

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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No. 39687-4-II

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

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RUSS OLSON,

Appellant,

v.

PIERCE COUNTY,

Respondent.

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**OPENING BRIEF OF APPELLANT**

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## I. INTRODUCTION

This appeal involves a challenge to an administrative decision by the Pierce County Department of Planning and Land Services that turned a privately owned parcel on which Appellant Russ Olson planned to build a modest single-family home into *de facto* permanent public native growth or greenbelt status. The County did not impose this status as a project condition, a zoning or land use designation, or because of some physical characteristic of the parcel that prevented its development, but rather as the result of misguided and illegal administrative decision-making.

Olson's property, called "Tract B," was created by a preliminary plat approval and is located within the boundaries of Pilchuck View Estates. After preliminary approval, however, Tract B was removed from the plat's future development because, at that time, the plat's infrastructure could not provide access and utilities to Tract B.

To prevent potential purchasers from presuming Tract B was a buildable lot and to alert owners of lots within Pilchuck View Estates that Tract B was not commonly owned open space, a Plat Note was inserted in the Final Plat Map approved in 1994. The Note labels Tract B as "Private Reserve," and states that a "public process" must be undertaken to remove this label. Tract B met applicable zoning densities, and the developers did not need to designate it as open space to meet the standards for

preliminary plat approval. Mr. Olson purchased Tract B from Pierce County in a 2003 tax sale. Thereafter, he obtained access and utilities to serve the parcel through an adjacent plat and sought to lift the Plat Note so he could build a home on Tract B. The Pierce County Department of Planning and Land Use Services (“PALS”) advised Mr. Olsen to file a plat alteration application, and it accepted his application. But the application was short-lived, because PALS changed its position and refused to process Mr. Olson’s application or go forward with the development approval process.

PALS created the fiction that Tract B was not a “lot,” and then construed Tract B’s current undeveloped condition as a land use designation of “native growth and greenbelt” or “open space.” County Staff then determined that it was “too late” to “create” a buildable lot on Tract B by “converting” the PALS-bestowed designation to something other than “native growth and greenbelt” or “open space” because more than five years had passed since final plat approval, even though Tract B was not part of the plat. Finally, PALS contended that Tract B, which is over one acre, was subject to a 1995 area-wide change to zoning laws that resulted in one dwelling allowed per ten acres and, therefore, undevelopable.

In short, the County turned the Plat Note from a shield into a sword, misconstruing its “Private Reserve” label and the public process requirement to strike the Plat Note as a land use or development condition. PALS ignored that (1) Tract B was a legal lot, and (2) the County’s nonconforming use regulations allow a legal lot of record that is zoned for residential use to be developed without regard to future zoning changes to lot size so long as the minimum lot size standard is met, such as with Tract B.

The Pierce County Hearings Examiner and the Superior Court accepted the County’s fictions, affirming an “Alice In Wonderland” scenario that Tract B never existed and that its future development was controlled as if it were still part of Pilchuck View Estates and required to be open space or greenbelt. The Plat Note is not a development condition, however, but rather a public notice provision; to lift or strike the Plat Note would not create a new lot or convert the designation of Tract B. After all, Pierce County sold Mr. Olson the lot. Striking the Note is only about eliminating a public notice that has served its purpose now that access and utilities are available. This is a matter of a process, not site development.

Land use decisions must be based upon the actual facts and circumstances, not fictions. In addition, local laws for development of non-conforming lots are not controlled by the State Plat Law. Pierce

County erred in not considering applicable laws and applying plat laws to a lot whose future development was not part of the final plat development. A process already exists to strike the Plat Note without submitting a plat alteration, although the County is estopped from contending the plat alteration device is unavailable if this Court finds no other way to strike the Plat Note.

For these reasons, Mr. Olson comes to this Court for relief. Mr. Olson is not asking the Court to act as trier of fact. As explained in this Brief, this Court can reach a correct determination by applying the standards for granting relief provided in the Land Use Petition Act, RCW 36.70C.

## **II. ASSIGNMENTS OF ERROR**

### **A. Trial Court<sup>1</sup>**

1. The Superior Court erred in interpreting the 1993 Pilchuck View Estates preliminary plat approval as not creating a “lot” denominated “Tract B,” and Mr. Olson’s request to strike the Plat Note as seeking to create a new lot or tract. *See* Order Dismissing LUPA Petition for Review and Judgment, Ex. A, p.3.<sup>2</sup>

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<sup>1</sup> For the Court’s convenience, the Trial Court’s Order and Hearing Examiner’s Decision assigned as error are set forth verbatim in the “Appendix” to this Brief.

<sup>2</sup> The Trial Court’s Order dated August 12, 2009, Clerk’s Papers (“CP”) 223-229, is referred to throughout this Brief as “Order.”

2. The Superior Court erred in ruling that future development of Tract B could occur only as part of development of the final Plat of Pilchuck View Estates. Order, Ex. A, p.3.

3. The Superior Court erred in ruling that the five-year period prescribed in RCW 58.17.170 for vesting a final plat applied to the removal of the Plat Note designating Tract B as “Private Reserve” until it could be served by access and utilities. *Ibid.*

4. The Superior Court erred in imposing a time restriction in the 1993 preliminary plat approval for invoking a public process to remove the Plat Note where none exists.

5. The Superior Court erred in ruling that a “public review process” requirement for striking the Plat Note was a development condition subject to the five-year period established in RCW 58.17.170 for vesting final plats. Order, Ex. A, pp.3-4.

6. The Superior Court erred in applying RCW 58.17.170 to preclude future development of Tract B for one single-family home because of intervening zoning adopted in 1995 and the expiration of five years from the date of final plat approval in 1994. Order, Ex. A, pp.3-4.

7. The Superior Court erred in construing Mr. Olson’s request as seeking the conversion of a land use designation. *Ibid.*

8. The Superior Court erred in construing the 1993 preliminary plat approval as designating Tract B as a “native growth or greenbelt area” which can no longer be “changed or converted” to allow further development review before the issuance of a building permit to construct a single-family home.

9. The Superior Court erred in failing to consider or apply Pierce County’s nonconforming use regulations which allow construction of a single-family home on a legal lot or tract that does not meet current zoning density requirements.

10. The Superior Court erred in failing to reach and consider Mr. Olson’s contention that Pierce County was estopped from processing the plat alteration it directed him to file to remove the Plat Note so that he could commence the process to obtain a building permit.

11. The Superior Court erred in failing to reach and consider Mr. Olson’s constitutional arguments that the County’s decision violated his fundamental rights to develop his property.

12. The Superior Court erred in entering its Order of Dismissal and Judgment under the Land Use Petition Act which failed to reverse the Decision of the Pierce County Hearings Examiner under the standards for granting relief set forth in RCW 36.70C. 130 with respect to the rulings identified as errors in B-1 to B-16 below.

**B. Hearings Examiner.<sup>3</sup>**

1. The Examiner erred in concluding that lifting the Plat Note would be “converting” Tract B to a new use. Decision, Findings of Fact (“FOF”) Nos. 18, 25-26.<sup>4</sup>

2. The Examiner erred in concluding that lifting the Plat Note would constitute a “major change” to the Plat of Pilchuck View Estates. Decision, FOF No. 25-26.

3. The Examiner erred in applying the five-year period in RCW 58.17.170 as controlling the time to invoke the “public process” to strike the Plat Note. Decision, FOF Nos. 17-19, 21-25.

4. The Examiner erred in holding that the 1993 preliminary plat approval creating Tract B meant that future development of Tract B was controlled by the State Plat Law. Decision, FOF No. 4; No. 10; No. 27; Conclusion No. 3.

5. The Examiner erred in construing the “private reserve” category on the final plat for Tract B as an “open space” and/or a “native growth or greenbelt area” use designation. Decision, FOF Nos. 9, 17, 19-20.

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<sup>3</sup> For the sake of convenience, the “Findings, Conclusions and Decision” of the Pierce County Hearing Examiner dated February 13, 2009, Petition for Review, Ex. A (CP 3-49) is referred to throughout this Brief as “Decision.”

<sup>4</sup> While certain rulings of the Examiner are denominated “Findings,” in actuality, they are Conclusions of Law. Nonetheless, to preserve his contentions on appeal, Mr. Olson assigns error to those findings set out above because they are not supported by substantial evidence. See Argument, *infra*, pp.34-41.

6. The Examiner erred in holding that striking the Plat Note via the required public process would “convert[]” Tract B from a an “open space” and/or a “native growth or greenbelt area” use designation. FOF Nos.19, 21.

7. The Examiner erred in ruling that because five years had passed from the date of final plat approval, it was “too late” to change the “open space land use designation” for Tract B. Decision, FOF Nos. 15, 21, 26, Conclusion of Law No. 3.<sup>5</sup>

8. The Examiner erred in construing lifting the Plat Note as (a) creating or adding a “new lot” for the plat of Pilchuck View Estates or (b) creating or adding Tract B to another plat, both impermissible changes. Decision, FOF No. 26; Conclusion No. 6.

9. The Examiner erred in shifting the “burden of proof” to Mr. Olson to demonstrate that there was a process and authority to strike the Plat Note and allow the normal process to obtain a building permit for a single-family home. Decision, Conclusion No. 2.

10. After impermissibly assigning Mr. Olson the burden of proof, the Examiner further erred to the extent he held that Mr. Olson had not “met” his burden. *Ibid.*

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<sup>5</sup> In the event that the Court treats any of the Examiner’s Conclusions of Law as findings of fact, Mr. Olson assigns error to each of the Examiner’s Conclusions of Law as not supported by substantial evidence.

11. The Examiner erred in failing to consider or apply the nonconforming use regulations for Pierce County which allow development of Tract B for a single-family home, even though it does not meet current zoning densities. Decision, Conclusions No. 3, No. 5.

12. The Examiner erred in construing Mr. Olson's position as "creating" a nonconforming lot. Decision, Conclusion No. 6.

13. The Examiner erred to the extent that he held allowing development of Tract B as a nonconforming lot was prohibited because of the expiration of the five-year period set out in RCW 58.17.170. Decision, FOF No. 18; Conclusions No. 3, No. 5.

14. The Examiner erred in determining that because striking the Plat Note did not fall within a plat alteration, no "public process" was available to do so.

15. The Examiner erred to the extent that he ruled that no public process was available to lift the restriction on Tract B in the Plat Note because of the expiration of the five-year period set out in RCW 58.17.170. Decision, Conclusion No.3; FOF No. 4.

16. The Examiner erred in affirming the Department of Planning and Land Services' Administrative Decision.

### III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Is Tract B an existing tract or lot such that its future development for a single-family home cannot be construed as creating or adding a new lot to an approved plat? (Addressing Assignment of Error Nos. A-1, B-8, B-12).

2. Because Tract B was excluded from the Pilchuck View Estates final plat development because it could not, at that time, be served by the plat infrastructure, is its future development subject to any time restriction for vesting and developing a final plat? (Addressing Assignments of Error Nos. A-2, A-4, B-2).

3. Is the Plat Note providing public notice as to the status of Tract B a development condition subject to the State Plat Law? (Addressing Assignments of Error Nos. A-3, A-5, B-3, B-4, B-7).

4. Is striking a plat note that was intended to provide notice to the public that a tract was not open space but rather reserved for future private development a conversion of a land use or zoning designation? (Addressing Assignments of Error Nos. A-7, A-8, B-1, B-5, B-6).

5. Is Tract B protected against any Staff imposed time restriction to remove the Plat Note under the unappealed language of the 1993 Decision? (Addressing Assignments of Error No. A-6).

6. Does RCW 58.17.170 (or any local law) preclude development of Tract B for a single-family home since (a) it is zoned for residential use; (b) it is a legal nonconforming tract or parcel which meets current minimum lot size requirements; (c) the owner only intends to reasonably develop Tract B consistent with current environmental development requirements; and (d) local law allows development of a lot which does not meet current zoning densities? (Addressing Assignments of Error Nos. A-9, B-11, B-13).

7. Does a process exist to remove the Plat Note from the recorded final plat? (Addressing Assignments of Error Nos. B-14, B-15).

8. If a plat alteration is the only process available to remove the Plat Note on the final plat approval, is Pierce County estopped from refusing to further process Mr. Olson's plat alteration application? (Addressing Assignment of Error No. A-10).

9. As applied, does the County's Decision as a whole violate Petitioner's constitutionally protected fundamental right to reasonable development of Tract B? (Addressing Assignment of Error No. A-11).

10. Did Mr. Olson meet his burden to demonstrate relief under one or more of the standards set out in the Land Use Petition Act, RCW 36.70C.130? (Addressing Assignments of Error Nos. A-12, B-9, B-10, B-16).

#### IV. STATEMENT OF THE CASE

The genesis of the matter is a preliminary plat approval for a plat entitled "Pilchuck View Estates." Tract B is within the boundaries of Pilchuck View Estates development, although it was not part of the final plat development. It has a tax parcel number and is recognized by Pierce County as a distinct, separate tract. *See* Staff Report, Exhibits 1D and 1E. **AR 59-62; AR 65-67.**<sup>6</sup> Tract B is shown on the Assessor's Parcel Map, Ex. 4. **AR 63.** *See also*, Assessor's Property Information printout. **AR 59-62.** A oversize site plan dated November 2, 1994 likewise shows Tract B as a denominated created parcel. **AR 92-93.**

Tract B was zoned residential when it was created. *See* Sheet 2 of 3 of Pilchuck View Estates Plat. Sheet 1, Note 6, states that the lots within the subdivision have been approved by Pierce County for single-family residential use only. CP 213-218. *See also* 1993 Decision, Finding No. 10, Rural-Residential Environmental zoning, Finding No. 12, Basic Density, one dwelling unit per acre, **AR 73.** The current zoning for Tract B is Rural-10. *See* Ex.6, **AR 151**, Critical Areas Checklist for Tax Parcel 3000250250. The current Zoning Code allows single-family detached housing as a permitted outright use in R-10. *See* Zoning Matrix,

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<sup>6</sup> "AR" refers to the Administrative Record. "TR" refers to the Transcript of Proceedings before the Hearing Examiner.

Gig Harbor subarea, attached in the Appendix.<sup>7</sup> There is no zoning category called “Open Space” or “Greenbelt.”

Tract B is relatively flat in its middle, and the home proposed by Mr. Olson would be located in that area. **AR 188**. This is the only area on Tract B that will be developed. *See* Olson testimony, **TR 56: 18-24**. A geotechnical report prepared at Mr. Olson’s expense concluded that Tract B can be developed in accordance with County requirements applicable to steep slopes. *See* geotechnical report, **AR 165-168**. No active landslide or erosion areas were observed at the site, according to the retained consultant. **AR 160**. Also, site conditions and site soils are not susceptible to liquefaction and the location of the proposed home is stable. **AR 166**. A slope stability analysis concluded that erosion controls should be implemented, which Petitioner Olson will do. *See* Olson correspondence, **AR 188, ¶ 3**. With imposition of these controls, the site can be developed with a single-family home with no adverse impacts to the environment and no adverse impacts to the existing developed lots within the subdivision. *See* geotechnical report, **AR 164-165**.

**A. The 1993 Preliminary Plat Approval.**

Pilchuck View Estates on Fox Island received preliminary subdivision approval on November 19, 1993. *See* Staff Report, Exhibit IF,

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<sup>7</sup> The Court can take judicial notice of the Matrix.

Report and Decision of the Hearing Examiner for Site Plan Review, SPR 7-92, Pilchuck View Estates, dated November 19, 1993. The 1993 Decision alludes to an application to subdivide a “preexisting” 23.6 acre parcel into 23 single-family lots. **AR 70.** However, the Staff Report, at p.3, states that the site plan review was to subdivide an approximately 25 acre<sup>8</sup> plus parcel into 23 single-family residential lots “and two tracts” (Tract A and Tract B). **AR 26.** The Examiner left these two parcels as included within the preliminary plat, so the site plan approval is for a 25.93 acre site with 23 platted lots plus Tracts A and B. **AR 74.**

Tract B was capable of being approved as a building site in 1993 because it met zoning density requirements but was not a “buildable lot” at the time due to its location on the side of a steep slope which did not allow for access or water service as the plat was proposed. **AR 260-61.** Thus, Tract B and one other tract (Tract A) located within the boundaries of the original parcel were intentionally excluded from the building lot approval process due to access and utility constraints that resulted from the proposed lot and street layout.

Pierce County Staff, by and through the Pierce County Prosecuting Attorney representing the Department of Planning and Land Use Services during the 1993 proceedings, suggested both tracts be designated

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<sup>8</sup> An acre is 43,356 square feet. On the approved oversize site plan, **AR 92-93**, each of the 23 lots are shown as over one acre. Tract B and Tract A are well over an acre.

*temporary* open space subject to later development. **AR 70.** The attorney for the proponent did not care how the tracts were labeled, but wanted the record clear that the tracts were not *required* open space for plat approval. He also wanted a note on the final plat stating that the two tracts were subject to future development. Ex.1F, Quinn testimony, **AR 71.**

As a result of extensive testimony and discussion by both PALS and the applicant, Tract B and Tract A were created as two new tracts (but not numbered plat lots) and thereafter each was given a tax lot identification number. **AR 260-61.** Future development of these two lots was then taken out of the plat development process:

(IV) The Applicant has voluntarily separated Tracts A and B from the balance of the plat. The plat layout, the other limitations of those Tracts, and the absence of access or utilities to serve the Tracts may not be the basis or justification for further approval of Tracts A and B as building sites.

1993 Decision, Conclusion No. 4.A(IV), **AR 75.**

The Hearings Examiner addressed the ability of Tract B to be developed in the future. The Examiner conditioned the 1993 approval of the Pilchuck View Estates Subdivision that any future development of Tract B must follow the notice and public hearing procedures required by the plat amendment process. The Examiner went on to state in Condition 4A that Tracts A and B were *not* required open space; the *current* use of

Tracts A and B were native growth areas or greenbelt areas; *future development* of either tract must follow the prescribed notice and hearing process; and the “status” of Tract B shall be shown on the face of the Final Plat to avoid third party purchasers expectations that Tract B was an approved building site or common open space. **AR 74.** No time period was set to remove the Plat Note for Tract B.

**B. Final Plat Approval.**

On November 2, 1994, the Pierce County Examiner approved the final plat of Pilchuck View Estates. *See* Staff Report, **AR 26.** The plat was recorded in 1994 under Auditor File Number AFN #9411020490. **AR 82-90.** The status of Tract B was described via a note on the recorded final plat, labeling it as “Reserved Area Private Ownership.”<sup>9</sup> **AR 94; TR 14: 14-20; AR 41.**

Note 5 of the Plat, under “General Notes,” contains normal language for Gig Harbor area plat development at the time, stating “Tracts shall be developed in accordance with the development regulations for Gig Harbor and applicable state law.”<sup>10</sup> **AR 75.** However, added is an atypical sentence which reads: “Prior to the development of Tract A and B see Condition 4(A) of the Office of Hearing Examiner of Pierce County

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<sup>9</sup> There has never been a zoning designation for “Private Reserve.”

<sup>10</sup> The State law reference is intended to refer to the Growth Management Act, RCW 36.70C, and development regulations enacted pursuant to GMA authority.

Report and Decision dated November 19, 1993.” **AR 132; TR 14: 14-20.**

This condition is the “public process” requirement to remove the “private reserve” label set out in the Plat Note.

**C. The 1995 Down-Zone.**

On July 11, 1995, the Pilchuck View Estates subdivision and surrounding area were down-zoned from one dwelling unit per acre (applicable at the time of the 1993 approval) density to one dwelling unit per 10 acres. The minimum lot size was kept at one acre, which Tract B meets. *See* Decision, **AR 10, Finding No. 12; TR 10: 21-25, 11: 1-2.** At the time the down-zone became effective Tract B had been issued a tax parcel identification number, was privately owned, and was undeveloped but subject to future development upon provision of access and utilities. *See* Staff Report, Ex. 1F, Conclusion 4A(II), **AR 74.**

**D. The Olson Purchase, Administrative Decision and Appeal to Examiner.**

Russell Olson purchased Tract B on December 22, 2003. *See* Staff Report, Ex. 1D, **AR 62.** Mr. Olson was aware that Tract B had not been designated a “building site” and was further aware of the public process requirement specified in the 1993 decision. **TR 44: 9-25; TR 45: 1-4.**

In 2007 Mr. Olson began the process for attaining a building permit by contacting PALS. **TR 47: 22-25; TR 48.** Pierce County

Planning expressly informed Mr. Olson (through his agent) that he could begin the process via submittal of a “plat alteration” and accepted Mr. Olson’s fee of \$900 dollars. *See* Decision, **AR 4-5**. *See also* **AR 190-91; TR 50: 10-25; TR 29: 8-10**. Thereafter, stating that Pierce County made a “mistake,” PALS returned Mr. Olson’s plat alteration application. **AR 4, AR 17 ¶ 4**. According to Staff, due to the intervening down-zone, there was no way Tract B could be “converted” to a building site.

Mr. Olson timely appealed the PALS Administrative Decision to the Office of Hearings Examiner. **AR 40**. The Examiner convened a public hearing on his appeal on November 13, 2008. **AR 3**. The County’s notice of hearing was sent to adjoining property owners and generally noticed to the public. The Examiner allowed members of the public to make comments without objection by Mr. Olson consistent with the public process set out in the 1993 preliminary plat approval for lifting the building restriction on Tract B. The citizens who testified largely expressed concerns as to soil and land erosion if Tract B were developed. *See* Derby testimony, **TR 64-65** and Carson testimony, **TR 67-68**.

Pierce County’s position at hearing was presented through Senior Planner Mojgan Carlson. *See* Decision, **AR 3**. Ms. Carlson contended that upon recording of a final plat, there is no major amendment procedure available to change a Plat Note. *See* Carlson testimony, **TR 17, lines 10-**

12. Since Tract B did not meet current density requirements, according to Ms. Carlson, Tract B must forever remain unbuildable and available only for open space use because the five year “vesting period” for final plat approval set out in the State law had expired. **TR 20, line 9.** Staff saw lifting the restriction on Tract B as somehow creating a new lot within the plat. **TR 21: 4-7.**

Carl Halsan, a former employee of the Pierce County Department of Planning and Land Services, testified that Tract B was a Legal Lot or Legal Tract because it met all requirements of the applicable zone at the time of its creation, and thus, could be built out under County Code provisions applicable to legal non-conforming lots because it met the current minimum lot size requirement. *See* Halsan testimony, **TR 29: 18-25; TR 30: 1-8.** Mr. Halsan further testified that Mr. Olson was not creating a new lot, as Tract B is already a lot or tract within the plat; he was simply seeking to eliminate a public notice provision set out in a note on the final plat. **TR 32: 12-18.**

Mr. Halsan also testified that a plat alteration would cover the entire plat, yet nothing on the plat itself needs altering. **TR 31, line 25.** Mr. Halsan advised the Examiner what is required is probably not a plat alteration. **TR 28: 15-18.** Mr. Halsan testified that based upon his experience with County regulations in effect in 1993, a site plan

amendment was available to strike the Plat Note. **TR 30, line 23; TR 30: 9-13.** Mr. Halsan further testified that there “must be a process” available because there was no intent in the 1993 Examiner’s decision to keep Tract B forever unbuildable once access and utilities were obtained because of want of a process. **TR 28, lines 15-18.** Mr. Halsan pointed out that there was no time restriction set out in the 1993 Examiner’s decision to commence the public process to lift the restriction on Tract B. **AR 220.**

**E. Examiner’s Decision.**

On February 13, 2009 the Pierce County Hearing Examiner upheld PALS decision that Tract B cannot be developed under any circumstances. *See* Decision, **AR 17, ¶ 5; AR 18.** The Examiner saw lifting the Plat Note as either creating a new lot or “converting” a land use designation. Decision, **AR 17, ¶ 5.** The Decision held that the intervening 1995 downzone from one dwelling unit per acre to one dwelling unit per 10 acres and the expiration of five years from final plat approval precluded any development of Tract B applying RCW 58.17.170. **AR 17.**

**F. Land Use Petition Act Appeal to Superior Court.**

On March 3, 2009, Mr. Olson filed a Land Use Petition Act appeal in the Pierce County Superior Court to challenge the Hearing Examiner’s decision. **CP 3-49.** Judge Lee issued her letter opinion on the merits of the case on July 28, 2009 (**CP 219-222**) and her final order on August 12, 2009

(CP 223-229). The Superior Court found that Mr. Olson had not met his burden of proof for relief under the Land Use Petition Act, ruling that Tract B was not a “created lot,” but if it was, its future development was controlled by the State Plat Law. CP 219-222. The lower court construed the status of Tract B as “native growth or greenbelt area,” and a change in that status would be “illegally converting” the lot to a new use precluded because of expiration of the five year period set out in RCW 58.17.170. The trial judge also ruled that the zoning promulgated in 1995 precluded development of the lot because it could no longer meet current zoning density standards. CP 219-222. The Superior Court did not reach or rule on Appellant’s estoppel, process or constitutional assignments of error although those were briefed and presented. Mr. Olson filed this appeal to Division II of the Court of Appeals on August 31, 2009. CP 230-240.

## 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). In this case, the Court reviews the decision of the Hearing Examiner which, functioning as an appellate body, had the County’s highest level of decision making authority.

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).

Two of those standards are primarily applicable here:

- (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; [and]
- (d) The land use decision is a clearly erroneous application of the law to the facts[.]

RCW 36.70C.130(1)(b)&(d).

Standards (b) and (d) present questions of law that this Court reviews de novo. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003).<sup>11</sup> 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, a court determines whether it is left with a definite and firm conviction that a mistake has been committed. *Id.*

To the extent the Examiner entered outcome determinative Findings, which does not appear to be the case, Mr. Olson requests relief under RCW 36.70C.130(1)(c). Mr. Olson's procedural contentions

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<sup>11</sup> Statutory construction is also a question of law that courts review de novo, *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001), and courts interpret local ordinances the same as statutes. *State v. Villarreal*, 97 Wn. App. 636, 641-42, 984 P.2d 1064 (1999). "[L]and-use ordinances must be strictly construed in favor of the landowner." *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007).

(failure to consider and apply applicable law and misallocation of the burden of proof) fall within RCW 36.70C.130(1)(a). His constitutional arguments fall within RCW 36.70C.130(1)(f).

The Land Use Petition Act provides that in the context of the error in law standard for relief, a court may give a local jurisdiction “such deference as is due the construction of a law by a local government with expertise.” RCW 36.70C.130(1)(b). In general, courts are to give deference to the past interpretation of a rule by those charged with enforcing it. *See, e.g., Mall, Inc. v. Seattle*, 108 Wn.2d 369 (1987). However, LUPA does not mandate deference unless it is “due.” Here, none is due. For one, Pierce County did not interpret its own ordinances to preclude relief to Mr. Olson. Two, no deference is due to a land use decision such as is before this Court that fails to consider all required provisions of local ordinances. *Griffin v. Thurston County Bd. of Health*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008) (citations omitted); *See also Puyallup v. Pac. Northwest Bell Tel. Co.*, 98 Wn.2d 443, 454, 656 P.2d 1035 (1982). Three, no deference is due when the County has made so many obvious mistakes, misinterpretations and misstatements of fact, as in this matter. The weight given an administrative policy depends upon the thoroughness evidenced in its consideration, the validity of its reasoning, and all those factors that give it power to persuade, if lacking power to

control. *White v. Salvation Army*, 118 Wn. App. 272, 277, 75 P.3d 990 (2003). Four, no deference is accorded a decision that is wrong. *Id.* Five, the County made no record to justify deference.<sup>12</sup> Six, essentially, this entire matter is not based upon discretion but the legal argument of the County's assigned attorney. No deference is accorded legal argument. *See* n.12, *infra*.

**B. Striking the Plat Note, Which Simply Provides Public Notice of Tract B's Status, Would Not Create a New Lot or a Change in Use.**

Mr. Olson asks that his appeal be answered for what it is, rather than what it is not. He neither seeks to create a new lot nor to convert or change the assigned zoning or any official land use designation for Tract B, only to strike the "private reserve label." This label is not a mandated open space or native vegetation/greenbelt designation. It served only as notice to the public of a holding category until access and utilities were obtained. Thus, there is no "conversion" in use or change in use

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<sup>12</sup> When a government agency asserts an 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). While the construction does not have to 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.* The municipal government "bears the burden to show its interpretation was a matter of preexisting policy." *Id.* (emphasis supplied); *see also, Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007). While the County may claim deference, it laid no foundation through testimony that the interpretations made on Mr. Olson's application are long-standing and part of a pattern of past application of the law. Indeed, Staff conceded the Olson situation was "unique." TR 18: 21-25; 19: 1-2.

before this Court. To make these contentions, the County engaged in outright misrepresentation both to the Examiner and the Superior Court.

In 1993, Pilchuck View Estates was created and approved by Pierce County with express provision for the future development of Tract B. **AR 92-93**. Because Tract B was not part of the original 23 platted lots served by plat infrastructures, but met density and lot size requirements at the time, the Hearing Examiner created the parcel, placed conditions for its future development and allowed the developer to then exclude the parcel from the “plat layout.” 1993 Decision, Conclusion No. 4, **AR 74**. The County conceded this in its Response Brief to the Superior Court, p.5: 16-17, p.11: 5-6, **CP 107-194**. The Superior Court ruling that Tract B is not a lot or tract and that Mr. Olson seeks to create a new lot thus has no merit and is an erroneous application of the law to the facts.

Tract B also was not designated “open space” or “native growth / greenbelt,” so a conversion of use is not before the Court. In 1993, the Examiner observed that the only use of Tract B *at the time* would be private open space because it did not have utilities or water needed to allow residential development but the parcel itself is zoned for single-family use which was its intended purpose in 1993. To elevate this observation (a mere reflection of physical reality or present condition) to an official land

use designation of “open space” is impermissible and inconsistent with the 1993 Decision, the related course of proceeding and the record.

The Plat Note which Mr. Olson seeks to strike describes Tract B as “reserved area private ownership.” At the time of plat approval, as the record demonstrates, the overall subdivision provided adequate lot sizes and screening buffers such that the developer did not need the undeveloped area comprising Tract B to be considered “open space” in order to gain the proposed density. **TR 20: 7-9.** Therefore, this matter has nothing to do with “conversion of use,” because there is no official open space designation. According to the record, “Private Reserve” was meant to convey that the parcel was not intended for public or common use and that it was reserved for future private residential use although not immediately developable due to the lack of utilities and access.

There is also no change in zoning. The preliminary plat approval is for residential use. Mr. Olson is not proposing to change the use. Rather, what is before the Court is development of a nonconforming lot which does not meet current zoning densities. The County engaged in an outright misrepresentation before the Examiner and the Superior Court, when suggesting that Tract B is officially designated or zoned “open space.” There is no such designation for Tract B. The final plat labels Tract B as a “private reserve area.” This label has no special meaning

under the Pierce County Code and certainly does not constitute a zoning classification. The “Private Reserve” label was a deliberate way to allow future development of Tract B and it is a perversion to turn the Plat Note into a prohibition.

**C. Future Development of Tract B is Controlled by Pierce County Regulations for Development of a Non-Conforming Lot and it Was Error to Ignore These Laws.**

By precluding the development of Tract B, Pierce County wrongfully dismissed its own procedure for avoiding a regulatory taking by allowing reasonable development as set out in the plain language of the unappealed 1993 Decision and its laws for non-conforming tracts. The Superior Court’s affirmance of the land use decision violates RCW 36.70C.130(1)(a), since the County and the lower court must consider and apply all applicable law. The error was not harmless for the following reason.

The Pierce County Code allows development of legal lots of record for a single-family dwelling “which cannot satisfy the density requirements of the zone where the lot was legally created prior to the effective date of this Title.”<sup>13</sup> PCC § 18A.35.020. Under the language,

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<sup>13</sup> The following definitions apply: “Parcel’ is defined as “any portion, piece or division of land, fractional part of subdivision of block, according to plat or survey; portion of platted territory measured and set for individual and private use and occupancy.” “Lot’ means a designated parcel, tract, or area of land established by plat, subdivision, or as

the Pierce County Development Regulations, PCC §18A.35.020, allow development of lots of record which cannot satisfy the density requirements of the zone where the lot was legally created prior to the effective date of the new zoning change. Thus, the County's interpretation that the new zoning precludes any residential use of Tract B is off-base and must be rejected because Tract B meets minimum lot size requirements and was legally created.

**D. The County's Determination that Tract B Could Be Developed Only Under the Zoning Designations that Existed in 1993 is an Erroneous Interpretation and/or Clearly Erroneous Application of the Law to the Facts.**

Because of Tract B's unique status, the 1993 Examiner mandated a plat note be filed alerting the public that Tract B was not immediately deemed developable (as were the 23 numbered platted lots) because it had not yet gone through the required review "...pertaining to development, or critical area, geotechnical consideration or the like" (Condition 4.A(II)). All this did was set over the development review process required by the Pierce County Code and the Growth Management Act, RCW 36.70A, not

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otherwise permitted by law, to be used, developed, or built upon as a unit. . . . 'Lot of record' means a platted or unplatted lot . . . . 'Nonconforming lot' means a lot which does not meet the design or density requirements of the zone classification in which it is located. A nonconforming lot is a lot that was legal when brought into existence or was made nonconforming by an acquisition of land in the public interest." PCC § 18.25.030, Definitions. Tract B is a "lot" as defined by RCW 58.17.020(9), which includes "tracts or parcels" as "lots." Tract B is a lot because it is labeled a "tract" on the approved preliminary and final plat.

preclude it forever as the Superior Court ruled. Mr. Olson has been waiting to commence this review process.

According to the Examiner and the Superior Court, “RCW 58.17.170 requires that newly created building lots comply with applicable R-10 zoning classifications that require a minimum lot size of ten acres.” *See* Decision, **AR 11**, **AR 17**. However, Tract B is not proposed to be newly created, because it was established in 1993. Thus, the reference to the State Plat Law is inapposite and not on point.

PALS, the Examiner and the Superior Court simply assumed that the zoning controls enacted in 1995 would apply to Tract B. This is not, however, what the 1993 Decision or the final plat approval state. Under “general notes,” the Final Plat states “tracts should be developed in accordance with development regulations from Gig Harbor and state law (the Growth Management Act) ....” **AR 132**. The Plat Note, and the language of the 1993 Decision, did not state that this means anything other than the zoning in effect in 1993 at the time of the preliminary plat application. This would preclude applying zoning adopted in 1995. While not in effect in 1995, the current version of the Pierce County Code specifies that a plat or site plan approval “... shall be vested for the specific use **[and]** density ... that is identified in the permit approval.”

PCC § 18.160.060(G). There is no time limit on the vesting provision set out in this local law for use and density.

If not vested against the 1995 zoning, however, Mr. Olson's situation presents as a typical one where growth eventually reaches a legal nonconforming lot so that it can be economically developed. The fact that Tract B is surrounded by a plat and was created through a preliminary plat process is simply backdrop, since its future development was removed from the final plat approval process. Its status is most similar to any parcel of land which happens to be adjacent to an approved plat development.

RCW 58.17.170 addresses vested development rights for created platted or buildable lots within an approved subdivision.<sup>14</sup> Under the statute, an approved plat is immune from zoning changes for a period of five years from the date of filing the plat. *Tekoa Construction, Inc. v. City of Seattle*, 56 Wn. App 28, 781 P.2d 1324 (1989) *review denied*, 114 Wn.2d 1005, 788 P.2d 1079 (1990). Here the situation is the same except that Tract B was not part of the plat built out.

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<sup>14</sup> RCW 58.17.170 states that "any lots in a final plat filed for record shall be a valid land use notwithstanding any change in zoning laws for a period of five years from the date of filing." This law goes on to state that a subdivision "shall be governed by the terms of approval of the final plat, and the statutes, ordinances and regulations in effect at the time of approval under RCW 58.17.150(1) and (3) for a period of five years after final plat approval unless a legislative body finds that a changing condition creates a serious threat to the public health or safety in the subdivision." Mr. Olson does not have a dispute with what this law says, but with its erroneous interpretation and application by the Examiner which the Superior Court affirmed. The State Plat Law imposes no prohibition on building out a lot that becomes nonconforming. Neither does local law.

The five year time-frame under RCW 58.17.070 applies to existing platted lots, but Tract B was specifically excluded from the plat approval in 1993 and so is not subject to the body of law that has grown up around plats and subdivisions, RCW 58.17 included. The policy behind RCW 58.17.170 is to allow a reasonable amount of time to develop lots within a plat under the conditions of the approval. That policy has no application here, however, nor does RCW Chapter 58.17, since Tract B is not part of the 23 platted lots, is not served by the plat infrastructure, and its future development was not tied into the approved “plat layout.”

As a result of the 1995 down-zone, at most, Tract B became a non-conforming parcel that was intended and expected to be developed at a later date regardless of the current zoning. Mr. Olson only seeks development of Tract B as a non-conforming lot under the current development regulations as originally intended by both parties, Mr. Olson’s predecessor-in-interest, the plat developer, and Pierce County. Current law allows build out under the zoning density at the time of preliminary plat approval. *See* PCC § 18.160.060(G).

The Examiner erroneously held that

Accepting Appellant’s position would adversely impact comprehensive planning under GMA, especially in rural areas. Allowing conversion of tracts in overly dense subdivisions into substandard lots would create numerous

non-conforming lots and subdivisions throughout rural areas where counties do not provide services.

Conclusion Nos. 5 and 6; **AR 17**.

There is no “conversion” of tracts into substandard lots or creation of such lots. Tract B is already a legal lot of record or tract. The Examiner is required to base his decision on the actual facts, not speculation, and the Code as written, but failed to do so. Conclusion 5 is pure speculation on the part of the Examiner not supported by substantial evidence, outside of his authority, and is in error. Nonetheless, the County Code allows the owner of a legal non-conforming lot to build a single-family home even if a lot does not meet current zoning density requirements.

**E. A Process Exists to Strike the Plat Note.**

The 1993 Decision alludes to both a plat amendment and amendment to the approved site plan as the “public process” required to lift the restriction on Tract B. **AR 41**. At the time of plat approval, Pierce County had no plat alteration or plat amendment regulations. **TR 30: 23-25; TR 31: 1-5** (Halsan Testimony). The Gig Harbor Development Regulations did contain a process for site plan amendment, PCC § 18.50.915. (*See Appendix*). **TR 31: 6-12**. The Code section provided that the Department can approve a minor amendment, but the Examiner must approve significant or major amendments to an existing

site plan. **TR 31: 13-19.** It would appear that the Examiner in 1993 had in mind a site amendment since imposing a useless act or compliance with an unavailable remedy cannot be presumed.

The County below claimed that no process exists to alter the face of the plat because the Gig Harbor Development regulations which allow site plan amendments were rescinded. The Examiner agreed, misassigning the “burden” to Mr. Olson to demonstrate a process was available. Mr. Olson has no “burden” to make local officials read and apply all provisions of the Pierce County Code. However, Mr. Olson did demonstrate that at least two processes were available: (1) a site plan amendment, and (2) a plat alteration. *See pp.19-20, infra* (summary of Halsan testimony).

There are more options. The current version of the Pierce County Code allows for “minor amendments” as an accepted land use application. *See* PCC § 18.80.020 (Public Notice Matrix). This matrix and the related Code provisions (PCC Chapter 18.80) provide for public review and comment, and thus, adherence to them would be in compliance with the mandated “public process” to strike the Plat Note.

Other provisions of the Pierce County Code allow changes to land use approvals, to the extent striking the Plat Note is perceived as a revision. PCC § 18.140.060 provides express authority that allows the

Hearing Examiner to modify any permit or approval which was issued pursuant to his review. This section of the Pierce County Code includes subdivisions (PCC § 18.25.020). It sets out specific requirements such as a public hearing, and notice provisions in the same manner that was required by the 1993 decision regarding the future development of Tract B. Under this code provision, the Hearing Examiner had the authority to modify the 1993 Decision to strike the Plat Note, thus paving the way for Tract B to qualify for development approval.

**F. Although the Findings are Not Outcome Determinative, the Hearing Examiner's Ruling that Tract B Cannot be Developed Under Any Circumstances is Not Supported by Substantial Evidence and Is Also Legal Error.**

The Examiner entered findings which in actuality are conclusions of law. Legal Interpretations are not evidence. *Ball v. Smith*, 87 Wn.2d 717, 724-25, 556 P.2d 936 (1976). Mr. Olson assigned error in his Petition for Review to each of the Examiners' "findings" to the extent they establish outcome determinative facts, which is not the case, to protect his position on appeal. **CP 3-49.**

The Examiner wrongfully held that Mr. Olson was trying to create a new lot within the plat of Pilchuck View Estates. Finding No. 26, **AR 16.** All of the evidence shows that Tract B is existing and a new lot is not being created nor was such proposed. Tract B was created by the

preliminary plat approval for Pilchuck View Estates when the Examiner specifically determined to include the tract in the approved plat. It is true that Tract B is not one of the 23 numbered platted lots and its future development was taken out of the “plat layout,” but it was created out of the 25 acre plus parcel. It has a stand-alone separate legal description. It is shown as a tract on the County Assessor’s system. A deed was issued by the Assessor to Mr. Olson for the parcel. **AR 65-66**. The approved site plan shows Tract B. **AR 92-93**. The Staff testimony was only that Tract B was not one of the numbered platted lots and a tax parcel number “doesn’t mean that we have a legal lot.” **TR 19: 3-22**. Mr. Halsan’s un rebutted testimony was that Tract B was created in 1993 by the plat approval and was a legal lot of record.

Finding Nos. 4, 15, 17-19, 21-25, and 26-27 erroneously hold that striking the Plat Note is subject to the State Plat Law. **AR 7**. These Findings are properly construed as Conclusions, but they are in error. Local regulations control development of a non-conforming lot or tract and elimination of the Plat Note can be accomplished through a site plan amendment or other process. No time restriction on amendments to an approved site plan is found in local regulations or in the 1993 Decision, a point conceded by Staff. **TR 17: 13-16**. The County conceded that by imposing a restriction, it is amending the 1993 Decision even though it is

final. **TR 17: 17-25; 18: 1-13.** Under the doctrine of finality, the County is precluded from amending the 1993 Decision, explicitly or by implication, but it was not appealed. *See, e.g., Samuel's Furniture Inc. v. Dept. of Ecology*, 147 Wn.2d 440, 458, 54 P.3d 1194 (2002).

Striking the Plat Note is not a “major change” to the Pilchuck View Estates plat, as the Examiner erroneously “found” in Finding Nos. 25-26. The Plat of Pilchuck Estates remains as approved, including its road layout and lots and overall size, if the Plat Note is stricken.

Finding No. 9 states in part: “Neither County staff, the PAC, nor the public considered Tracts A and B for any use other than open space.” **AR 8.** To the same effect is Finding Nos. 17, and 19-20. There is no substantial evidence to support these Findings – it is pure speculation. In fact, Tract B was intended for future residential development.

Finding No. 9 further states in part that, “At the time of preliminary and final plat approval, Tract B had to remain an open space.” **AR 8.** This portion of Finding No. 9 is not supported by substantial evidence, implying a land designation when the intent was to place Tract B in a holding category. At the time of preliminary and final plat approval, no open space designation was required for preliminary plat approval and the assigned status was interim. The tract remained privately owned and was not available for open space use by members of the public.

Finding No. 10 states in part:

It appears that the plat proponent attempted to exclude portions of the plat parcel from the subdivision area and keep them under its ownership. However, the condition required the plat proponent to maintain Tracts A and B as part of the plat parcel.

**AR 8.** This Finding is not supported by substantial evidence. Tract B was created by the plat approval with no objection by the proponent/developer and then explicitly excluded from the plat layout. *See* Staff Report, Ex.1F, **AR 70, ¶ 6.**

Finding Nos. 18, 25-26, 19-21 (and derivatively, Finding No. 17) imply that Mr. Olson is creating a new lot by “converting” the use of Tract B. These Findings are legal interpretations or rulings, but are not supported by substantial evidence. Tract B was zoned for residential development but its build out was deferred until access and utilities were secured. In other words, its assigned status was temporary. **TR 28: 16-17.** The parcel was created in 1993. Thus, Mr. Olson is “not adding a lot.” **TR 33: 4-15.**

Finding No. 20 (**AR 13**) states that Tract B was only useable for open space. As set out above, the tract was not designated for open space and its interim use was for “native growth or greenbelt areas” until utilities and access were available. Tract B’s status at the time of plat approval was simply a circumstance, not a limitation or lack of entitlement.

Finding No. 21 states in part that, “RCW 58.17.170 prohibits appellant from changing Tract B’s primary use from open space to a building site.” **AR 13.** Finding No. 22 erroneously applies this law to convening the public process to strike the Plat Note. Neither “Finding” is supported by substantial evidence, as open space is not Tract B’s “primary use.” The parcel was created for residential use. Convening a public process is not a development condition or requirement.

Finding No. 25 states, in part:

Said condition requires a major amendment to the approved site plan to change the use of the tracts. A major amendment requires public notice and a public hearing. The decision approving the preliminary plat never considered Tracts A and B as building lots and did not approve them as building lots. Said condition also restricted the tracts use to native growth or greenbelt areas. Neither the original plat proponent nor the Appellant submitted an application to change the use of the tracts either between preliminary and final plat approval of *[sic]* within five years subsequent to final plat approval. Thus, in accordance with RCW 58.17.170 as interpreted by Noble Manor, supra., Appellant may not now convert Tract B from a “native growth or greenbelt areas” into a building site.

**AR 15.**

Finding No. 25 is, once again, a legal determination rather than a Finding. It misconstrues the intent of the 1993 Decision and is not supported by substantial evidence. Petitioner also challenges Finding No. 25 to the extent it holds that the hearing convened on Mr. Olson’s

appeal of the County's May 12, 2008 administrative decision, at which the public was allowed to testify, is somehow not full compliance with the public process set out in the 1993 Decision for lifting the restriction on Tract B. There is no "conversion" of Tract B to a building site from a native growth or greenbelt status. The uncontroverted evidence is that the lot is presently undeveloped, because of the historic lack of utilities and access, but was always intended for and approved for development as a residential use.

Finding No. 26 states in part:

Furthermore, conversion of Tract B requires a substantial change to the approved preliminary and final plat. The deputy hearing examiner recognized the significance of the change by requiring a major amendment to the approved site plan to include public notice and a public hearing. Major changes included the potential addition of two lots to a previously approved 23 lot preliminary/final plat and for Tract B to gain access from a road other than the internal plat road which provides access for all other plat lots. Tract B would also receive water service from other than the plat system and would essentially become part of the tract to the south.

**AR 16.**

Finding No. 26 is not supported by substantial evidence. There is no addition of "new lots" or the "addition" of Tract B to another plat. Nor is there a "substantial change" to the approved preliminary or final plat since Tract B was removed from the plat development. No change is requested or

will be made to any lot, its dimension or location, and access and utilities remain unchanged. The only “change” is elimination of a fragment of language contained in a final Plat Note to provide notice to the public. It is of no importance where the water service is acquired. The hearing on Mr. Olson’s appeal complied with the public process to lift the restriction.

Finding No. 27 states:

Appellant argues that the doctrine of finality allows development of the lot since nothing in the 1993 decision prohibits its development in the future. However, a hearing examiner’s conditions of approval cannot overrule provisions of the State Subdivision Act and adoption of new development regulations. The legislature has determined that the possibility of converting Tract B to a building lot expired upon adoption of new development regulations or the expiration of five years following final plat approval, whichever later occurs. In the present case, Pierce County adopted new development regulations increasing lot sizes in the R10 classification to a minimum of ten acres one year following final plat approval. RCW 58.17.170 allowed an additional four years for the conversion of Tract B into a building site. Appellant cannot now convert Tract B from a “native growth or greenbelt areas” to a building lot of substandard size.

**AR 16.**

Finding No. 27, once again, is not a true finding. Nonetheless, it is not supported by substantial evidence and impermissibly inserts a time restriction into the 1993 plat decision in violation of the doctrine of finality. The Examiner was not asked to overrule any current development regulations.

**G. If a Plat Alteration is Required, the PALS is Estopped from Asserting That the Plat Alteration Cannot be Processed.**

Mr. Halsan's appeal on behalf of Mr. Olson sets out the basis for equitable estoppel. Specifically:

On September 26, 2007 the agent for the appellant asked planning via email (copy attached) the following:

*I need to get something in writing from you on this pre-filing we did on 9/4/07 please. Before we make any decision about moving forward, we need some "official" Planning position on the matter. It can be email if that's all you have time for. We are particularly interested in process (who signs) and burden we'll have to meet given HE Decision from 1993 and the current alteration provisions of 18F.*

On September 27, 2007 planner replied via email (attached):

*Hi; as I mentioned to you last week, I talked to Jill (Jill Guernsey, Deputy Prosecuting Attorney) and Vicki (Vicki Diamond, Supervisor Current Planning) about this project and they also agreed that it needs a plat alteration. Per Section 18F.40.080.A.5, the signature of the majority of the property owners within the plat is required for this project. As far as Section 18F.40.080.D., you are o.k. as the lot/tract is larger than one acre in size (R10 zone). Please note that all agencies involved must review the proposed plat alteration prior to the hearing. Also, upon the Hearing Examiner approval, Mylar must be signed by all agencies prior to recording.*

In December of 2007, it was determined that only the appellant needed to sign the alteration, not the majority of the property owners within the plat.

On March 7, 2008 the plat alteration was submitted. It was deemed complete on March 18<sup>th</sup> and circulated for comment

until April 15<sup>th</sup>. On March 21<sup>st</sup>, the site was posted.

*See* Staff Report, Ex.1A; **AR 46**.

Mr. Halsan testified that Staff identified a “plat alteration” as the only process available to strike the Plat Note, and Mr. Olson followed the Staff directive. **TR 29: 7-10**. Pierce County did not talk about any need to meet current zoning densities. **TR 34: 9-16**. The decision was about a “way to get there from here.” **TR 34: 23-25; 35: 1-14**. Mr. Olson relied upon staff’s representation and actions in submitting the plat alteration request and paying the required filing fee:

Basis of Appeal

The appellant looked to the County for direction prior to investing substantial capital in the project knowing the conversion of the tract might be problematic. The appellant took this extra step since county staff has the primary responsibility for correctly interpreting the development regulations. The appellant placed substantial reliance on the determinations made by PALS staff in regard to moving forward with this project.

Appeal, **AR 40**. *See also* Olson Testimony, **TR 48: 14-17**; Halsan Testimony, **TR 34: 23-25, 35: 1-14**.

The Staff Report filed with the Examiner ignored the history set out by Mr. Halsan, contending it was doing Mr. Olson a favor by cancelling the plat alteration application. Staff presumed that by simply

returning the application fee, any harm is cured.<sup>15</sup> That is not correct. Based upon Staff representations, Mr. Olson already incurred substantial expense beyond the application fee, including costs for a septic design, a topographical survey, and geotechnical analysis. **TR 51-52.** In reliance on Staff's representations, Mr. Olson's financial outlay to date totals over \$40,000. **TR 52.** Thus, if the Court determines a site plan amendment or other process is unavailable to strike the Final Plat Note, in the alternative, it should rule that Pierce County is estopped from cancelling the plat alteration application because of Mr. Olson's detrimental reliance on Staff assertions and actions.

Equitable estoppel can be applied to governmental entities. *See Kramarevcky v. DSHS*, 122 Wn.2d 738, 743-44, 863 P.2d 535 (1993). Equitable estoppel is based upon the principle that a party should be held to a representation made or a position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon. *Id.* The elements of equitable estoppel are: (1) a party's admission, statement, or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement, or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or

---

<sup>15</sup> The application fee has never been returned.

admission. *Id.* In addition, a party asserting the doctrine against the government must meet two additional requirements: equitable estoppel must be necessary to prevent a manifest injustice, and the exercise of governmental function must not be impaired as a result of the estoppel. *Id.*

The doctrine of estoppel should be applied to prevent staff from changing its position. The plat alteration was accepted and fees paid for its processing. Manifest injustice would result if PALS is allowed to change its position because Mr. Olson is then precluded any opportunity to use and develop Tract B. Allowing the plat alteration to be processed impairs no governmental function. Indeed, it facilitates governmental operations by forcing staff up front to thoroughly analyze matters subject to a pre-application conference. The pre-application conference is intended to serve the purpose of ruling out applications “dead-on-arrival.” If this purpose is ignored, applicants and property owners should not be made to suffer the consequences, as is the case here with Mr. Olson.

All elements of estoppel are met under the presented facts. Pierce County should be barred from changing its position and asserting that Mr. Olson’s application for a plat alteration cannot be processed.

**H. The County’s Decision as a Whole, as Applied, Violates Mr. Olson’s Constitutional Rights.**

This Court need not reach the constitutional basis for Mr. Olson’s

appeal, but if this Court decides it must, then the Decision as applied to Mr. Olson is plainly unconstitutional and must be reversed and vacated.

The Washington Supreme Court has long recognized that development rights are “beyond question” valuable rights in property that are given protection under the vested rights doctrine and the due process clause of the Fourteenth Amendment. *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 50, 720 P.2d 782 (1986).

In this case, there is no dispute that Tract B is a legally established parcel created in 1993 intended for future development. The County’s Decision to not strike the Plat Note and process Mr. Olson’s Building Permit Application for Development of Tract B violates his substantive due process and property rights, because it denies him any meaningful use or development of his property.

The County’s Decision not to accept Mr. Olson’s amendment application satisfies substantive due process standards only if it “(1) is aimed at achieving a legitimate public purpose, and (2) uses means to achieve that purpose that are reasonably necessary and not unduly oppressive upon individuals.” *West Main Assocs.*, 106 Wn.2d at 52. Failure to meet any of these tests violates due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article XI,

Section 3 of the Washington State Constitution. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990).

Under Washington case law, the “unduly oppressive” prong is the most determinative one. It involves balancing the public’s interest against those of the regulated landowner. *Guimont v. Clarke*, 121 Wn.2d 586, 608, 854 P.2d 1 (1993) (violation of due process found); *Sinatra Inc. v. Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992) (taking claim remanded; violation of due process found); *Robinson v. Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992) (violation of due process found). In assessing this prong, courts consider “(a) the nature of the harm to be avoided; (b) the availability and effectiveness of less drastic measures; and (c) the economic loss suffered by the property owner.” *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 768, 49 P.3d 867 (2002). The non-exclusive factors that guide the inquiry are:

On the public’s side, the seriousness of the public problem, the extent to which the owner’s land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner’s side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulations, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

*Presbytery*, 114 Wn.2d at 331.

The articulated factors favor Mr. Olson. On the public side, there is no showing of any harm if Tract B is reasonably developed in a manner consistent with the existing neighborhood and current regulations, including those applicable to legal nonconforming parcels and minimum lot sizes. Indeed, the public interest is served by completing the site development, because it promotes infill development required by the Growth Management Act, RCW Chapter 36.70A. The Growth Management Act favors infill development to reduce urban sprawl.

On Mr. Olson's side, the amount of percentage of value loss is significant if Tract B cannot be reasonably developed. Unless vacated, the County's decision is permanent and perpetual, and prevents any development on Tract B because of the 1995 down-zone or return on his investment backed expectations, including the cost of site application fees and related studies. As mentioned above, Washington courts have long recognized that "[a]lthough less than a fee interest, development rights are beyond question a valuable right in property." *West Main Assocs.* 106 Wn.2d at 51 (quoting *Louthan v. King County*, 94 Wn.2d 422, 428, 617 P.2d 977 (1980)), relying on *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). *See also* C. Siemon, W. Larsen & D. Porter, *Vested Rights* 61-68 (1982). The County's means

to achieve its purpose of taking away Petitioner's development rights are not reasonably necessary.

Finally, the Hearing Examiner's decision declaring no development rights are available on Tract B is unduly oppressive. Reasonable development of Tract B under current regulations for nonconforming parcels is a much less onerous means to resolve this matter.

The County's decision as applied also violates the Washington State Constitution, Article I, Section 16, which provides, in part, that "[N]o private property shall be taken or damaged for public or private use without just compensation," and the United States Constitution Fifth Amendment clause. As applied, the County's decision denies Mr. Olson all economically viable or beneficial use of his property. *See, e.g., Guimont v. Clarke*, 121 Wn.2d 586, 854 p.2d 1 (1993); *Lingle v. Chevron USA, Inc.*, 125 S. Ct. 2074, 161 L.Ed. 876 (2005).

The Hearing Examiner's decision is a total infringement on Mr. Olson's vested property rights, substantive and procedural due process rights, and his right to be free of arbitrary and unreasonable government decision making. "Conclusory action taken without regard to the surrounding facts and circumstances is arbitrary and capricious ...." *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962, 954 P.2d

250 (1998) (quoting *Hayes v. City of Seattle*, 131 Wn.2d 706, 717-18, 934 P.2d 1179 (1997)).

In *Mission Springs*, the Court found that the City, acting through its City Council and/or City Manager, arbitrarily refused to process Mission Springs' grading permit application and unlawfully withheld the permit. The Court held that such action was "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action" because it was without lawful authority and in unreasoning and willful disregard of the permit applicant's lawful entitlements. *Mission Springs*, 134 Wn.2d at 962 (citations omitted). Substantive due process rights protect landowners from governmental action that is shown to be "arbitrary, irrational or tainted by improper motive." *Robinson v. Seattle*, 119 Wn.2d 34, 62, 830 P.2d 318 (1992) (citations omitted). The County's decision as applied to Mr. Olson, by refusing to apply the Pierce County Code as written to provide substantive and procedural relief, is unconstitutional. This includes the failure to allow striking the Plat Note under regulations which allow changes to a land use appeal and the County non-conforming lot laws.

## VI. CONCLUSION

For the foregoing reasons, this Court should reverse the Superior Court's dismissal of Mr. Olson's Petition for Review, affirm the appeal,

and remand this matter back to Pierce County to (1) strike the Plat Note, and (2) allow Mr. Olson to commence the process to seek a building permit and site development approval for a single-family home.

RESPECTFULLY SUBMITTED this 10 day of December, 2009.

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

**CERTIFICATE OF SERVICE**

I hereby certify that on this 10<sup>th</sup> day of December, 2009, I caused the original and one 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  
(253) 593-2970, tel

I further certify that on this 10<sup>th</sup> day of December, 2009, I caused a copy of the document to which this certificate is attached to be delivered to the following via overnight mail:

Jill Guernsey, WSBA #9443  
Pierce County Prosecutor's Office  
955 Tacoma Avenue South, #301  
Tacoma, WA 98402-2160  
(253) 798-6732, tel  
(253) 798-6713, fax  
jguerns@co.pierce.wa.us, email

FILED  
COURT OF APPEALS  
DIVISION II  
09 DEC 11 PM 12:33  
STATE OF WASHINGTON  
BY g  
DEPUTY

Declared under penalty of perjury under the laws of the State of

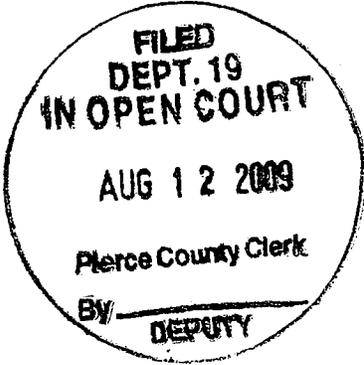
Washington at Bainbridge Island, Washington this 10<sup>th</sup> day of December, 2009.

Christy A. Reynolds  
Christy Reynolds  
Legal Assistant

## APPENDIX

- 1) TRIAL COURT'S ORDER, AUGUST 12, 2009
- 2) HEARING EXAMINER'S DECISION, FEBRUARY 13, 2009

**No. 1**



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

RUSSELL OLSON;

Petitioner,

NO. 09-2-06534-4

vs.

PIERCE COUNTY,

ORDER DISMISSING LUPA PETITION  
FOR REVIEW AND JUDGMENT

Respondent.

**JUDGMENT ENTRY**

<b>Judgment Creditor:</b>	<b>Pierce County</b>
<b>Judgment Creditor's Attorney:</b>	<b>Jill Guernsey, Deputy Prosecuting Attorney</b>
<b>Judgment Debtor:</b>	<b>Russell Olson</b>
<b>Judgment Debtor's Attorney:</b>	<b>Dennis D. Reynolds</b>
<b>Amount of Judgment:</b>	<b>\$ 491.52</b>
<b>Costs:</b>	<b>\$ 291.52</b>
<b>Attorney's Fees:</b>	<b>\$ 200.00</b>
<b>Interest:</b>	<b>12% from date of entry</b>

THIS MATTER came on for hearing on July 14, 2009, before the Honorable Linda CJ Lee; the Petitioner appearing by and through his attorney, Dennis D. Reynolds; the Respondent appearing by counsel Gerald A. Horne, Pierce County Prosecuting Attorney, by Jill Guernsey, Deputy Prosecuting Attorney; and the Court having reviewed the file and pleadings herein and having heard argument of the parties and having issued a memorandum opinion dated July 28, 2009, attached as Exhibit A to this order; now, therefore, it is hereby

**COPY**

1 ORDERED, ADJUDGED AND DECREED that:

2 1. The Petitioner has not met his burden of proof under RCW 36.70C.130;

3 2. The Hearing Examiner's decision in this matter dated February 13, 2009, is  
4 affirmed; and

5 3. The Petitioner's LUPA Petition for Review is hereby dismissed with prejudice;  
6 and it is further

7  
8 ORDERED, ADJUDGED AND DECREED that Respondent is the prevailing party in  
9 this matter and entitled to costs and statutory attorneys' fees pursuant to RCW 4.84.080; and it  
10 is further

11 ORDERED, ADJUDGED AND DECREED, that final judgment is hereby entered in  
12 favor of Pierce County against Petitioner Russell Olson in the amount of Four Hundred  
13 Ninety-one and 52/100 Dollars (\$491.52).

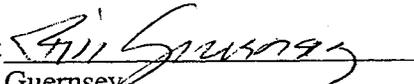
14 DATED this 12 day of August, 2009.

**LINDA CJ LEE**

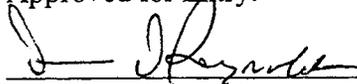
15  
16 \_\_\_\_\_  
The Honorable Linda CJ Lee

17 Presented by:

18 GERALD A. HORNE  
19 Pierce County Prosecuting Attorney

20 By:   
21 Jill Guernsey  
Deputy Prosecuting Attorney  
WSBA #9443

22 Approved for Entry:

23   
24 Dennis D. Reynolds  
Attorney for Petitioner  
25 WSBA #4762

# **EXHIBIT A**

**SUPERIOR COURT  
OF THE  
STATE OF WASHINGTON  
FOR PIERCE COUNTY**

Linda CJ Lee, JUDGE  
Sandi Rutter, Judicial Assistant  
Kellie Smith, Court Reporter  
DEPARTMENT 19  
(253)798-7735

334 COUNTY-CITY BUILDING  
930 TACOMA AVENUE SOUTH  
TACOMA, WA 98402-2108



July 28, 2009

Dennis Dean Reynolds  
200 Winslow Way W, Unit 380  
Bainbridge Island WA 98110-4932

Jill Guernsey  
955 Tacoma Ave S, Room 301  
Tacoma WA 98402

**Re: Russell Olson v. Pierce County  
Pierce County Superior Court Cause No. 09-2-06534-4**

Dear Counsel:

The positions taken by both sides in this case are akin to two ships passing in the night. Petitioner Olson contends that Tract B is a lot that was created pursuant to the 1993 Hearing Examiner Baxter's decision and that he is merely trying to implement a process required under the 1993 Hearing Examiner's (by Hearing Examiner Baxter) decision to develop the property. According to Petitioner Olson, Hearing Examiner Causseaux erred when he held that Petitioner Olson failed to convert Tract B from a "native growth or greenbelt area" to a building lot within the time requirements of RCW 58.17.170. On the other hand, the County argues that Tract B was designated a "native growth or greenbelt area" in the 1993 Hearing Examiner's decision and due to development regulations passed after the 1993 Hearing Examiner's decision, Hearing Examiner Causseaux did not err in finding that Petitioner Olson is now precluded by RCW 58.17.170 from converting Tract B to a residential building site.

The standard of review applied by the Court in this LUPA proceeding is set forth in RCW 26.70C.130. The burden is on the Petitioner to prove one or more of the grounds for relief set forth in RCW 26.70C.130. Although many arguments have been made, both sides agree that this case boils down to a legal issue, not an issue of fact.

In 1993, the Hearing Examiner reached the following conclusions with regard to the property at issue:

4. The proposed site plan of Pilchuck View Estates should be approved, subject to the following conditions:
  - A. The entire parcel **must** be included in the subdivision. The area labeled "Not A Part" to the west of the proposed Lot 10 will be designated as Tract "A," and the area labeled "Not A Part" on the southwest corner of the site shall be designated as Tract "B." With regard to Tracts "A" and "B", the following conditions shall apply:
    - (I) Tracts A and B are not required as open space under the Gig Harbor Development Regulations to justify the density of the proposal. However, those Tracts have not been proposed by the Applicant as building sites, and information necessary to review them as building sites has not been submitted to or considered by Pierce County Planning and Land Services Department, the Peninsula Advisory Commission, or the Hearing Examiner. In addition, Tracts A and B have not been considered under the requirements of applicable Pierce County Codes, including those pertaining to development, critical areas, geotechnical considerations, and the like. As such, they cannot be approved as building sites at this time.
    - (II) Tracts A and B are not approved as building sites or lots. The only use which may be made of Tracts A and B at the preset [sic] time is as native growth or green belt areas. Any proposed use or development of Tracts A and B may only be considered as a major amendment to the plat of Pilchuck Estates, and as a major amendment to the approved site plan, requiring notice and a public hearing.
    - (III) The restrictions applicable to Tracts A and B shall be set forth on the fact of the plat. The purpose of this requirement is to insure that Tracts A and B are not conveyed to a third party with the expectation that they could be used as building sites.
    - (IV) The Applicant has voluntarily separated Tracts A and B from the balance of the plat. The plat layout, the other limitations of those Tracts, and the absence of access or utilities to serve the Tracts may not be the basis or justification for future approval of Tracts A and B as building sites.
  - ...
  - H. The following note shall be placed on the face of the final plat:

“Tracts A and B on this plat shall be developed in accordance with the Development Regulations for the Gig Harbor Peninsula, and applicable state law. ....”

(Emphasis in original). AR 74-75. Following the Hearing Examiner’s decision in 1993, final plat approval was obtained in 1994. AR 92-94.

In 1994, Pierce County adopted its Comprehensive Plan and implemented new zoning regulations in 1995. At the same time, the Gig Harbor Peninsula Comprehensive Plan and Gig Harbor Development regulations were repealed in their entirety. As a result, Fox Island was rezoned to Rural 10, which only allows one dwelling unit per ten (10) acres. With the change in zoning regulations, it is no longer possible to create a building site on the size of property at issue in this case.

Pursuant to the plain language in paragraph 4(A)(II) of the 1993 Hearing Examiner decision, Tract B was not an approved building site or lot. In fact, the plat applicant specifically tried to eliminate Tract B from the plat by designating it as an area that was “Not A Part” of the proposed site plan for Pilchuck View Estates. Thus, the plat applicant attempted to exclude the area known as Tract B from the proposed plat, and although Hearing Examiner included the area in the plat, the property at issue was acknowledged as an “area ...designated as Tract ‘B’” and approved as a “native growth or greenbelt area[.]”. Therefore, the 1993 Hearing Examiner’s decision did not create a “lot” known as Tract B. Rather, the 1993 Hearing Examiner’s decision explicitly held that Tract B was not an approved building site or lot.

However, even if a lot was created pursuant to the 1993 Hearing Examiner’s decision, developing a lot that was designated a “native growth or greenbelt area[.]” into a building site at this time is precluded by law. As noted above, Pilchuck View Estates was given final plat approval in 1994. RCW 58.17.170 states, in relevant part, that:

... Any lots in a final plat filed for record shall be a valid land use notwithstanding any change in zoning laws for a period of five years from the date of filing. A subdivision shall be governed by the terms of approval of the final plat, and the statutes, ordinances, and regulations in effect at the time of approval under RCW 58.17.150(1) and (3) for a period of five years after final plat approval unless the legislative body finds that a change in conditions creates a serious threat to the public health or safety in the subdivision.

RCW 58.17.170.

Here, final plat approval was in 1994. The “zoning laws” changed in 1995, after final plat approval. However, pursuant to RCW 58.17.170, the owner of Tract B had 5 years from the date of final approval (i.e., until 1999) to seek approval to develop Tract B as a residential building site under the zoning laws in effect in 1994. No owner of Tract B made any attempts to

Olson v. Pierce County  
July 28, 2009  
Page 4

seek approval to develop Tract B as a residential building site until 2007, when Petitioner Olson sought a pre-development conference. AR 188-189; VRP 49. Therefore, pursuant to RCW 58.17.170 and the intervening zoning regulation changes, Petitioner Olson is precluded from attempting to change Tract B from a native growth or greenbelt area to a building site.

Based upon the foregoing, Hearing Examiner Causseaux's land use decision dated February 13, 2009 is affirmed. I have scheduled the presentation of the final order in this matter for August 14, 2009, at 9 a.m. Please contact my Judicial Assistant, Sandi Rutten, at (253) 798-7735 if there is a conflict with this presentation date.

Finally, I wish to extend my compliments to both counsel for presenting this Court with clear and comprehensive written and oral arguments. I also appreciate your patience in awaiting this decision.

Regards,



Linda CJ Lee  
Pierce County Superior Court Judge



**No. 2**

**OFFICE OF THE HEARING EXAMINER**

**PIERCE COUNTY**

**REPORT AND DECISION**

**CASE NO.:** ADMINISTRATIVE APPEAL: CASE NO. AA4-08, APPELLANT  
RUSSELL OLSON, APPLICATION NO. 636827

**APPELLANT:** Russell Olson  
P.O. Box 223  
Fox Island, WA 98333

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

**PLANNER:** Mojgan Carlson, Senior Planner

**SUMMARY OF REQUEST:**

Appeal of the May 12, 2008, decision of the Planning and Land Services Administrative Official which cancelled the Plat Alteration application submitted on March 7, 2008. The plat alteration was to convert an existing tract (Tract B), within the approved plat of Pilchuck View Estates (SPR7-92), to a buildable lot for construction of a single-family residence. The final plat was recorded in 1994 under Auditor Fee Number AFN #9411020490. The subject site is 1.5-acres in size, located on the southwest margin of Fox Island, within the plat of Pilchuck View Estates, at 1002 Paha View Drive, FI, within the NE ¼ of Section 13, T20N, R1E, W.M., in Council District #7.

**SUMMARY OF DECISION:**

Request denied.

**DATE OF DECISION:** February 13, 2009

**COURT REPORTER:** Linda M. Grotfendt  
James, Sanderson & Lowers

**PUBLIC HEARING:**

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

The hearing was opened on November 13, 2009, at 1:18 p.m.

Parties wishing to testify were sworn in by the Examiner.

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

- EXHIBIT "1" - Planning and Land Services Staff Report and Attachments**
- EXHIBIT "2" - Original brief from Dennis Reynolds**
- EXHIBIT "3" - Aerial Photo**
- EXHIBIT "4" - Assessor's Parcel Map**
- EXHIBIT "5" - Site location**
- EXHIBIT "6" - Critical Area checklist tax parcel 3000250250**
- EXHIBIT "7" - Boundary Topographical Survey**
- EXHIBIT "8" - Site Survey depicting photo locations and photos**
- EXHIBIT "9" - Geotechnical Report Site Survey**
- EXHIBIT "10" - Geo Resources LLC Report dated January 2, 2006**
- EXHIBIT "11" - Certificate of Water Availability**
- EXHIBIT "12" - Letter dated November 7, 2008, Peninsula Septic Design**
- EXHIBIT "13" - Letter dated July 29, 2007, Olson to PC Development Center**
- EXHIBIT "14" - Email from Mr. Halsan with County staff and legal advisor**
- EXHIBIT "15" - Aerial photo by LeRoy Consultants**
- EXHIBIT "16" - Public Records Request**
- EXHIBIT "17" - Deed**

MOJGAN CARLSON appeared, presented the Planning Division Staff Report to include a chronology of events. The tract exceeds the minimum lot size, but the plat now exceeds the density in the applicable R10 classification. Following recording of the plat an applicant would have no major amendment procedure available. A plat alteration cannot add new lots. The R10 zone would allow five lots on the site with 50% open space. The plat lost its vesting rights five years after recording. Note 5 on the plat refers to Condition 4A of the Examiner's decision.

Upon questioning by DENNIS REYNOLDS, attorney at law, representing the appellant, MS. CARLSON testified that the County offered to refund the fees paid for the plat alteration. She could find no provision at all to either add a lot or change a tract in a plat. The decision cites the process for an amendment, but the original applicant did not use it. There was no vesting on implementing the condition. The County is amending the condition of the hearing examiner by adding a time restriction. Pierce County did issue a

tax parcel number, but that does not make the tract a legal lot of record. Tract B is part of the plat, but is not part of a lot. It is a parcel of land owned privately. The other lot owners have no interest in the ownership.

Upon questioning by JILL GUERNSEY, deputy prosecuting attorney, MS. CARLSON testified that the Examiner approved the preliminary plat on November 19, 1993, and the final plat on November 2, 1994. During that time the developer could have applied for a major amendment to change the tract to a lot. On December 4, 2003, Mr. Olson purchased the tract at a tax sale for \$1,026.55. She had no conference with Mr. Olson regarding his use of the property.

Upon questioning by MR. REYNOLDS, MS. CARLSON stated that Condition No. 4A was imposed because the tract had no access or utilities.

MR. REYNOLDS then appeared and introduced Exhibits "3" – "14".

CARL HALSAN appeared and testified that he agrees that a plat alteration is not the proper process to implement the 1993 decision. What then is the process? The answer can't be no process. How do we get the lot developed and the restriction lifted? The tract is a lot with a temporary restriction. Mr. Olson purchased the lot which could become a buildable lot, but would need to go through a public process. He attended a County pre-filing conference in 2004. Five County departments were represented to include the Planning Department and the prosecuting attorney who agreed that the alteration process was proper. He also agreed. They then made application, but then staff determined that the alteration was not the proper process. RCW 58.17 includes a definition of tracts and parcels. The Pierce County Code has the same definitions. However, neither defines "lot of record". The tract also could be called Lot B. The only process available is a site plan major amendment, but it has no standards. The only major amendment standards is that it is not a minor amendment and requires the public process. Pierce County does not have an alternate procedure so it relied on RCW 58.17, but the Gig Harbor Development Regulations did contain a procedure for a major amendment to a site plan. On reconsideration the Hearing Examiner said major amendment so it included a public process. A plat alteration covers the entire plat, yet nothing on the plat needs altering. The notes on the plat concern Tract B which says: See Condition 4A before development. Therefore, so nothing needs to change on the face of the final plat map. Here we have nothing to change. We are not adding a new lot as Tract B is already a new lot. We are not subdividing further and we are not increasing the number of lots.

Upon questioning by MR. REYNOLDS, MR. HALSAN identified Exhibit "14" as true and correct copies of emails. Staff indicated that the plat alteration was acceptable because the lot had more than one acre.

Upon questioning by MS. GUERNSEY, MR. HALSAN testified that Mr. Olson hired him in late summer of 2007. They will obtain access through another plat known as Pebble Beach. They would not use the internal plat roads for access.

RUSSELL OLSON, appellant, appeared and testified that he is a Boeing machinist and not a land developer. He was walking on the beach and someone told him about the tract and also told him that it was coming up for sale. He purchased the tract at a tax sale and research the parcel before doing so. He came to the annex and obtained a copy of the Examiner's decision of 1993 and found that it was originally a lot. It was referred to as a lot and not open space. He also found that he needed to go through the public meeting process and that the lot had landslide potential. He submitted a critical areas checklist on July 18, 2007. He talked with people at Pierce County about the tract before he purchased it. He talked about whether it was buildable. He had concerns about the Critical Areas Ordinance and other items to include the public process. The utilities will also access the lot through Pebble Beach. When he got mixed signals he retained Mr. Halsan to help him through the process. He had a predevelopment meeting with staff and referred to his letter to staff of July 29, 2007. The reason for the letter was to request a preapplication conference and to advise staff of his status and plans. At the conference he had to have a topographic survey, geotechnical survey, septic design, water to the property, and an engineer designed driveway. The County then made the decision that he needed a plat alteration. Mr. Halsan prepared the plat alteration application and he paid a \$900 fee. The County accepted the application and fee. The septic design is in process, but he has already brought water to the site. He took all steps based on staff's recommendations as to the process. He spent more than \$40,000. The geotechnical report concluded that he can develop the site. The geotechnical engineer made recommendations for site development all of which he will follow. He prepared a topographic survey on February 27, 2007, which is Exhibit "9". He then identified other exhibits in the notebook submitted by Mr. Reynolds. The middle of the parcel is flat and he will only develop that area. He will not touch the balance of the lot. Exhibit "8" is the survey with photographs so one can see how the property appears. He intends to reside in the home. Exhibit "15" is an aerial photograph showing the access and the blue color is a road. He does not need an easement across another parcel to access his property. The utilities come from the road which is Popago Drive.

DAVE DERBY, president of the Pebble Beach Homeowners Association, appeared and testified that at no time did the homeowners association approve an access for Mr. Olson. He did not contact them to inquire about a road access. They are a gated community of 14 lots. Pilchuck Estates is above their subdivision. The appellant's proposal would create a major change in the area. Soil and land erosions are major issues.

FRED GOZALES, past president of the homeowners association, appeared and testified that he was never approached by Mr. Olson regarding an access. He served as president from 2004 to 2006 when Mr. Derby took over.

RON CARSON appeared and testified that he owns Lot 12 of Pilchuck Estates and knows that the site has the potential for erosion. Neighbors understood that the tract was a mitigation site for stormwater runoff as the lot would absorb it. His lot is 80 feet above the Olson parcel and is quite steep. He cannot cut into the hill due to the landslide potential.

He has real liability concerns.

GARY O'CONNELL appeared and testified that he resides at the bottom of the hill and is concerned with drainage. A plat amendment should have been done years ago. He confirmed that Mr. Olson's property lies under the road.

Upon questioning by MS. GUERNSEY, MR. OLSON responded that he is a resident of 828 Hyak Place on Fox Island and was on the beach adjacent to the property. He has never purchased tax title property before. He owns seven parcels of property, three on Fox Island, one in Eastern Washington, and others on the Key Peninsula. He has not applied for or received permits for any of the other properties. This is the first time he has sought to develop a parcel as his present house was already built when he moved in. He came to the Planning Department to get information once before his purchase in December, 2003. He made a request for public records and the request bears his signature and handwriting. It is dated September 22, 2005. He looked at the file on approximately that date. It was his second review. He also made a request for public records September 8, 2005, where he reviewed the plat and the Examiner's decision. He is sure he looked at the file before that. From his reading, the people talking in the decision meant Tract B to be a lot if they went through the public process. Before the predevelopment conference on August 11, 2007, he had a geosurvey conducted. He went into the department a second time. People he remembers talking with and having their cards were Rhonda Downs and Patrick Prendergast. Mr. Prendergast wrote on the back of his card that he was responsible for Pebble Beach. He paid to be placed on a list for water. The Planning Department did not tell him to do it, but he knew he had to have water. Concerning the septic design, he had a list of items and this was one of them. He had a geotechnical report and survey performed before the meeting as he wanted to come prepared. After the prefilling meeting more surveying was required and he retained Leroy Engineers. He had expenses both before and after the prefilling meeting and he can't break them down. The plat alteration was the idea of the Planning Department at the prefilling meeting.

Upon questioning by MR. REYNOLDS, MR. OLSON testified that he read the Hearing Examiner's report and noted Tract B was retained in private ownership. It was not owned in common by the other lot owners, but it was not already a lot.

MR. REYNOLDS and MS. GUERNSEY then presented closing arguments. The Examiner then left the record open for Mr. Reynolds to provide a brief on December 5, 2008; Ms. Guernsey to provide a response on December 12, 2008; and Mr. Reynolds to provide a response on December 19, 2008.

No one spoke further in this matter and the Hearing Examiner took the matter under advisement. The hearing was concluded at 3:45 p.m.

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

## FINDINGS, CONCLUSIONS AND DECISION:

### FINDINGS:

1. The Hearing Examiner has admitted documentary evidence into the record, heard testimony, and taken this matter under advisement.
2. This Administrative Appeal is exempt from review under the State Environmental Policy Act (SEPA).
3. Notice of this request was advertised in accordance with Chapter 1.22 of the Pierce County Code. Notice of the date and time of hearing was published at least 10 days prior to the hearing in the official County newspaper.
4. Russell Olson (Appellants) appeals the decision of a Pierce County Planning and Land Services (PALS) Administrative Official to cancel a plat alteration application that would have allowed conversion of a Tract in the Pilchuck View Estates subdivision to a buildable, single family residential lot. At the hearing the Appellant and PALS staff agreed that changing a tract to a buildable lot utilizing the plat alteration procedure is not proper. However, PALS asserts that Section 18.160.060(B) of the Pierce County Code (PCC) and RCW 58.17.170 prohibit conversion of the tract to a building lot in the present case because of the adoption of more restrictive zoning and because the Appellant did not submit a completed application until more than five years had elapsed from the effective date of final plat approval. The Appellant asserts that both the PCC and RCW include "lot" within the definition of "tract"; that the Examiner's decision approving the preliminary plat specifically recognizes the tract as a building site; that the tract met all requirements of the applicable zone at the time of creation; that the Appellant has fulfilled all conditions precedent to development; and therefore the County should issue a building permit for a single family residential dwelling. For the reasons set forth hereinafter, expiration of the five year vesting period coupled with the necessity of major changes to the previously approved subdivision not reviewed by staff prohibits conversion of the tract to a building lot. The issues raised at the hearing exceeded the issues raised in the appeal which were limited to PALS' determination that the plat alteration procedure was not proper. However, PALS and the Appellant agreed that the Examiner should determine whether the Appellant could, using any procedure, convert the tract into a buildable lot.
5. The facts relevant to resolving the appeal are not in dispute and are set forth hereinafter.
6. By Report and Decision dated November 19, 1993, former Deputy Hearing Examiner, Bruce F. Baxter, conditionally approved the site plan and preliminary plat application for Pilchuck View Estates. The approval authorized subdivision of a 23.68 acre parcel into 23 single family residential lots and two tracts. Tract B, the

subject of the present appeal, is located in the southwest corner of the plat parcel, contains 65,303 square feet, and is designated a "landslide and erosion hazard area". The site plan shows a natural drainage course extending across the central portion of Tract B from northeast to southwest. A note on the final plat placed on Tract B reads:

(Reserved area private ownership, See Note 5 SHT 3 of 3).

7. Tract A contains 32,830 square feet, measures 70 feet in width, and varies in depth between 438 and 449 feet. Said tract separates lot 10 of Pilchuck View Estates from Carr Inlet and has the same note as Tract B.
8. Due to its location below and on the side of a steep slope, Tract B at the time of both preliminary and final plat approval had no access to the internal plat road and no water service. At the time of preliminary and final plat approval, Tract B had to remain in open space.
9. The public notice of the Pilchuck View Estates project provided for both the Peninsula Advisory Commission (PAC) meeting and the Examiner's hearing referred to a 23 lot, single family residential subdivision. Neither County staff, the PAC, nor the public considered Tracts A and B for any use other than open space.
10. On November 2, 1994, this Examiner approved the final plat/site plan of Pilchuck View Estates which showed Tracts A and B as open space areas and which contained the note referred to above. In addition, Note 5 of the final plat reads in pertinent part:

Tracts A and B on this plat shall be developed in accordance with the development regulations for the Gig Harbor Peninsula, and applicable State law....Prior to the development of Tract A and B See Condition No. 4(A) of the Office of the Hearing Examiner of Pierce County Report and Decision dated November 19, 1993.

Condition 4A of Deputy Examiner Baxter's decision reads as follows:

4. The proposed site plan of Pilchuck View Estates should be approved, subject to the following conditions:
  - A. The entire parcel **must** be included in the subdivision. The area labeled "Not A Part" to the west of proposed Lot 10 will be designated as Tract "A", and the area labeled "Not A Part" on the southwest corner of the site shall be designated as Tract "B". With regard to Tracts "A" and "B", the following conditions shall apply:

- (I) Tracts A and B are not required as open space under the Gig Harbor Development Regulations to justify the density of the proposal. However, those Tracts have not been proposed by the Applicant as building sites, and information necessary to review them as building sites has not been submitted to or considered by Pierce County Planning and Land Services Department, the Peninsula Advisory Commission, or the Hearing Examiner. In addition, Tracts A and B have not been considered under the requirements of applicable Pierce County Codes, including those pertaining to development, critical areas, geotechnical considerations, and the like. As such, they cannot be approved as building sites at this time.
- (II) Tracts A and B are not approved as building sites or lots. The only use which may be made of Tracts A and B at the present time is as native growth or green belt areas. Any proposed use or development of Tracts A and B may only be considered as a major amendment to the plat of Pilchuck Estates, and as a major amendment to the approved site plan, requiring notice and a public hearing.
- (III) The restrictions applicable to Tracts A and B shall be set forth on the face of the plat. The purpose of this requirement is to insure that Tracts A and B are not conveyed to a third party with the expectation that they could be

used as building sites (emphasis added).

- (IV) The Applicant has voluntarily separated Tracts A and B from the balance of the plat. The plat layout, the other limitations of those Tracts, and the absence of access or utilities to serve the Tracts may not be the basis or justification for future approval of Tracts A and B as building sites.

It appears that the plat proponent attempted to exclude portions of the plat parcel from the subdivision area and keep them under its ownership. However, the condition required the plat proponent to maintain Tracts A and B as part the plat parcel.

11. Pilchuck View Estates was located within the Rural Residential Environment of the applicable Gig Harbor Peninsula Comprehensive Plan and Development Regulations which allowed a maximum density of one dwelling unit per acre. All lots within Pilchuck View Estates contained more than one acre and therefore met basic density requirements as set forth in PCC 18.50.225. Tract A contained more than 12,500 square feet; had a minimum of 70 feet of shoreline frontage; and therefore met the density requirements for lots located on saltwater shorelines in the Rural Residential Environment. Tract B contained approximately 1.5 acres. Thus, both Tracts A and B met building lot size and density requirements of the applicable Rural Residential Environment. The overall subdivision provided adequate lot sizes and screening buffers such that it did not need the open space in Tracts A and B to gain the proposed density.
12. Pursuant to requirements of the State Growth Management Act (GMA), the Pierce County Council adopted the Pierce County Comprehensive Plan with an effective date of January 1, 1995 the new plan changed the designation of the subdivision parcel and the surrounding area to Rural-10 (R10). On July 11, 1995, Title 18A PCC, the Development Regulations – Zoning implementing the Plan, became effective and placed the plat parcel and surrounding area in the R10 classification. The R10 zone allows a density of one dwelling unit per ten acres subject to increases with provisions of open space. On December 1, 2002, the Gig Harbor Peninsula Community Plan became effective and maintained the subdivision parcel in its R10 designation.
13. On December 12, 2003, Appellant purchased Tract B through a Pierce County tax foreclosure procedure. On August 1, 2007, Appellant applied for a pre-filing meeting with PALS staff in order to discuss the feasibility of converting Tract B to a

buildable lot. On March 7, 2008, Appellant submitted a plat alteration application which the County initially accepted. However, the County subsequently the application returned along with Appellant's filing fee on May 12, 2008, having determined that Appellant could not convert Tract B to a buildable lot using the plat alteration process.

14. Appellant proposes to construct a 3,000 to 5,000 square foot single family residential home in the flatter, southwest portion of Tract B. For the purposes of this decision the Examiner has assumed that Appellant has secured access and utilities through another plat to the south. Access and utilities to Appellant's home site would extend north into Tract B from Papago Drive.
15. Appellant argues that PCC 18.50.915 authorizes amendments to binding site plans, and therefore he may use such procedure to change Tract B to a building lot and to provide access and utilities to said lot from an exterior road. Appellant also argues that Tract B meets the definition of "lot of record" as set forth in the PCC and is therefore a buildable lot. Finally, Appellant argues that Tract B was legally created as a "lot" and is therefore vested under the standards of the Rural Residential Environment in 1993. PALS asserts that upon final plat approval in 1994, Tract B was an open space tract, not a building lot, and that more than five years elapsed from the date of final plat approval until Appellant attempted to secure a plat alteration and obtain a building permit. PALS therefore asserts that RCW 58.17.170 requires that newly created building lots comply with the applicable R10 zone classification that requires a minimum lot size of ten acres. PALS also asserts that the Pilchuck View Estates subdivision presently exceeds the maximum density authorized by the R10 classification and adding another lot would further violate density limitations.
16. RCW Chapter 58.17, the State Subdivision Act, provides the following definitions in RCW 58.17.020 as follows:
  - (1) "Subdivision" is the division or redivision of land into five or more lots, tracts, parcels, sites or divisions for the purpose of sale, lease, or transfer of ownership....
  - (9) "Lot" is a fractional part of divided lands having fixed boundaries, being of sufficient area and dimension to meet minimum zoning requirements for width and area. The term shall include tracts or parcels.

In accordance with the above definitions, the Pilchuck View Estates subdivision was approved with 23 building lots and two tracts, also meeting the definition of "lot". RCW 58.17 does not set forth a definition of "lot of record".

17. The Development Regulations for the Gig Harbor Peninsula at the time the Pilchuck

View Estates proponents submitted a completed application for preliminary plat approval and at the time Pierce County granted final plat approval set forth the following definitions:

1. 18.50.145L.3 Lot. A "lot" is a platted or unplatted parcel of land unoccupied, occupied, or to be occupied by a principal use or building and accessory buildings, together with such yards and open spaces as are required by this Regulation. A lot is not a building site unless it is a lot of record or meets the minimum area requirements of an environment or zone.
2. 18.50.145L.9 Lot of Record. A "lot of record" means a lot as shown on an officially recorded plat or short plat or a parcel of land officially recorded or registered as a unit of property and as described by meets and bounds.

Tract B was not proposed for occupancy by a building and yards, but for retention in "native growth or green belt areas". Tract B was specifically "not building sites or lots". An owner could apply to convert Tract B to a building site, but would need to do so in compliance with the time limits set forth in RCW 58.17.

18. RCW 58.17.170 sets forth the requirements for final plat approval and includes the following language:

... Any lots in a final plat filed for record shall be a valid land use notwithstanding any change in zoning laws for a period of five years from the date of filing. A subdivision shall be governed by the terms of approval of the final plat, and the statutes, ordinances, and regulations in effect at the time of approval under RCW 58.17.150(1) and (3) for a period of five years after final plat approval unless the legislative body finds that a change in conditions creates a serious threat to the public health or safety in the subdivision.

While the "zoning laws" changed one year after final plat approval, an owner could have applied to convert Tract B to a building site four years subsequent to the zoning change. However, Appellant application to change the use of Tract B was nine years following expiration of the time period authorized by RCW 58.17.170.

19. Section 18.50.145(U) PCC provides the following definitions:

- (1) Use. "Use" of property is the purpose or activity for which the land, or building thereon, is designed, arranged, or intended, or for which it is occupied and maintained and shall include any manner of performance of such activity

with respect to the performance standards of this regulations. The word “use” also means the “development”.

- (3) Use, primary. “Primary use” means the main use of land or buildings as distinguished from a subordinate or accessory use.

Deputy Examiner Baxter’s decision restricts both the “use” and “primary use” of both tracts to “native growth or greenbelt areas”. Appellant had to apply to change the use of the tract within five years of final plat approval.

20. The above chronology and definitions show that at the time of application for preliminary plat approval, Pilchuck View Estates proposed a 23 lot, single family residential subdivision and two open space tracts not 25 lots or building sites. The plat proponent had performed no studies on said tracts, nor had requested the County to review said tracts as potential building lots, and the County had performed no such review. At the time of final plat approval the use of the tracts remained solely open space. The use remained solely open space for almost ten years following final plat approval until the Appellant acquired Tract B and began an inquiry as to converting the use from open space to a building lot. Thus, at preliminary plat approval, final plat approval, and upon expiration of the five year period following final plat approval the “use” and “primary use” of Tracts A and B was open space.
21. Shortly after final plat approval the new comprehensive plan and development regulations adopted pursuant to GMA became effective and placed Pilchuck View Estates in the rural area of the County and the R10 zone classification. At such time Tract B no longer met the minimum lot size for a building lot and the plat now exceeded the density requirements of the R10 classification. The County asserts that because of the zone change, RCW 58.17.170 prohibits Appellant from changing Tract B’s primary use from open space to a building site.
22. In its decision in Noble Manor Company v. Pierce County, 133 Wn. 2d 269 (1997), our Washington Supreme Court addressed RCW 58.17.170, the “divesting” statute. The Court held:

...In the Friends case, we looked to the vested rights provided under RCW 58.17.033, not to the older statute [RCW 58.17.170] which now serves to divest rights if they are not exercised within five years of approval of a formal subdivision. The five-year divesting statute was irrelevant to this court’s inquiry in the Friends case because the zoning laws had changed between the time the developer applied for a plat and the time that plat was approved. Therefore, under RCW 58.17.170, no rights to use the lots would have vested since rights under that older statute vest only at the

time of approval of the plat, not at the time of application....

...The Legislature did not divest a short plat's vested rights after five years as it had previously done with formal subdivisions...It is within the power of the Legislature to pass legislation which divests a short plat's vested rights after some reasonable amount of time. However, such a statute has not been enacted and we decline to do so by statutory construction when the "divesting" statute applies only to formal subdivisions. See RCW 58.17.170. 133 Wn. 2d 269 @ 282.

Footnote 8 of the Noble Manor decision reads in part:

...The Legislature did not consider RCW 58.17.170 to be an application of the vested rights doctrine because it did not vest any rights at the time of application, but acted only to divest rights which do not accrue under that statute until the time of approval of the subdivision.

Our Supreme Court interpreted RCW 58.17.170 as divesting rights to use lots within a platted subdivision five years subsequent to the date of approval. Under Noble Manor, the opportunity to convene a public hearing process to consider conversion of Tract B to a buildable lot lapsed five years following final plat approval because of the intervening adoption of the R10 zone classification.

23. Furthermore, in Settle, Washington Land Use and Environmental Law and Practice, the author discusses RCW 58.17.170 in Section 3.14 as follows:

Based upon the forgoing analysis, lot purchasers are immune from zoning changes for five years from the date the final plat is filed for record...

It is clear that after the five-year immunity period has run, the owners of contiguous lots could be required to comply with new regulations. Thus, if minimum lot size were raised by Health Department or zoning regulation, the owner of contiguous lots with an inadequate area could be required to combine lots to satisfy the new regulations. Whether the owner of the entire subdivision could be required to increase the width of roads or make additional public facilities improvements to comply with new local subdivision regulations adopted after the statutory immunity period is unclear. Given the limited extent of the immunity expressly recognized by the court in Norco, it would seem that the subdivision owner could be required to comply with the new regulations if by their terms, they applied to such previously approved subdivisions. However,

there is no appellate court holding on the issue.

The Noble Manor, supra., decision gives credence to the author's analysis that lot purchasers are immune from zoning changes for five years from the date of final plat approval.

24. The unpublished Washington Court of Appeals decision (which cannot be used as precedent) entitled Michael L. Achen and Katherine J. Achen v. Clark County, Case No. 31774-5-II, rejected the Achen's argument that their vested rights to add previously rejected lots to a subdivision extended until expiration of the three year period in which to present a final plat (i.e. between preliminary and final plat approval). The Court followed the Noble Manor admonition that the length of vesting is for the legislature to decide as opposed to the courts:

Thus, we reject outright the Achens' argument that their vested right to five acre minimum lot sizes for Tiger Lilly [preliminary plat] should have persisted for three years following preliminary approval of their 14 lot subdivision.

In the present case, the opportunity for the original plat proponent or a subsequent owner to commence a public process to consider a use of Tract B other than as "native growth or green belt areas" expired five years subsequent to final plat approval.

25. Appellant argues that approving Tract B as a building site requires no changes to the plat other than perhaps relabeling "Tract B" as "Lot B". Thus, development of Tract B does not create a new lot and does not require further subdivision. However, as previously found, notice for the preliminary plat advertised 23 single family residential building lots and Condition 4A(II) of the Deputy Examiner's decision provided in part:

Tracts A and B are not approved as building sites for lots. The only use which may be used of Tracts A and B at the present time is as native growth or green belt areas...

Said condition requires a major amendment to the approved site plan to change the use of the tracts. A major amendment requires public notice and a public hearing. The decision approving the preliminary plat never considered Tracts A and B as building lots and did not approve them as building lots. Said condition also restricted of the tracts use to native growth or greenbelt areas. Neither the original plat proponent nor the Appellant submitted an application to change the use the use fo the tracts either between preliminary and final plat approval of within five years subsequent to final plat approval. Thus, in accordance with RCW 58.17.170 as interpreted by Noble Manor, supra., Appellant may not now convert Tract B from a "native growth or greenbelt areas" into a building site.

26. Furthermore, conversion of Tract B requires a substantial change to the approved preliminary and final plat. The deputy hearing examiner recognized the significance of the change by requiring a major amendment to the approved site plan to include public notice and a public hearing. Major changes included the potential addition of two lots to a previously approved 23 lot preliminary/final plat and for Tract B to gain access from a road other than the internal plat road which provides access for all other plat lots. Tract B would also receive water service from other than the plat system and would essentially become part of the plat to the south.
27. Appellant argues that the doctrine of finality allows development of the lot since nothing in the 1993 decision prohibits its development in the future. However, a hearing examiner's conditions of approval cannot overrule provisions of the State Subdivision Act and adoption of new development regulations. The legislature has determined that the possibility of converting Tract B to a building lot expired upon adoption of new development regulations or the expiration of five years following final plat approval, whichever later occurs. In the present case, Pierce County adopted new development regulations increasing lot sizes in the R10 classification to a minimum of ten acres one year following final plat approval. RCW 58.17.170 allowed an additional four years for the conversion of Tract B into a building site. Appellant cannot now convert Tract B from a "native growth or greenbelt areas" to a building lot of substandard size.

### CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.
2. Section 1.22.090(G) PCC sets forth the burden of proof in an administrative appeal. Said section provides:
  - G. Burden of proof. A decision of the Administrative Official shall be entitled to substantial weight. Parties appealing a decision of the Administrative Official shall have the burden of presenting the evidence necessary to prove to the Hearing Examiner that the Administrative Official's decision was clearly erroneous.

The appellant has not met his burden of proof of showing that PALS' interpretation of the deputy hearing examiner's November 19, 1993, decision in accordance with the State Subdivision law and Pierce County Code is clearly erroneous.

3. The preliminary plat approval and site plan approval for Pilchuck View Estates created Tract B as a native growth or greenbelt area, but not as an approved building site or building lot. During the time that the plat parcel was within the Rural

Residential Environment of the Development Regulations for the Gig Harbor Peninsula and for five years following final plat approval, the plat proponent or subsequent owners of Tract B could have applied to convert Tract B from native growth or greenbelt area to a building lot in accordance with Condition 4(A) of preliminary plat approval. However, once the zone changed and the divesting period passed, the time for applying for such conversion expired. Appellant did not apply to convert Tract B within the required time and therefore may not do so at the present.

4. While PALS may have provided initial erroneous information regarding development of Tract B, the Examiner has no authority to consider equitable issues. In Francis L. Chaussee v. Snohomish County Council, et al, 38 Wn. App 630 (1984), our Court of Appeals addressed a hearing examiner's authority as follows:

...His determination is limited to an administrative proceeding to determine whether or not a particular piece of property is subject to a County land ordinance...He had no discretion to exempt a land owner from SCC 20A based on what he deemed equitable without regard to statutory requirements and the need for substantial evidence to meet statutory requirements...

The Superior Court properly determined that the Hearing Examiner and County Council were without jurisdiction to consider equitable issues....38 Wn. App 630 at 638, 640.

Thus, the Examiner is without authority to consider remedies such as equitable estoppel.

5. The density limitations of the applicable Rural-10 classification effective in the Gig Harbor Peninsula Community Plan Area prohibit conversion of Tract B into a buildable lot of the Pilchuck View Estates subdivision.
6. Accepting Appellant's position would adversely impact comprehensive planning under GMA, especially in rural areas. Allowing conversion of tracts in overly dense subdivisions into substandard lots would create numerous non-conforming lots and subdivisions throughout rural areas where counties do not provide services. In the present case, Appellant or other owners would have the opportunity to create two substandard lots within a plat which greatly exceeds the density of the applicable R10 zone. If the definition of tract is interpreted to mean buildable lot then potential owners could apply to change tracts designated for various purposes to buildable lots. Furthermore, a plat proponent could attempt to circumvent the subdivision process by proposing ten building lots and ten open space tracts. The proponent could then make separate application to convert the tracts to building sites.

**DECISION:**

The appeal of Russell Olson is hereby denied.

**ORDERED** this 13<sup>th</sup> day of February, 2009.



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**STEPHEN K. CAUSSEAU, JR.**  
Hearing Examiner

**TRANSMITTED** this 13<sup>th</sup> day of February, 2009, to the following:

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

**CASE NO: ADMINISTRATIVE APPEAL: CASE NO. AA4-08, APPELLANT  
RUSSELL OLSON, APPLICATION NO. 636827**

**NOTICE**

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

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

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