residential category to another involved an “amendment to” the Development Agreement itself, and only Sunrise as the “Master Developer” could propose and file any application for development on First Assembly’s property.

Despite support in fact and law for First Assembly’s full and unfettered development rights and interests in the property, support in the County Code for its right to subdivide and develop its property, and the history of the transaction indicating Sunrise’s recognition of First Assembly’s development rights – not to mention support in the Development Agreement itself for the right of subsequent property owners

to develop their property consistent with assigned zoning classifications – the County’s Department of Planning and Land Services (“PALS”) adopted Sunrise’s position. The County required First Assembly to obtain written consent from the Master Developer, i.e., Sunrise, prior to processing any zoning applications. Sunrise withheld its consent.

First Assembly appealed PALS’ decision to the County’s Office of Hearing Examiner. At the hearing, County staff and the Pierce County Office of Prosecuting Attorney declined to defend PALS interpretation or participate in any meaningful way, but instead deferred to Sunrise as an intervening party in the appeal.¹ At Sunrise’s urging, the Examiner refused to admit evidence regarding the property transaction between Sunrise and First Assembly, the significance of the quit claim deed of conveyance from Sunrise to First Assembly, or the intent of the Development Agreement from an individual that drafted it. The Hearing Examiner accorded substantial deference to the County’s interpretation (which was really Sunrise’s interpretation) agreeing that First Assembly sought an “unapproved amendment” to the Development Agreement. The Examiner also accepted Sunrise’s position that it could deny any subsequent purchaser the right to develop their property without Sunrise’s explicit consent. In so doing, the Examiner made findings and

¹ The Pierce County Office of Prosecuting Attorney did not file a brief in either the proceeding before the Examiner or with the superior court.

conclusions that were not supported by substantial evidence, and which erroneously interpreted and applied the law to the facts.

The superior court then affirmed the Examiner's decision.

Because these decisions impermissibly apply the Development Agreement to First Assembly and violate statutory and constitutional requirements governing quasi-judicial land use decisions, this appeal followed.

II. ASSIGNMENTS OF ERROR

1. The Hearing Examiner and the superior court erred in determining that First Assembly was subject to the terms of a development agreement to which First Assembly was not party and that did not exist at the time First Assembly purchased its property.

2. In the alternative, the Hearing Examiner and superior court erred in determining that First Assembly was not a successor party to the Sunrise Development Agreement and, thus, had no right to apply to develop its property without Sunrise's permission.

3. The Hearing Examiner made prejudicial procedural errors that were material to his decision.

4. The superior court erred when denying Petitioner's Land Use Petition Act appeal and entering a final judgment and order in favor of Respondents for one or more of the reasons set out above, (1) – (3).

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did First Assembly have authority to submit land use applications for its property without Sunrise's permission or authorization? (Assignments of Error #1, #2, #4).
2. Did the Sunrise Development Agreement even apply to First Assembly since it was not a party to the contract and the agreement was not in effect at the time First Assembly purchased its property from Sunrise? (Assignments of Error #1, #4).
3. Since Sunrise conveyed to First Assembly all its rights and interests under the terms of the quit claim deed with no reservations of rights, was First Assembly, a successor under the Development Agreement as a matter of law and fact, fully entitled to submit land use applications on its own behalf to develop its land? (Assignment of Error #2, #4).
4. Would upholding the Hearing Examiner's and superior court's interpretation of the Development Agreement requiring Sunrise's permission to submit applications to develop First Assembly's property result in absurd and inequitable consequences thus requiring its rejection? (Assignments of Error #1, #2, #4).

5. Should the Examiner have admitted evidence relevant to First Assembly's status as a successor in interest under the Development Agreement? (Assignment of Error #3, #4).

6. Did the Examiner impermissibly accord unreasonable deference to the Planning Director's interpretation of the Development Agreement. (Assignment of Error #3, #4).

7. Did the Examiner lack substantial evidence to support his finding that the County's and Sunrise's interpretations of the Concomitant Agreement and Development Agreement have been consistent since interpretation? (Assignment of Error #2, #4).

IV. STATEMENT OF THE CASE

A. First Assembly's Puyallup Property.

For over 70 years, First Assembly operated its religious institution on two parcels of land comprising approximately 6.51 acres in the City of Puyallup, Washington (the "Puyallup Property"). Report of Proceeding, June 6, 2007 (hereinafter "RP") at 39; AR, Hearing Ex. 3G.² The Puyallup Property's two parcels included one parcel of approximately 160,000 square feet at 601 Ninth Avenue S.E., and one non-contiguous parcel across the street of approximately 125,000 square feet. AR, Hearing Ex. 3G, at 3. The uses on First Assembly's Puyallup Property

² The superior court has provided the record on appeal to this Court. All "AR" citations are to the Administrative Record submitted to the Court.

included a church sanctuary, a chapel, school classrooms, several offices, and a gymnasium. *Id.* As of May 2000, the value of the Puyallup Property was estimated to be \$8,250,000. *Id.* at 1; RP at 42.

B. The First Assembly / Sunrise Transaction

Sometime between 2000 and 2001, First Assembly's governing board decided to locate a new site that would support the modernization and expansion of its religious facilities. RP at 40. As an agent of the Church, Mr. Michael Moore, a real estate broker and member of First Assembly's congregation, contacted the nearby property owner, Western Washington Fair Association ("WWFA") to assess its interest in the First Assembly Property. *Id.* WWFA operates and manages the Puyallup Fair on nearby land, and it was believed that WWFA was interested in acquiring additional land for fairgrounds expansion and parking. *Id.*

Mr. Moore made a presentation to the WWFA Board of Directors, and the Board advised Mr. Moore that it was interested in acquiring a portion of the Puyallup Property, which then served as a parking lot. *Id.* The WWFA needed the additional parking spaces to serve the Puyallup Fair and other events it held throughout the year. *Id.* As a member of the WWFA Board of Directors, Mr. Harry Corliss attended Mr. Moore's presentation. *Id.* In addition to his duties as a member of the WWFA

Board, Mr. Corliss is the President of Sunrise Development Corporation.

Id.

After the presentation and Board meeting concluded, Mr. Corliss invited Mr. Moore to meet with him personally to discuss details of a property deal. *Id.* at 40-41. In a meeting the following day, Mr. Corliss offered to sell First Assembly a 22-acre parcel of vacant land (the “Sunrise Parcel”) within a master planned community then being developed by Sunrise within unincorporated Pierce County. *Id.* at 41. Mr. Corliss represented the Sunrise Parcel as a wonderful location for development of an expanded religious campus, and offered to facilitate a three-way transaction that would involve: (1) Sunrise’s purchase of First Assembly’s Church property; (2) WWFA’s purchase of First Assembly’s parking lot property; and (3) First Assembly’s purchase of the Sunrise Parcel. *Id.*

According to Sunrise’s property appraisal, the 22-acre Sunrise Parcel was valued at \$2.6 million. AR, Hearing Ex. 3H, at 44. This appraisal was based in large measure on the property’s development potential, using the “highest and best use” of the property as “Single Family Residential Development” with “estimated 132 potential finished lots.” *Id.* at v, 44. The appraisal represented the value of the property “as if owned in fee simple without encumbrances.” *Id.* at v, vii.

The three-way transaction eventually transpired as follows: On March 14, 2001, First Assembly executed a Warranty Deed transferring the Puyallup parking lot property to WWFA for \$700,000. RP at 42. On March 19, 2001, First Assembly conveyed the remainder of the Puyallup Property to T and S Development Properties, LLC (a holding company owned by Mr. Corliss, and named after his sons) for \$4.47 million. RP at 41-42; AR, Hearing Ex. 3F at 27. On April 3, 2001, Sunrise (and Mr. Corliss) executed a Quit Claim Deed conveying the 22-acre Sunrise Parcel to First Assembly. AR, Hearing Ex. 3F, at 3. In sum, Sunrise and WWFA purchased First Assembly's Puyallup Property valued at \$8.25 million for a total consideration of \$7.77 million in cash and property. RP at 42.

There were no deed restrictions, encumbrances, or limitations of any kind on the property conveyed by Sunrise to First Assembly. *Id.* Sunrise conveyed the Sunrise Parcel to First Assembly on April 3, 2001, and the deed was recorded with the Pierce County Auditor on April 6, 2001. AR, Hearing Ex. 3.

C. The Sunrise Master Planned Community

The Sunrise Master Planned Community is a large, multi-use development comprising approximately 1,467 acres of land in unincorporated Pierce County (the "Sunrise Development"). AR, Hearing

Ex. 1C, Agreement at 1.1. The conceptual plan for the Sunrise Development is flexible and contemplates a broad range of uses, including: single-family and multi-family dwellings, commercial facilities, educational uses, religious uses, park land, and open spaces. *Id.* at 1.1-1.2. These uses, and the precise locations of the uses and associated zoning designations can be amended or modified in response to development needs and market conditions. *Id.* at 1.2-1.7

D. The Sunrise Development Agreement

A concomitant zoning agreement between Pierce County and Mt. Rainier Ventures (now Sunrise) concerning the Sunrise Development – including master plans relating to land use, zoning, transportation, sanitary sewers, water, storm drainage, and temporary erosion controls – was initially approved by Pierce County in December 1986, and amended in October 1992. AR, Hearing Ex. 1C, Agreement at Recitals 2-4.

The County approved a conceptual Master Plan, included as an exhibit to the Concomitant Agreement, in 1993. *Id.* at Recital 5. Sunrise and Pierce County subsequently amended the master plan and rezoned certain parcels within the Sunrise Development in 1999. *Id.* at Recitals 8-9. The Pierce County Council terminated the Concomitant Agreement by Ordinance (Ord. 2000-97S), however, on May 3, 2001, exactly one month *after* First Assembly obtained all rights and interests in

the Sunrise Parcel. *Id.* at Recital 10. Therefore, as of May 3, 2001, there was no private-public agreement controlling development on the Sunrise Parcel.

The Ordinance terminating the Concomitant Agreement (Ord. 2000-97S) provided as follows:

Section 1. The Concomitant Agreement adopted by ordinance No. 96-92S, as amended, is *hereby terminated*.

Section 2. The Council requests that, *after the applicant for the Sunrise Development submits an application* for final approval of a Planned Unit Development and development agreement to Planning and Land Services for review, Planning and Land Services administer the Sunrise Development pursuant to the provisions of PCC 18A.75.080 for approving a final development plan and development agreement.

Section 3. The Council further *requests that the Department consider the recommendations of the Hearing Examiner* in pages 15 through 18, recommended conditions 1 through 18, in the Hearing Examiner's decision on the Sunrise Master Plan (Case No. Z22-83), dated May 20, 1997.

Pierce County and Sunrise then entered into a Development Agreement on November 15, 2001. AR, Hearing Ex. 1C, at 16. Because the Ordinance terminated the Concomitant Agreement before the Development Agreement was entered, a "gap" exists between the termination of the Concomitant Agreement and approval of the Sunrise Development Agreement. Despite owning full title and all rights and interests in the Sunrise Parcel, First Assembly was not a signatory to the

Sunrise Development Agreement. *Id.* Furthermore, the record reflects that First Assembly did not give permission or authority to any party to bind or control its ownership or development rights in the Sunrise Parcel.

The Development Agreement, executed after the First Assembly/Sunrise transaction, allows assignation of “all or any portion of the respective interests, rights or obligations under [the] Agreement or in the Project to other parties acquiring an interest or estate in all or any portion of the Property” (AR, Hearing Ex. 1C, at 5.3.2), and allows “the Agreement, or any subsequent approval, including, but not limited to the land use plan elements or conditions of approval, [to be] amended or modified at the request of the applicant or applicant’s successor in interest” (*id.* at 5.21).

The Development Agreement between the County and Sunrise provides that individual development projects shall be governed by the zoning classifications. The Zoning Master Plan, Exhibit “H” to the Development Agreement, zones the First Assembly property as moderate single-family residential (MSF). Exhibit “F,” but the Final Development Plan, designates the property as “park.” The Zoning Map controls over the generalized development plan.³

³ The contract in this regard comports with land use law. A parcel of land’s designation for zoning purposes takes precedent over that parcel’s general land use designation found in a comprehensive land use plan. “[C]omprehensive plans generally are not used to

E. First Assembly's Proposed Development and Applications

1. Conditional Use Permit Application

In 2002, First Assembly filed an application to develop its Sunrise Parcel pursuant to a conditional use permit process. RP at 45. The application contemplated a church sanctuary, a multi-use building, an office building, a music center, a sports complex and outdoor playing fields. *Id.* See also AR, Hearing Ex. 3K (Destiny Christian Center Site Plan). The conditional use application proposed 4 to 5 acres of park space, and had the support of Sunrise.⁴ AR, Ex. 1, Staff Report at 5; RP at

make specific land use decisions;" rather, "a comprehensive plan is a 'guide' or 'blueprint' to be used when making land use decisions." *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997); see also RCW 36.70A.030(4) (comprehensive land use plan is "a generalized coordinated land use policy statement of the governing body"); 1 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING 3D § 1.13, at 21 n.47 (1986) ("Zoning is very precise and legally restricts the present land use, while the general plan is merely a planning document which is to serve as a guide to future land use."). Accordingly, while "any proposed land use decision must generally conform with the comprehensive plan," "there need not be 'strict adherence' to a comprehensive plan." *Mount Vernon*, 133 Wn.2d at 873. Because of the nature of a comprehensive plan, "conflicts surrounding the appropriate use [of land] are resolved in favor of the more specific regulations, usually zoning regulations." *Id.* Thus, "[a] specific zoning ordinance will prevail over an inconsistent comprehensive plan." *Id.* Put another way, "[i]f a comprehensive plan prohibits a particular use but the zoning code permits it, the use would be permitted." *Id.* at 874.

⁴ In the event that only 4-5 acres of park land were developed on the 22-acre Sunrise Parcel, or the possibility that First Assembly "may or may not build a park" at all, Sunrise was aware that it remained responsible for the overall park obligation within the Sunrise Master Planned Community. AR, Hearing Ex. 3E, Pierce County Letter to Sunrise (Dec. 19, 2003). Both the Pierce County Executive and the County Council acknowledged that the Development Agreement contemplates the delegation of development responsibilities, but that the "ultimate burden" of compliance remained with Sunrise. *Id.*

62. Ultimately, the application was withdrawn because of wetland issues (a wetland mitigation bank to be established by Sunrise was found to be noncompliant) and issues with park operations (Pierce County insisted on public access and operating hours detrimental to the Church's interests). AR, Hearing Ex. 3L, Moore Letter to Sunrise (Nov. 14, 2003).

Notwithstanding the conceptual "park" designation on the entire Sunrise Parcel, Pierce County did not require the Development Agreement to be amended for approval of the conditional use permit. AR, Hearing Ex. 3L. Further, there was no requirement of express authorization from Sunrise as the overall developer of the Master Planned Community. *Id.*; AR, Hearing Ex. 3E. And, Sunrise made no assertion that First Assembly did not possess development rights as to the Sunrise Parcel, or that any express authorization was required for First Assembly to develop the Sunrise Parcel. *Id.*

2. The Plat and Zoning Application at Issue in This Appeal

In February 2007, after a presubmittal meeting with County Staff to determine proper procedures and preferences for processing the land use applications, First Assembly filed an application with Pierce County proposing to change the land use designation for its property from Park to Multi-family and the zoning designation from Moderate Single Family

(MSF) to High Density Residential (HRD), also a residential designation. AR, Hearing Ex. 1B at 1; RP at 5. First Assembly also requested a preliminary plat approval contemplating one six-acre lot for the development of a 65,000 square foot church facility, and one 16-acre lot for the development of 21 multi-family buildings. AR, Hearing Ex. 1B at 1. The multi-family project would fund church activities.

On February 12, 2007, Pierce County accepted the applications for processing. AR, Hearing Ex. 1 at 11; RP at 10. The published Notice of Application did not refer to the Development Agreement; rather, it only referenced the map amendment and plat approval requests. *See* AR, Hearing Ex. C. Only after “further investigation in response to a letter from Sunrise,” did the County staff determine that it “made an error” in accepting the applications. *Id.*; RP at 10. Agreeing with Sunrise, the County found that the zoning map amendment application (and derivately the plat application) constituted a change to the Development Agreement, and that *only* Sunrise was authorized to amend the Agreement. AR, Hearing Ex. 1A (County Letter to WDW, March 22, 2007); RP at 10-11.

In a subsequent letter to First Assembly, Pierce County cited the following language in the Development Agreement:

The approved Sunrise Development Agreement, or any subsequent approval, including, but not limited to the land use plan elements or conditions of

approval, may be amended or modified at the request of the *applicant* or applicant's successor in interest. . .

and stated that it interpreted the word "applicant" as meaning the entity with the *controlling interest* in the Master Planned Community, not the owner of any individual parcels. AR, Hearing Ex. 1A; RP at 12.

The County did not address whether First Assembly was a "successor in interest" under the Agreement. AR, Hearing Ex. 1A. Instead, staff took the position that an amendment to the Development Agreement must include express authorization from Sunrise, asserting a position that proposed development must be consistent with both the Zoning Master Plan, Exhibit "H" to the Development Agreement and Exhibit "F," the Final Development Plan. RP at 10-12. The zoning for First Assembly's parcel is MSF on Exhibit "H," but the land use designation on Exhibit "F" is "parks." Section 1.1 of the Development Agreement provides that individual projects shall be governed by the zoning classifications as depicted on Exhibit "H," the Zoning Master Plan.⁵ R, Hearing Ex. 1C. First Assembly appealed this decision to the Examiner.

⁵ First Assembly's project could be constructed to comply with the MSF zoning. An amended application is currently being processed by Pierce County under the MSF zoning designation. See Declaration of Mike Moore in Support of Stay and Supplemental Declaration of Mike Moore in Support of Motion to Modify Ruling.

F. The Examiner's Decision and Appeal

The Hearing Examiner found that the County correctly interpreted and applied the Sunrise Development Agreement to First Assembly's land use application and denied the appeal. AR, Decision, Finding 4. The Examiner concluded that (1) an amendment to the Agreement was required as part of the land use application approval process, and (2) Sunrise (as it set forth in its letter of objection) was the only entity with "standing" to request an amendment or modification of the Development Agreement. AR, Decision, Conclusion 2.

In his conclusions, the Examiner recognized that the Development Agreement contemplated a conventional method of quit claim or other deed *as well as* the assignment or transfer of "all or any portion of the respective interests, rights or obligations" to "other parties acquiring an interest or estate in all or any portion of the property." AR, Decision, Conclusion 3. Emphasizing only a portion of the contract language, the Examiner concluded that for such transferee to receive all "interests and rights" under the Development Agreement, including the right to amend it, the party would have to "incur the obligations under the agreement as to the property transferred." AR, Decision, Conclusion 3. In other words, only an assignee could seek amendments to the Development Agreement according to the Examiner.

After refusing to consider testimony regarding the parties' intent in entering the Development Agreement from the planning professional who drafted the document, the Examiner found that the parties to the Development Agreement (Sunrise and Pierce County) "interpret it in the same manner." AR, Decision, Finding 6. Despite his observation that this issue was a "case of first impression," RP at 89-90, the Examiner also accorded deference to the County's determination, concluding, without substantial evidence for support, that the interpretation and administration of the Development Agreement by the County and Sunrise "have consistently been the same since inception," but cited no examples. AR, Decision, Conclusion 5.

The Examiner also found that "[i]ssues surrounding the negotiations and eventual agreements between the parties, which culminated in the quit claim deed [between Sunrise and First Assembly], are beyond the scope of the hearing and the Examiner's jurisdiction." AR, Decision, Finding 5A. The Examiner further found that he "has no authority to make any decisions regarding the agreement between Sunrise and [First Assembly], and therefore said exhibits are not relevant to the present proceeding and will not be admitted to the record." AR, Decision, Finding 8. Without even considering the property transfer, the Examiner concluded that "the property transfer did not reflect a transfer of any rights

or obligations under the Development Agreement,” AR, Decision, Conclusion 3, but then held the transfer was subject to the Development Agreement.

G. Appeal to Superior Court

First Assembly appealed the Examiner’s decision to the Pierce County Superior Court, raising twelve assignments of error. CP 1-70. The fundamental assignments related to the County’s decision that Sunrise had the right and authority to control development and use of First Assembly’s land by withholding its “permission” to file any land use applications. *Id.* Related assignments included contesting the County’s application of the Development Agreement at all, and the Examiner and staff concluding First Assembly was not a successor empowered to file land use applications in its own right. *Id.* Assignment was also made to the Examiner’s procedural rulings precluding admission of certain evidence and according substantial deference to the County’s sui generis interpretation. *Id.*

The superior court affirmed the decision of the Hearing Examiner in all respects. CP 184-186.

V. ARGUMENT

A. Standard of Review for LUPA Appeals.

The Land Use Petition Act (“LUPA”) governs review of land use decisions. *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 175, 4 P.3d 123 (2000). A land use decision is “a final determination by a local jurisdiction’s body . . . with the highest level of authority to make the determination, including those with authority to hear appeals[] on . . . [a]n application for a project permit.” RCW 36.70C.020(1)(a). In this case, the court reviews the decision of the Pierce County Hearing Examiner which, functioning as an appellate body, had the County’s highest level of decision making authority. Pierce County Code (“PCC”) § 1.22.140(C).

A party who seeks relief under LUPA has the burden of establishing that one of the six standards of RCW 36.70C.130(1) is met. *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999). Five of these standards are applicable here:

- (a) The body or officer that made the land use decision engaged in unlawful procedure 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; . . .or
- (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

Standards (a), (b), (d) and (f) present questions of law which the court reviews de novo. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003). Standard (c) concerns a factual determination that the court reviews for substantial evidence supporting it. *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371, 859 P.2d 610 (1993). Substantial evidence is evidence that would persuade a fair minded person of the truth of the declared premise. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751 52, 49 P.3d 867 (2002).

The clearly erroneous test in standard (d) involves applying the law to the facts. *Citizens to Preserve Pioneer Park, L.L.C. v. City of Mercer Island*, 106 Wn. App. 461, 473, 24 P.3d 1079 (2001). Under that test, the court determines whether it is left with a definite and firm conviction that a mistake has been committed. *Id.*

B. First Assembly Had Full Authority Under the County Code and the Development Agreement to Submit the Land Use Applications Without Sunrise’s Permission or Authorization.

First Assembly’s property (“Sunrise Parcel”) is located within Sunrise’s master planned community, designated as a Planned Unit Development (“PUD”) pursuant to Ordinance 2000-97S. AR, Hearing Ex. 1, at 5. The underlying zoning is MSF. *Id.* at 12. These designations govern the Sunrise Parcel and were in place *prior to* First Assembly’s ownership. The Development Agreement specifically provides in Section 1.1 that “development of individual projects within Sunrise shall be governed by the zoning classifications as depicted on the zoning master plan.” AR, Hearing Ex. 1C. This provision does not contemplate authority from Sunrise for individual development proposals.

According to the County Code, a Master Planned Community (“MPC”) must be administered as a PUD. PCC § 19A.30.130(E). An application for a PUD may be initiated by the property owner(s), agent of the owner(s), contract purchaser(s) of property involved in a proposed PUD, or a public agency. PCC § 18A.75.080(D). The PUD Section of the Code does not specify *who* may apply for amendments. Nor does the

Code contain a requirement of authorization by any other party, even in the event of a contract purchaser without legal title to property.⁶

The Code does regulate the review and approval of “PUD Development Agreements.” PCC § 18A.75.080(P). However, after a PUD-related designation is adopted by the County Council, the zoning in place at the time of designation approval controls development of the land until a PUD permit, or Development Agreement, is approved by the Hearing Examiner. PCC § 18A.75.080(F), PCC § 19A.30.130(E). In this case, the Sunrise Parcel was conveyed to First Assembly *prior to* the Development Agreement being approved and, therefore, the underlying zoning controls development under principles of contract law, as well as the cited code language.

Again, there are no specific requirements for amendments to a PUD, although it is significant that “property owners” may initiate PUD applications. As far as rezones, the application requirements are provided in PCC § 18A.95.030.⁷ These requirements include a preliminary

⁶ Under the general provisions in Section 18.40 of the Code, an applicant/agent submitting a land use application “must be the landowner(s) or must have a signed letter of authorization from the landowner(s).” PCC § 18.40.020(B)(1). As to the Sunrise Parcel at issue here, First Assembly *is* the property owner and gave WGWS written authority to submit land use applications on its behalf.

⁷ The Growth Management Act requires that a municipality adopt a comprehensive plan which is composed of “. . . maps, and descriptive text” and includes a “land use element . . . designating the proposed general distribution and general location and extent of uses of land . . .” RCW 36.70A.070(1). The comprehensive land use map and its land

completeness review, application site plan, a 12-month refilling limitation and appropriate fee. *Id.* First Assembly followed these procedures as determined by the County’s determination of completeness. AR, Hearing Ex. 4, Staff Report at 11. This Code section does not define who may apply for zoning amendments, although the Code section on use permits discusses zoning code and zoning map amendments and provides that “[o]ne or more owners of property directly affected by the proposal may petition the Planning Commission to initiate an amendment.” PCC § 18A.85.040(D)(1)(d). Regarding site specific zoning, the Code provides: “the County may, in the future, develop amendment and review procedures for site-specific zoning map amendments beyond those already established by the Council for Comprehensive Plan amendments (*see* PCC chapter 19C.10) if necessary.” *Id.*

And, with respect to a Development Agreement, the Code provides:

Once the Final Development Agreement is approved by the Director and *signed by the property owner*, all persons and parties, their successors, and heirs who own or have any interest in the real property within the proposed PUD project are bound by the final development agreement.

designations can be amended on a single parcel or on a single ownership basis if the land is located within a “Master Planned Community.” PCC § 19C.10.020; PCC § 19C.10.030(A). Any “citizen” can docket a comprehensive plan amendment. PCC § 19C.045(A).

PCC § 18A.75.080(P)(5) (emphasis added). As a result, no parties are bound until a Development Agreement is approved by the Director and signed by the property owner. Because the Sunrise Parcel was conveyed on April 6, 2001, and the Development Agreement was not signed until November 15, 2001, First Assembly could not have been bound by the Development Agreement at the time of purchase. *See, supra*, pp. 10-11. The question then becomes whether it was bound at the time of execution.

The Code provides that the Development Agreement must be signed by the “property owner.” At that time, First Assembly *was* a property owner (with all rights and interests of a property owner). First Assembly did not sign the Agreement, however, nor did it give any party the authority to sign the Agreement on its behalf. As a result, the Agreement does not bind First Assembly, and it need not be amended to develop the First Assembly property.

Even if it were applicable, the Development Agreement provides that “[r]equests for development permits that implement and are consistent with the Final Development Plan and Zoning Plan as described in section above *shall be* processed and approved pursuant to Pierce County Development regulations – Zoning (18A) except as modified by this Agreement.” AR, Hearing Ex. 1C, Agreement at 5.1.1(A) (emphasis added). The First Assembly zoning application implements the flexible

concepts of the Development Agreement; it does not seek to amend these conceptual plans. After all, the Zoning Map controls individual development projects. The zoning is residential and the proposal is for a church and residential use which is consistent with the assigned zoning. Consequently, the application should have been processed pursuant to the County Code, and the Code does not require authorization from another property owner to process zoning applications.

Likewise, the Code does not require authorization from another property owner to process plat applications. Indeed, divisions of land within the boundaries of an approved Planned Unit Development, Planned Development District, or Master Planned Community are specifically exempted from the requirements of Title 18F of the County Code, Development Regulations – Land Divisions and Boundary Changes. PCC § 18F.10.060(2).

C. By Its Terms and Under Washington law, First Assembly Is Not Subject to the Sunrise Development Agreement.

The Examiner and superior court erred in holding First Assembly to the terms of the Sunrise Development Agreement. First Assembly is not subject to the terms of the Agreement because that Agreement did not exist until *after* First Assembly purchased its Sunrise property, and First Assembly was not a party to the Agreement.

As described above (at 10-11), Sunrise conveyed the Sunrise Parcel to First Assembly, and the deed was recorded with the Pierce County Auditor in early April 2001. AR, Hearing Ex. 3. Exactly one month after First Assembly obtained all rights and interests in the Sunrise, the Pierce County Council terminated the Concomitant Agreement between the County and the developers of the Sunrise Parcel. *Id.* at Recital 10. In other words, as of May 3, 2001 there was no private-public agreement controlling development on the Sunrise Parcel. AR, Decision, at 7 (“[s]ubsequent to Appellants acquiring the property, the Pierce County Council adopted Ordinance 2000-97S, which terminated the concomitant agreement and approved a Development Agreement . . .”). There is no evidence that any terms in the Concomitant Agreement survived this termination.

Then, in November 2001, Sunrise and the County entered into the Development Agreement that is the crux of this litigation. First Assembly’s purchase of its Sunrise Property thus preceded the Development Agreement *by seven months*. Thus, it is undisputed that at the time of the Agreement, First Assembly *already* was a *bona fide* property owner of land within the project boundary of the Sunrise Master Planned Community. First Assembly was not a party to the Development

Agreement, and Sunrise was not authorized to act as an agent of First Assembly in entering into the Development Agreement.

It is black-letter law that a non-signatory to a contract cannot be bound to a contract unless the non-signatory is a successor to a signing party or a signing party is acting as the non-signatory's agent. *E.g.*, *Powell v. Sphere Drake Ins.*, 97 Wn. App. 890, 895-96 & n.11, 988 P.2d 12 (1999); *Britton v. Co-op Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993); *Henry v. Assoc. Indem. Corp.*, 217 Cal. App. 3d 1405, 1416-17 (1990).

This is true with respect to development agreements as well.

Washington law provides that:

A development agreement shall be recorded with the real property records of the county in which the property is located. During the term of the development agreement, the agreement is *binding on the parties and their successors*

RCW 36.70B.190 (emphasis added).

Indeed, the Development Agreement itself provides that it shall be binding upon and inure to the benefit of only “successors” and “assigns” of the parties. , AR, Hearing Ex. 1, at 5.3.1. Because First Assembly was not a party to the Development Agreement and no party was acting as its agent, it could be bound only if it is a “successor” to a party, which it is not – First Assembly already owned the Sunrise parcel outright (including

all rights and interests in the property) *prior* to the execution and adoption of the Development Agreement.

Put simply, if First Assembly is not a successor in interest, and not bound by the Agreement, it need not amend the Agreement in order to develop its property. In fact, this is what the County staff initially determined when processing First Assembly's land use application. First Assembly's application described in the Public Notice simply requested a change in the underlying zoning designation and the subdivision of its property through the platting process. Only at Sunrise's urging did Pierce County change its position with regard to First Assembly's application, thereafter requiring an amendment to the Development Agreement. RP at 10-11.

First Assembly cannot be bound by the Development Agreement, and it was reversible error for the Examiner and the superior court to apply the terms of the Development Agreement to First Assembly.

D. Sunrise Conveyed to First Assembly All its Rights and Interests Under the Terms of the Quit Claim Deed with No Reservation of Rights or Affirmative Obligations Under the Development Agreement.

Not only did the Development Agreement not exist when First Assembly purchased the Sunrise Parcel, but in that purchase, Sunrise conveyed the property to First Assembly via a quit claim deed, which, in

turn conveyed “all of the grantor’s right, title and interest in the described property.” WASHINGTON REAL PROPERTY DESKBOOK (3d ed.) § 32.3(4). According to Washington statute, every duly executed quitclaim deed shall “release and quitclaim to the grantee, his heirs and assigns in fee of all the then existing legal and equitable rights of the grantor in the premises therein described.” RCW 64.04.050.

The Supreme Court has confirmed that a quitclaim deed is deemed a good and sufficient conveyance of all then existing legal and equitable rights of the grantor in the described premises. *Security Sav. and Loan Ass’n v. Busch*, 84 Wn.2d 52, 56, 523 P.2d 1188 (Wash. 1974) (citing RCW 64.04.050); *McCoy v. Lowrie*, 44 Wn.2d 483, 268 P.2d 1003 (1954). The *Busch* court opined that because the grantors conveyed all of their then existing legal and equitable rights in and to the property, there was nothing left to which their legal interest – in that case, a homestead right – could continue to attach, and therefore, the right “was extinguished.” *Busch*, 84 Wn.2d at 56. Thus, under Washington law, whatever rights that Sunrise possessed as to the subject parcel were extinguished by virtue of the quit claim deed, and it has no say in how First Assembly develops its property.

Moreover, Sunrise, cannot claim that it acquired any rights or interests as to the Sunrise Parcel after the transaction, or pursuant to the

Development Agreement, because the Quit Claim Deed specifically provided as follows:

THE GRANTOR, SUNRISE DEVELOPMENT CORPORATION OF WASHINGTON, A WASHINGTON CORPORATION, as a gift only and for no consideration, conveys and Quit Claims to FIRST ASSEMBLY OF GOD, DBA DESTINY CHRISTIAN CENTER, A WASHINGTON NON-PROFIT CORPORATION, the following described real estate, situated in the County of Pierce, State of Washington, including any interest therein which grantor may hereinafter acquire.

Thus, all of Sunrise's interests as to the Sunrise Parcel, both present and future, were transferred to First Assembly and Sunrise's rights as to that parcel were legally extinguished.

E. If First Assembly Is Bound by the Development Agreement as a Successor, It Is Entitled to the Benefits of the Contract.

Even if First Assembly is bound by the Development Agreement as a successor, that means it is entitled to the benefits of the Agreement, one of which is the right to file land use applications to develop its property and to otherwise amend the Agreement.

The Examiner acknowledged that the Development Agreement provides that "Sunrise may transfer property via the conventional method of quitclaim or other deed, *but may also 'assign or transfer all or any portion'* of the respective interests, rights or obligations under" the

Development Agreement “to other parties acquiring an interest or estate in all or any portion of the property.” AR, Decision, Conclusion 3 (emphasis added). If a party such as First Assembly is a successor, it is both bound by the contract and entitled to the corresponding benefits. Those benefits include the right to modify or amend the Agreement, including any land use designations established by the contract:

The approved Sunrise Development Agreement, or any subsequent approval, including, but not limited to the land use plan elements or conditions of approval, *may be amended or modified at the request of the applicant or the applicant’s successor in interest.*

AR, Hearing Ex. 1, at 5.21 (emphasis added).⁸

1. To determine the intent behind the phrase “successor in interest” in the Development Agreement, the Court must look to the Agreement itself.

It is well settled that if the terms of an agreement taken as a whole are plain and unambiguous, the meaning should be deduced from the language of the agreement. *See, e.g., Universal/Land Const. Co. v. City of Spokane*, 49 Wn. App. 634, 637, 745 P.2d 53 (1987) (citing *Grant Cnty.*

⁸ In addition, no contract obligations as to compliance with affirmative obligations of the Sunrise Development Agreement were imposed via deed or transferred by Sunrise to First Assembly. A property owner can have rights under the contract without necessarily assuming responsibility for affirmative obligations relating to provision of infrastructure. Thus, any concerns as to unilateral amendment of the Agreement that would risk Sunrise’s obligations to provide public infrastructure is not an issue. The Examiner missed this important distinction when entering his decision.

Constructors v. E.V. Lane Corp., 77 Wn.2d 110, 121, 459 P.2d 947 (1969)). Furthermore, under the section of the Development Agreement governing the “applicable law,” the Agreement provides that the rules, regulations, official policies and specifications applicable to the Project shall be those set forth in the Agreement itself. AR, Hearing Ex. 1C, at 5.1.1.

The Agreement itself, however, does not define the phrase “successor in interest.” With regard to undefined terms, reviewing courts will generally give terms their plain, ordinary, and popular meaning. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998). The plain, ordinary and popular meaning of a successor in interest is stated succinctly in Black’s Law Dictionary as “[o]ne who follows another in ownership or control of property.” BLACK’S LAW DICTIONARY 1283 (5th ed. 1979). The legal definition adds that in order to be a successor in interest, a party must retain the same rights as the original owner. *Id.* Because the Sunrise Parcel was conveyed via a quit claim deed – which legally conveys *all* of the grantor’s right, title and interest – First Assembly followed Sunrise in ownership or control and obtained all rights such as to qualify as a successor in interest under law. *See* WASHINGTON REAL PROPERTY DESKBOOK (3d ed.) § 32.3(4); RCW 64.04.050.

The County interpreted the term “applicant” to mean an entity with a “controlling interest” in the overall development, and determined that Sunrise must therefore approve of any amendment request. AR, Hearing Ex. 1A, Letter from County. Although the County never even addressed the successor in interest issue in its staff report, the Examiner upheld its interpretation as correct. AR, Decision, Finding 4, 5D.

On the issue of whether First Assembly was a legal successor in interest, the Examiner simply concluded as follows:

Section 5.21.1 of the Development Agreement authorizes amendment or modification of the Development Agreement by “the applicant or the applicant’s successor in interest.” Such clause allows Sunrise or parties to which it assigns its interests, rights or obligations under Section 5.3.2 of the Development Agreement to amend or modify the agreement. Therefore, the Appellants are not a successor in interest.

AR, Decision, Conclusion 4.

This conclusion defies a basic tenet of property law: that a deed, upon execution, transfers one’s interest in land, and the transferee becomes a successor to the interests of the transferor. In addition, according to the Examiner, only an “assign” can amend the Development Agreement, not a successor in interest. Both propositions are incorrect. A successor can amend the contract, and First Assembly is a successor in interest.

If Sunrise wished to retain any rights as to the Sunrise Parcel – such as the ability to “assign” a successor development rights – it would have had to expressly reserve that right. In fact, evidence in the record revealed that Washington developers have recorded covenants running with properties subject to development agreements providing such limitations on successors or amendment rights. For example, the Issaquah Highlands development agreement submitted to the Examiner in a hearing exhibit specifically provides the restrictive language to do just that. AR, Hearing Ex. 3D2, at 4.

With regard to specific language in a deed, in order to place limitations on a real property estate or to make it conditional, the deed must clearly indicate such intent, either expressly or by implication. *Grove v. Payne*, 47 Wn.2d 461, 288 P.2d 242 (1955). In this case, Sunrise reserved no rights or interests, and placed no restrictions or limitations on the Sunrise Parcel. It cannot now claim that First Assembly is not a successor (or has less than the full estate) unless it says so. In upholding the County’s interpretation (which was simply the acquiescence to Sunrise’s interpretation), the Examiner and superior court erred as a matter of law.

2. Because the Development Agreement allows for Sunrise to transfer its rights and interests in all or any portion of the overall Project

(and indeed contemplates such transfers), a key issue is whether Sunrise did so as to First Assembly, such as to create a successor in interest under the contract. In its letter to Pierce County, Sunrise argued that First Assembly was not a successor in interest because it had not been specifically designated as such, and because First Assembly had not assumed all of the development obligations of the overall Master Planned Community project. The County acquiesced to this position, and the Examiner upheld it, even though the contract distinguishes between rights and obligations, successors and assigns, and allows land to be sold to third parties via deed without necessarily “all or any parties of the rights, interests of the obligations” set out in the Development Agreement. *See* AR, Hearing Ex. 1C, at Section 5.3.1 (successors) and 5.3.2 (assignment).

As set out above, the Agreement itself does not define a successor in interest and, therefore, cannot answer the question of whether Sunrise intended to create in First Assembly a successor in interest. Likewise, the County Code does not define a successor in interest, and cannot be relied upon to elucidate intent. The Supreme Court has stated that in interpreting contract language, courts may consider the surrounding circumstances as well as the subsequent conduct of the parties for the purpose of determining the parties’ intent. *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (citing RESTATEMENT (SECOND) OF CONTRACTS

§ 214(c)); *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 510 P.2d 221 (1973).

The *Berg* Court, in adopting the “Context Rule” cited *Stender* as follows:

Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

Stender, 82 Wn.2d at 254, 510 P.2d 221.

Because the circumstances surrounding the transfer of the subject property to First Assembly bears on the issue of whether a “successor in interest” was created, that transaction may be considered as a “circumstance surrounding the making of the contract” as to determining intent. The Sunrise-First Assembly transaction clearly demonstrates that Sunrise intended to transfer all rights and interests such as to create a successor in interest. Further, Sunrise’s actions after the transaction, and after execution of the Development Agreement, only buttress the conclusion of its affirmative intent.

On the last point, the Sunrise Parcel was purchased and sold based upon representations by Sunrise that First Assembly could develop

multiple religious and supporting uses on the property. The transaction involved a property trade in which the fair market value was assessed using its highest and best use, residential zoning, and status as an unencumbered and unrestricted fee. In determining intent, the amount of consideration may be helpful to a court. *Roeder Co. v. K & E Moving & Storage Co., Inc.*, 102 Wn. App. 49, 56, 4 P.3d 839 (2000). Further, the property was conveyed by quit claim deed, which transfers *all* rights and interests of the grantee. Consequently, the circumstances of Sunrise's actions leading up to the execution of the Development Agreement evinced an intent to create a successor in interest as to the Sunrise Parcel, but without affirmative obligations as to the provision of public infrastructure.

The subsequent acts and conduct of both Sunrise and the County with regard to First Assembly's rights and interests also shed light on the parties' intent as to the Development Agreement. Specifically, in 2002, after First Assembly applied for a conditional use permit to develop the Sunrise Parcel with multiple religious and supporting uses and only limited park space, the County processed the application without objection by Sunrise. *See, supra*, pp. 13-14. Given the County's interpretation in the instant case, such development would have also required an amendment to the Development Agreement and authorization from

Sunrise. No such interpretation was made. First Assembly was allowed to seek development entitlements on the property notwithstanding its designation for park uses pursuant to the Development Agreement. Both Sunrise and the County knew that Sunrise remained responsible for the overall development obligations of the Project, but neither party interpreted the application as requiring an amendment to the Agreement, or requiring specific authorization because First Assembly was not a successor or did not have a “controlling interest” in the overall development. These actions assist the court in determining what was intended by the Development Agreement.

An examination of the reasonableness of the County’s interpretation also supports a finding that First Assembly is a successor in interest under the Agreement if bound by the Agreement. It should be noted that Pierce County simply adopted Sunrise’s interpretation without independent analysis. Through its counsel, Sunrise interpreted the terms “successor in interest” as meaning only a transferee that assumes all of the development obligations of the overall master planned community. This interpretation accepted by the Examiner is patently unreasonable.

Under Sunrise’s interpretation, Sunrise could sell off all 1,467 acres without transferring its “overall” development obligations, thus resulting in no successors under the Agreement. This interpretation could

keep Sunrise controlling all future development on property in which it has no interest. In fact, under this interpretation, Sunrise could cease to exist as a corporate entity and no property owners within the Project would be entitled to amend the Agreement, regardless of circumstances. Courts will not engage in a strained or forced construction that would lead to absurd results. *See, e.g., Christal v. Farmers Ins. Co. of Washington*, 133 Wn. App. 186, 191, 135 P.3d 479 (2006); *see, infra*, pp. 40-43.

In short, when determining whether First Assembly is a successor under its terms – if indeed bound by the Agreement at all – the circumstances surrounding the Agreement, the subsequent conduct of the parties, and the reasonableness of their respective interpretations indicate that First Assembly has all rights and interests as to its property and can apply to change the zoning for its property and develop its land without Sunrise’s permission.

F. Upholding the County’s Interpretation of the Development Agreement Would Result in Absurd and Inequitable Consequences.

Under Washington law, any terms in an agreement will be given “a practical and reasonable interpretation that fulfills the object and purpose of the contract rather than a strained or forced construction that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective.” *Washington Pub. Util. Districts’ Utilities Sys. v. Public Util. Dist. No. 1*,

112 Wn.2d 1, 11, 771 P.2d 701 (1989). In so doing, courts will determine the mutual intentions of the contracting parties according to the reasonable meaning of their words and acts. *Fisher Properties v. Arden Mayfair Inc.*, 106 Wn.2d 826, 726 P.2d 8 (1986) (it was error to adopt an unreasonable interpretation of a lease to require restoration to conditions of forty years earlier); *see also Berg*, 115 Wn.2d at 668 (reasonableness of parties' respective interpretations may be appropriate factor in interpreting written contract). If, in fact, the resolution of this dispute revolves around the undefined phrase "successor in interest," the interpretation must be practical and reasonable.

When a certain provision in an agreement is subject to two possible constructions, one of which would make the contract unreasonable and imprudent, and the other would make it reasonable and just, courts will adopt the latter interpretation. *Dickson v. United States Fid. and Guar. Co.*, 77 Wn.2d 785, 790, 466 P.2d 515 (1970). The result of prohibiting all property transferees from amending land use designations set out in the Development Agreement unless they have a "controlling interest" in the overall development or were "explicitly assigned" a "portion" of those interests, would be absurd in a number of ways.

First, the fundamental attributes of property ownership includes the right to possess, to exclude others, and to dispose of property and reasonably develop property. *Guimont v. Clarke*, 121 Wn.2d 586, 595, 854 P.2d 1 (1993) (citing *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 329-30, 787 P.2d 907 (1990)). If Sunrise’s interpretation that First Assembly is “limited to park uses” is upheld, then First Assembly would be denied these fundamental rights of ownership. First Assembly could not practically “possess” a public park, could not exclude others, could not and it certainly would have difficulty disposing of property in which the owner is entitled to no rights. This interpretation would also violate another fundamental attribute of ownership – the right to make some economically viable use of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886 (1992). A regulatory decision that denies all economically viable use of a property would constitute a compensable taking. *City of Seattle v. McCoy*, 101 Wn. App. 815, 828, 4 P.3d 159 (2000). This absurd result can not be what the Agreement, the County, or the Examiner truly intended, but that is the consequence.

Second, the quit claim deed evinces the intent to release all rights and interests in real property. Neither the Examiner nor the County has the authority to interpret a deed such as to bestow rights to the seller not

bargained for, or to restrict any rights granted the purchaser in a deed. Instead, the interpretation of deeds presents mixed questions of fact and law, which involves the application of contract law principles. *Hanson Indus., Inc. v. County of Spokane*, 114 Wn. App. 523, 526, 58 P.3d 910 (2002); *Alby v. Banc One Financial*, 119 Wn. App. 513, 82 P.3d 675 (2003). A municipal government cannot be given indirect authority to modify a private deed through an administrative decision, even if under the guise of construing a development agreement.

Third, there is a distinct likelihood that no future property transferee will have a “controlling interest” in the Sunrise Master Planned Community Development. The Development Agreement contemplates “the sale and assignment of portions of the property to other persons who will own develop and/or occupy portions of the property” and Sunrise “may transfer all or any portion . . .to other parties.” AR, Hearing Ex. 1C, at 5.3.2. Under the Examiner’s decision, Sunrise could conceivably convey the entire Master Planned Community consistent with the Agreement, either all at once or parcel by parcel, and still maintain control over property in which it has no interest. In addition, in the event Sunrise went out of business or otherwise dissolved, no party would have any right of amendment. These absurd consequences are not what the parties

intended and not what the Development Agreement provides. The Examiner's decision that leads to these results must be reversed.

G. The Examiner Made Prejudicial Procedural Errors that Were Material to the Decision.

1. The Examiner Erred in Refusing to Admit and Consider Evidence Relevant to First Assembly's Status as a Successor in Interest Under the Development Agreement.

It is well settled that strict rules of evidence do not apply at administrative hearings; instead, the examiner shall admit and give probative effect to evidence which possesses probative value. *JJR Inc. v. City of Seattle*, 126 Wn.2d 1, 5, 891 P.2d 720 (1995). In this case, the Examiner refused to consider probative evidence proffered by First Assembly relevant to its status as a successor in interest and whether the Sunrise Development Agreement even applied to First Assembly.

Specifically, the Examiner found that:

The Appellants offered exhibits providing information regarding the purchase of the parcel from Sunrise. The Appellants also offered to supplement the record with letters from a real estate broker and former Sunrise consultant familiar with the Development Agreement. The Examiner has no authority to make any decisions regarding the agreement between Sunrise and the Appellant, and therefore said exhibits are not relevant to the present proceeding and will not be admitted to the record. Likewise, the letters from Carl Halson [sic] and Mike Moore offer their interpretations of the Development Agreement and are not relevant since

the Agreement speaks for itself. Therefore, said letters will not be admitted.

AR, Decision, Finding 8.

Contrary to the Examiner's finding, information regarding the purchase and sale of the subject property is of paramount relevance in this case. This evidence is not only relevant but essential to First Assembly's position on appeal in several ways. Because the transaction occurred prior to execution of the Development Agreement, the evidence would have demonstrated that the parties had no intent that First Assembly be subject to a later agreement. The evidence as to the transaction history and the conveyance of all rights and interests by quit claim deed would have also shown Sunrise's intent that First Assembly was a successor to its interest as to the subject property to the extent the Development Agreement did apply.

The Examiner also refused to consider a letter and testimony from Mr. Carl Halsan, who actually drafted the Development Agreement. Mr. Halsan was to present evidence from personal knowledge as to the parties' intent that a land owner could be a successor with rights under the Development Agreement without assuming all of the project developer's burdens. Sunrise objected to the testimony on the basis that Mr. Halsan was not a "party." A witness, however, may testify to matters of which he

has personal knowledge. *State v. Vaughn*, 101 Wn.2d 604, 611-12, 682 P.2d 878 (1984); ER 602. The burden of showing personal knowledge rests with the proponent of the testimony. *Vaughn*, 101 Wn.2d at 611. Here, the testimony was simply disallowed.

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Evidentiary rulings are reviewed for manifest abuse of discretion. *Washington Cedar & Supply Co., Inc. v. State, Dept. of Labor & Industries*, 119 Wn. App. 906, 83 P.3d 1012 (2003) (citing *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997)). This occurs when an agency applies the wrong legal standard or when it takes a view no reasonable person would take. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). The evidence proffered by First Assembly’s witnesses would certainly make asserted facts more probable.

The County Code does not limit evidence that can be presented to the Examiner. Parties appealing a decision of the Administrative Official, however, “have the burden of presenting the evidence necessary to prove to the Hearing Examiner that the Administrative Official’s decision was clearly erroneous.” PCC § 1.22.090(G). Under the circumstances, a reasonable person would allow the evidence, consider its relevance, and

assign it the appropriate weight – especially given the substantial burden on First Assembly to make its case.

The Examiner found that the Agreement speaks for itself, and therefore the evidence was not relevant. This finding is untenable in that the evidence goes to whether (a) the Agreement applies in the first place, and (b) First Assembly’s status under the contract if the Agreement applies. On the last point, because the Agreement does not define successors in interest, evidence as to intent is relevant and should have been considered at least on the question of the reasonableness of Sunrise’s offered interpretation that First Assembly was not a successor-in-interest.

The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 37, 442 P.2d 641 (1968). A ruling that would limit the interpretation of a written instrument to its four-corners merely because it seems to the Examiner to be clear and unambiguous, would either “deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.” *Id.*

In Washington, the threshold to admit relevant evidence is very low. “Even minimally relevant evidence is admissible.” *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007). Further, relevant evidence need provide only “a piece of the puzzle.” *Id.* The Examiner clearly abused his discretion and engaged in unlawful procedure. There is an abuse of discretion when a decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997). Especially considering the significant burden on First Assembly in this appeal, the determination that its evidence was irrelevant constitutes reversible error.

2. The Examiner Accorded Unreasonable Deference to the Planning Director.

When a government agency asserts a particular interpretation, it is incumbent on that agency to show that it has adopted and applied such interpretation as a matter of agency policy to be entitled to any deference. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992). The Examiner accorded substantial weight to the County’s interpretation as a matter of course citing to the appellant’s burden of proof, without considering the content of the interpretation, whether it was supported by policy, or whether the interpretation had even been advanced in the past. AR. Decision, at Conclusion 5. The evidence, however,

revealed that the interpretation was not even that of the County, but one advanced by Sunrise itself.

There is no evidence in the record that the issue had ever been raised in the past, that the County was ever asked to make an interpretation on who could amend a Development Agreement, or the meaning of a “successor in interest.” The Examiner said it best, “Sunrise asserts that it alone has that authority [to amend the Agreement]. The Pierce County administrative official agrees with Sunrise’s interpretation.” AR, Decision, Finding 6. This is not an “interpretation” by the County entitled to deference. The court in *Cowiche Canyon* recognized municipal *ad hoc* interpretations and held that they are not entitled to great weight. 118 Wn.2d at 815.

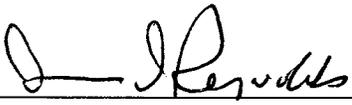
In this case, the Examiner accorded deference to and upheld the County’s interpretation that a successor in interest under a Development Agreement is *only* an entity with a controlling interest in the entire property subject to the Agreement. There was no evidence in the record of such an interpretation ever being made before, or any support in the Code for such interpretation. The County’s interpretation was simply a “by-product of current litigation.” *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007). While the County’s interpretation need not be memorialized as a formal rule, it cannot merely “bootstrap a legal

argument into the place of agency interpretation,” but must prove an established practice of enforcement. *Id.* (citing *Cowiche Canyon*, 118 Wn.2d at 815). The County “bears the burden to show its interpretation was a matter of preexisting policy.” This it has not, and indeed cannot do. The Examiner’s deference to the County was error.

VI. CONCLUSION

For the foregoing reasons, this Court should reverse the superior court’s order and the decision of the Pierce County Hearing Examiner and order the plat application and zoning amendment requests be processed by Pierce County without the requirement that Sunrise “approve or jointly apply” for such development approvals.

RESPECTFULLY SUBMITTED this 22nd day of September,
2008.

By 
Dennis D. Reynolds, WSBA #04762
Dennis D. Reynolds Law Office
200 Winslow Way West, Ste. 380
Bainbridge Island, WA 98110
(206) 780-6777 Phone
(206) 604-5739 Fax
E-Mail: dennis@ddrlaw.com

*Counsel for First Assembly of God of
Puyallup d/b/a Destiny Christian Center
and WGW Incorporated*

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd of September, 2008, I caused the original and a copy of the document to which this certificate is attached to be delivered for filing via overnight mail to:

Clerk of Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

I further certify that on this 22nd day of September, 2008, I caused a copy of the document to which this certificate is attached to be delivered to the following via overnight mail:

Jill Guernsey
Pierce County Prosecuting Attorneys Office
955 Tacoma Avenue South, #301
Tacoma, WA 98402

G. Richard Hill
McCullough Hill, P.S.
701 Fifth Avenue, Suite 7220
Seattle, WA 98104

FILED
COURT OF APPEALS
DIVISION II
08 SEP 23 AM 10:07
STATE OF WASHINGTON
BY _____
DEPUTY

Declared under penalty of perjury under the laws of the state of Washington dated at Seattle, Washington this 22nd day of September, 2008.

Christy Reynolds
Christy Reynolds