



**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. RESPONSE TO RESTATEMENT OF THE ISSUES ..... 4

III. STATEMENT OF FACTS ..... 5

IV. STANDARD OF REVIEW ..... 11

V. LEGAL ARGUMENT ..... 13

    A. The 2008 Hearing Examiner Decision Erroneously Interpreted and Erroneously Applied the Law When It Misinterpreted and Misapplied the 1993 Hearing Examiner Decision that Specifically Provided for the Right to Develop Tract B Subject to Compliance With a Public Review Process and Current Development Regulations.....13

    B. Tract B’s Previous Status as a Tax Foreclosure Sale Has No Bearing on Mr. Olson’s Rights to Develop His Property.....15

    C. RCW 58.17.170 Does Not Apply Because Tract B Was Not a Part of The Pilchuck View Estates Plat Development Build-out But Was Reserved For Future Development. ....16

    D. The Doctrine of Finality Does Not Apply Because Tract B Was Subject to Specific and Express Rules and Requirements that Span the Passage of Time Since 1993. The Doctrine of Finality Should be Invoked on Behalf of Mr. Olson to Honor the Clear Instructions Provided by the 1993 Hearing Examiner.....19

    E. Tract B Has Always Met and Currently Meets the Minimum Lot Size for Development Because Tract B was Legally Established as a Tax Lot in 1993 and Can be Developed as a Non-Conforming Lot as to the Current Zoning Density. ....20

    F. The County’s Assertion that Mr. Olson’s Constitutional Rights Were Not Violated Because He Did Not Own the Property in 1995 is Wrong. The County’s Refusal to Accept Mr. Olson’s Land Use Application is Both a Procedural and Substantive Violation of His Constitutional Rights. ....23

VI. CONCLUSION..... 25

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>STATE CASES</b>	
<i>Commercial Waterway Dist. No. 1 v. King County</i> , 197 Wash. 441 85 P.2d 1067 (1938).....	16
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 815, 828 P.2d 549 (1992).....	13
<i>Griffin v. Thurston County Bd. of Health</i> , 165 Wn.2d 50, 196 P.3d 141 (2008).....	12
<i>Noble Manor v. Pierce County</i> , 133 Wn.2d 269, 943 P.2d 1378 (1997).....	19
<i>Parkridge v. City of Seattle</i> , 89 Wn.2d 454, 573 P.2d 359 (1978).....	22
<i>Puyallup v. Pac. Northwest Bell Tel. Co.</i> , 98 Wn.2d 443, 656 P.2d 1035 (1982).....	12
<i>Schofield v. Spokane County</i> , 96 Wn. App. 581, 980 P.2d 277 (1999).....	11
<i>West Main Assocs. v. City of Bellevue</i> , 106 Wn.2d 47, 720 P.2d 782 (1986).....	23, 24
<i>White v. Salvation Army</i> , 118 Wn. App. 272, 75 P.3d 990 (2003).....	12, 13
 <b>STATE STATUTES</b>	
RCW 36.70A.020(2).....	9
RCW 36.70A.020(6).....	25
RCW 36.70C.130(1).....	11
RCW 36.70C.130(1)(b).....	12

RCW 36.70C.130(1)(b)&(d).....	11
RCW 58.17.....	12
RCW 58.17.170.....	3, 16, 17, 19

**LOCAL STATUTES**

PCC Ch. 18E.110.....	10
PCC Ch. 18E.80.....	10
PCC Chapter 18.80.....	2
PCC Title 18E.....	2, 5
PCC § 18.10.070(B)(2)(C).....	10
PCC § 18.80.020.....	2
PCC § 18A.35.130.....	9, 21, 23
PCC § 18D.40.010.....	2
PCC § 18D.40.05.....	2
PCC § 18D.40.060.....	2
PCC § 18E.10.030.....	10
PCC § 18E.10.050.....	10
PCC § 18F.40.080.....	9

## I. INTRODUCTION

Appellant Russell Olson here challenges the unique determination of Pierce County staff, made 18 years after the plat decision creating Tract B, arbitrarily declaring the parcel unbuildable open space. Fundamentally, this case is about nothing more than a landowner exercising his right, consistent with existing critical area and building regulations, to develop a nonconforming lot removed from a plat project years ago for purposes of its future development. Mr. Olson does not seek to “convert” his lot, which is already zoned for single-family residential development and use. He seeks only to create an access road and building pad after going through the normal development review process. He simply proposes to construct a modest home for himself wholly consistent with the zoning use designation and the neighborhood.

Tract B was created by the 1993 preliminary approval of the Pilchuck View Estates Plat. It was specifically identified as a tract subject to future development. At the request of Pierce County, Tract B was given a tax parcel identification number and removed from the Plat when the original plat developer concluded that the parcel could not be served by the proposed plat infrastructure based upon then-existing site constraints. Tract B was set aside for future development, with the express requirement that future development be approved by a process that

closely mirrored the process employed to approve the preliminary plat of Pilchuck View Estates, including public notice, environmental review, and application of land use law.<sup>1</sup>

Tract B was labeled “Private Reserve” in 1993 for reasons of process, not substance. The intent and history of the County’s 1993 preliminary plat approval show conclusively that this label was not intended to designate Tract B as permanent “open space.” See Opening Brief, p.13. Clearly, common use or public ownership was not intended. The term “private” is totally inconsistent with the County’s argument that Tract B is common open space for the benefit of residents of Pilchuck View Estates. Tract B was and still is zoned for residential development.

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<sup>1</sup> The County wrongly continues to claim no process exists by which Tract B may be developed, summarily precluding Mr. Olson from even beginning the land use application process. To the contrary, the current version of the Pierce County Code allows for development of nonconforming lots and “minor amendments” are an accepted land use application. See PCC § 18.80.020 (Public Notice Matrix). This matrix and related Code provisions (PCC Chapter 18.80) both provide for public review and comment as required by the 1993 Decision. In addition, the critical areas review process involves public notice and review. Pierce County Code § 18D.40.010 details the process by which SEPA review is initiated for development projects. PCC § 18D.40.050 provides specific instructions regarding public notice of SEPA review and PCC § 18D.40.060 grants Pierce County substantive authority to then approve, approve with conditions or deny a permit application based on the SEPA analysis. Pierce County Code 18E Critical Areas provides specific development guidelines for development that occurs within designated critical areas such as Tract B. PCC 18E is not a road block code provision but rather a road map by which critical areas development are regulated by the County. See p.10, *infra*. Mr. Olson below identified several laws which could be used to strike the plat note. His reference to PCC § 18.80.020 is a citation of additional authority, not a new argument as contended by the County in its Response Brief. Although this provision does not guarantee approval of Mr. Olson’s land use application, it conferred upon the Hearing Examiner express authority to strike the Plat Note and allow Mr. Olson’s permit process to begin.

Following the process mandated in 1993 for development of Tract B does not change its use or convert any zoning or assigned land use designation.

In 2008, disregarding the record, the intent of County Staff in 1993, and the plain language of the 1993 decision, the County arbitrarily and mistakenly declared Mr. Olson's property permanent "open space." Unless overturned, this illegal decision, affirmed by the Hearing Examiner in 2008 and the Pierce County Superior Court in 2009, essentially results in a gift of Tract B forever to the surrounding luxury properties. While this result may satisfy the owners of platted lots within Pilchuck View Estates, they have no ownership or use rights to Tract B. The neighboring owners' subjective and unsupported interpretation that Tract B is their own private open space is irrelevant and in no way justifies the County's arbitrary decision.

The "Divesting Statute," RCW 58.17.170, does not bar the approval process established in 1993 for Tract B. Indeed, the County would violate the doctrine of finality by disregarding or rescinding the procedure established in 1993 that allowed development of Mr. Olson's property. The County created Tract B. It gave the property legal status and provided express language allowing its development in the future. The County seeks to bar the process it enacted before it has begun. This is clear legal error.

## II. RESPONSE TO RESTATEMENT OF THE ISSUES

Mr. Olson in his Opening Brief did not misstate the facts or ignore his obligations under the Land Use Petition Act as interpreted by this and other courts. Mr. Olson clearly acknowledged his burden under LUPA; he accurately stated the standards for review at p. 22 of his Opening Brief.

Tract B is located at the end of Paha View Drive on Fox Island between two existing homes in a luxury development on the southwest side of the island. It is not part of the Plat development because its access and utilities come through another plat. **TR 37:2-14**. *See also* Opening Brief, p.15; 1993 Decision, Conclusion No. 4.A(IV), **AR 75**.

Pierce County misstates or misunderstands the legal basis of Mr. Olson's right to develop his Fox Island Property: Pierce County Code provisions governing development of nonconforming lots. Although Tract B meets the one-acre minimum lot size required by the Code, it does not meet the current Code density of ten acres for each dwelling unit. Accordingly, Tract B is "nonconforming." *See* Opening Brief, p. 17, pp 27-28. Mr. Olson thus correctly stated the issues before this Court based upon the actual facts and circumstances of the case. Opening Brief, pp.10-11.

The County's Restatement falsely states that this case involves "altering a plat" or "converting a use" or critical areas designation. The

fact that Tract B is located within a “landslide and erosion hazard area” does not change this result. Such an area is not a zoning designation, but a condition of the land which requires heightened environmental review before a home can be constructed under the Pierce County Critical Areas Ordinance, PCC Title 18E. Mr. Olson does not ask that this designation be removed; he agrees he must comply with the ordinance.<sup>2</sup>

### III. STATEMENT OF FACTS<sup>3</sup>

Mr. Olson strongly disputes the County’s application of the facts to the law, and the legal rulings by the Examiner as affirmed by the Superior Court, but concurs with some of the County’s factual summary of the case as presented in its Response Brief (pp. 3-16), particularly the following:

1. In 1993, the County approved the Pilchuck View Estates plat, which created 23 lots served by private roads, utilities, and on-site sewage disposal systems created by the plat developer. There is extensive testimony regarding the status of two tracts, “A” and “B” (Olson property), that were also created as tracts but could not be served roads and utilities at the time the plat was approved. These two tracts were not

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<sup>2</sup> The uncontroverted record and expert reports submitted by Mr. Olson show that he can develop his property in compliance with the Critical Areas Ordinance for residential construction, although such review has not yet occurred. **AR 165-68**. The Examiner and the Superior Court did not mention changing a critical areas designation and Mr. Olson has never contended the County regulations for such areas do not apply.

<sup>3</sup> The County is wrong that Mr. Olson did not assign error to any Findings of Fact except Finding No. 10. While it is true that the Findings are in actuality conclusions of law, Mr. Olson assigned error to numerous Findings and briefed those assignments in his Opening Brief. *See* Assignments Nos. 1-8, 13, 15.

included among the numbered 23 platted lots because of site constraints precluding provision of access and utilities through the plat property. The County correctly notes that the developer intended these areas to be physically separate from the rest of the plat, specifically for development upon availability of utilities at a later date. County's Brief, p. 4. In 1993, the County thought the two tracts had to be part of the preliminary plat approval while the developer was willing to exclude them. The compromise was to create the two tracts through the preliminary plat approval process but then to remove them from the Plat for purposes of future development, subject to a public process to meet Mr. Lynn's concerns referenced by the County at page 5 of its Response.

2. It was not necessary to designate either Tract as open space to obtain plat approval. Through agreement by all parties, Tracts A and B were considered as native growth or greenbelt areas "*at the present time*" (referring to 1993) because they had not gone through the development review process. The reference to "open space" simply reflected the physical condition of the heavily-forested undeveloped parcels at the time. 1993 Decision, comment 4(A)(II), County Brief, p.6. All parties to the 1993 hearing examiner decision intended Tract B to be developed upon provision of access and utilities after the prescribed procedure was followed, so any consideration as "open space" was "temporary," as noted

by Planner Anna Maria Sibon, and the parcel was subject to later development. The plat approval did not label Tracts A and B as “open space.” It is undisputed that Tract B was labeled “Private Reserve,” as stated in the Response Brief at p.7, with the critical area site conditions as to slopes and drainage noted on the face of the Plat, and that the Plat (and terms of approval) did not purport to convey any interest in Tract B to any other lot owner.

3. The Hearing Examiner addressed the issue of notice to third parties regarding sale of Tract B in Comment 4(A)(III). The County argues that this condition supports its interpretation of the Hearing Examiner’s intent in 1993. However, when read in its entirety, the comment clearly refers to sale of Tract B to third parties during proposed build-out of the plat and does not purport to limit Tract B indefinitely into the future. The comment clearly understands that Tract B would be developed, but might be sold before the conditions of development were met, *i.e.* review under the Critical Areas Ordinance and regulations in effect at the time of proposed development. This is consistent with Ms. Sibon’s testimony concerning the “temporary” status of the parcels. The restrictions noted on the face of the plat do not purport to designate Tracts A and B as permanent greenbelt or open space; rather, they only require that the owner of these tracts undertake the designated

development review process because of the site conditions referenced in the Plat Note, No. 5.

4. The County correctly points out that General Note 5 on the face of the plat identified critical areas and that Tract B was “Reserved Area, Private Ownership.” However, the County argues that this note is evidence that Tract B was never to become an approved building site. Mr. Olson does not contend that Tract B was approved as a building site in 1993 given the absence of a development review process similar to that accorded the 23 platted lots. Contrary to the County’s argument, General Note 5 clearly identifies Tract B as subject to future development in accordance with land use regulations that applied to the Gig Harbor Peninsula and applicable state law. That review would include critical areas review because Tract B is located in a landslide/erosion hazard area and natural drainage course. Note 5 is further evidence that all parties involved intended and expected Tract B to be developed at a later date, consistent with Ms. Sibon’s comments. Simply giving notice to the public and potential purchasers that future development could not occur until completion of a public process similar to that applied to the numbered lots in the plat does not render the Tract B approval process a change in zoning or alteration of the plat. *See* former Department of Planning and Land

Services employee Carl Halsan's testimony summary, Opening Brief, pp.19-20.

5. The County correctly states that the zoning changed and that Fox Island was down-zoned in 1995, and that in 2005 the County adopted PCC § 18F.40.080, which would prohibit creation of additional lots within an approved plat. The context must be understood. Down-zoning of Fox Island to a density of no more than one dwelling unit per ten acres resulted from Growth Management Act requirements to control "urban sprawl." *See* RCW 36.70A.020(2). Mr. Olson's lot is one of thousands of properties located throughout the State of Washington rendered non-conforming by counties' adoption of "large lot" densities to meet GMA requirements. What the County fails to acknowledge is that the Pilchuck View Estates Plat does not need to be altered. *See* Halsan testimony. Tract B is an existing lot, rendering this provision of the County's Code irrelevant. As required by Pierce County, Tract B was given its status as a legally-created tax parcel subject to later development.

The County further fails to acknowledge that County land use regulations allow for the development of existing lots made non-conforming through subsequent zoning changes. PCC § 18A.35.130 specifically allows the development of Tract B as a non-conforming lot, as Tract B was legally created prior to the 1995 and 2005 zoning changes.

6. Mr. Olson purchased Tract B at a tax foreclosure sale. As a local neighbor and member of the community, Mr. Olson was very familiar with and researched the status and history of Tract B. By reading the plain language used by the Hearing Examiner in 1993, Mr. Olson correctly concluded that Tract B could be developed, but only after undergoing the process prescribed by the Hearing Examiner and the development process set out in the County's development regulations, including critical areas review, for erosion hazard and natural drainage areas. Of note, Mr. Olson purchased Tract B from Pierce County, which provided no notice that the tract was undevelopable because the County considered it permanent greenbelt or open space. This status is not shown on the face of the Final Plat or on the Pierce County Zoning Map. The landslide/erosion label from the County's Critical Areas Map is shown on the plat, but this designation means simply that any development proposal must undergo additional review. *See* PCC § 18E.10.030, .050; Chapter 18E.80 (Landslide Hazard Areas); Chapter 18E.110 (Erosion Hazard Areas). Compliance with the Critical Areas Ordinance requires submittal of an application with public notice and a public hearing. PCC § 18.10.070(B)(2)(C). This process is easily construed as one which meets the process requirement for Tract B set out in the 1993 Decision.

#### IV. STANDARD OF REVIEW

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). The County takes issue with what it terms a “shotgun approach” regarding Mr. Olson rights under LUPA. If the County has an issue with the public’s right to different levels of judicial review, Mr. Olson suggests that the County take this up with the Legislature and change the law. Until that time, Mr. Olson is entitled any and all standards of review that apply as set out in the Land Use Petition Act. As stated in his Opening Brief, of the six standards of review, two 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).

The County argues that the 2008 Hearing Examiner decision<sup>4</sup> should be afforded deference despite clear misinterpretation of the plain language of the 1993 Hearing Examiner Decision.

Under LUPA, a court may give a local jurisdiction’s interpretation of the law “such deference as is due the construction of a law by a local

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<sup>4</sup> The County is correct that the Examiner acted as the “Original Tribunal” in this matter.

government with expertise.” RCW 36.70C.130(1)(b). LUPA does not mandate deference unless it is “due.” Here, none is due for the following reasons:

Pierce County patently did not interpret its own ordinances to preclude relief to Mr. Olson because the County claims no ordinance exists to allow development of Tract B and it relies instead upon a state statute, RCW 58.17.

No deference is due to a land use decision 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). Here, Pierce County erroneously claims that there are no provisions in the code to allow development of Tract B as a non-conforming lot.

No deference is due when the County has made as many obvious mistakes, misinterpretations, and misstatements of fact, as it has 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).

No deference is accorded a decision that is wrong. *Id.*

The County has made no record to justify deference.<sup>5</sup>

This entire matter is not based upon discretion, but upon the legal argument of the County's assigned attorney. No deference is accorded legal argument. *See* Opening Brief, p.24, n.12.

## V. LEGAL ARGUMENT

### A. **The 2008 Hearing Examiner Decision Erroneously Interpreted and Erroneously Applied the Law When It Misinterpreted and Misapplied the 1993 Hearing Examiner Decision that Specifically Provided for the Right to Develop Tract B Subject to Compliance With a Public Review Process and Current Development Regulations.**

The 2008 decision upheld by the Superior Court failed to acknowledge the language in the 1993 Decision that clearly and concisely instructed how the process of developing Tract B was to occur. The 1993 Decision was written specifically to help both future owners of Tracts A and B and County staff begin the development application process when the time came. Here, the County refuses to allow a process contemplated by all parties in 1993 to even begin. The 2008 Decision erred by not allowing Mr. Olson to follow the express instructions of the 1993 decision.

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<sup>5</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).

The 2008 Hearing Examiner erroneously concluded Tract B was never considered for anything more than open space/greenbelt.<sup>6</sup> The Examiner extracted one sentence out of the entire 1993 No. 4(A) condition, which was carefully drafted by the 1993 Examiner. The 2008 Examiner relied on this small portion of Condition 4(A) to infer that Tract B was never considered for anything more than native growth/green space. The full context of the sentence and the entirety of Condition 4(A) was that Tract B was not being considered for anything more than native growth/green belt *at the present time* (in 1993) in reflection of the site condition. Even then it was only temporary, and the 1993 Examiner provided specific instructions as to how the development process would begin in the future. The 1993 Decision simply reflected the fact that Tracts A and B at that time lacked roads and utilities; it did not conclude that this physical condition was immutable. More to the point, the decision did not purport to permanently designate the Tracts as open space. It bears repeating that Tract B is not labeled open space or greenbelt on the Final Plat. The truth is that Tract B was always considered for development in the future.

By erroneously stating Tract B was never intended for anything more than a native growth or greenbelt area, the 2008 Examiner illegally

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<sup>6</sup> Finding No. 17, **AR 12**.

boot-strapped the description of Tract B's physical condition in 1993 (that it then lacked road and utility access) and the fact that Tract B had not yet gone through the development review process, into a permanent open space designation. The Superior Court compounded the error when it upheld the 2008 Examiner's error by declaring that Tract B was never intended for anything more than *open space* and was not even a lot. This error compels reversal of the Superior Court's decision to affirm. *See* Opening Brief, pp.24-27.

**B. Tract B's Previous Status as a Tax Foreclosure Sale Has No Bearing on Mr. Olson's Rights to Develop His Property.**

The County salts its argument with references to the fact that Mr. Olson purchased Tract B from the County through a tax foreclosure sale at a price set by the County. The County is clearly attempting to sway this Court's decision by coloring Mr. Olson as a person trying to get "something for nothing." But Mr. Olson has the same rights as any other property owner, which are not diminished in any way by how Tract B was purchased. The County cites no authority by which Mr. Olson can be punished for having a keen eye for a development opportunity or simply because he purchased Tract B allegedly at a below-market price.

When Pierce County acquired title to Tract B via tax foreclosure, it acquired title as absolutely as if purchased by an individual. The County

had the right to sell Tract B at any time to justly apportion the proceeds to the state. *Commercial Waterway Dist. No. 1 v. King County*, 197 Wash. 441 85 P.2d 1067 (1938). Pierce County therefore had several options with respect to its disposition of the property. It could have held the property in trust; it could have sold it to maximize the County's benefit from owning the property; it could have held the property under a "public reserve" label, if the Plat Note was altered.

It is important to remember that Pierce County set the price by which Mr. Olson purchased the property. Pierce County has introduced no evidence that any market analysis or research was performed to assess the property's value in light of the 1993 Hearing Examiner Decision. If such information existed, the County did not disclose it to Mr. Olson at the time of purchase. Nor did the County disclose any restriction on development apart from the notes on the final plat of Pilchuck View Estates. These notes make no reference to a restriction on future development, but simply identify a process to go through before the parcel can be developed.

**C. RCW 58.17.170 Does Not Apply Because Tract B Was Not a Part of The Pilchuck View Estates Plat Development Build-out But Was Reserved For Future Development.**

The County misapplies RCW 58.17.170 to support its claim that the clock has "run out" because of a five-year build-out limitation of a plat contemplated by the statute. This argument is a red herring because it is

uncontested that the five-year period was met for development of the 23 platted lots.

In addition, although Tract B is located within the physical boundaries of the Pilchuck View Estates, it was not part of the 23 lots approved for the subdivision and served by the specified plat infrastructure. As a separate tract, Tract B was only reserved for later development because of a lack of access and utilities at the time of approval in 1993. Because Tract B was never a part of the Plat, RCW 58.17.170 does not apply and the County's laborious arguments regarding application of this statute should be disregarded.

The County rightly states that Mr. Olson does not take issue with the Examiner's Findings that the density of the Plat would be precluded under current zoning. The County assigns greater importance to this fact than is due. A new plat development is not before this Court. The County conceded that RCW 58.17.170 does not affect the density of Pilchuck View Estates, even after the five-year period:

Q: Now, what is your understanding about the way that works? For example, this is a 23-lot plat, and so, then, how would the vesting statute impact that plat, then? Let's say that 22 lots were purchased and built on. There's one lot that's not.

A: The plat was approved for 23 single-family residential lots, so the five years does not apply to that. But the five-year period obviously is for additional number of the lots – if they could go ahead and, you know, do a

major amendment to the plat for additional lots. But the five years has been passed already.

Q: So what does the five year – we have the 23-lot plat sitting here, okay, the final plat, and the five years passes. What’s the significance of that?

A: That – now you have to meet today’s regulations. If the five years has passed, it doesn’t go back to what it was originally approved for, but it goes back: Well, what is today’s regulations?

Q: So if, in this 23-lot plat, say, none of the lots are developed, then, does the Applicant then have to – or a plat owner have to combine those lots to meet the standards, the density standards, of the R10?

A: **I – I wouldn’t say that he would. I believe those are created lots of record, so there’s 23 single-family residential lots that were approved, and it will remain as that.** I think the vesting for the five years is that – let’s say, now, the zoning is RNC, and if someone wants to come and do a single-family residence and single-family residence is not allowed in RNC, then –

Q: So it’s vested for the use, then?

A: Correct.

Q: So it doesn’t matter, then, that the lots are not sold, but it’s the use?

A: It’s the use.

Q: That’s what we’re looking at?

A: It would – I would say yes.

**TR 23:3-25, 24:1-13** (emphasis supplied).

The County’s argument is illogical. It concedes that Tract B was created by the Pilchuck View Estates preliminary plat approval, as were the 23 platted lots. It agrees that any undeveloped platted lot is not subject

to RCW 58.17.170 and that the five-year period was met for plat development of the 23 platted lots. But it then claims that Tract B is somehow subject to the statute because of a “change in use.” However, Tract B was and remains a legally-created parcel; it was and remains zoned for single-family use. A clearer example of arbitrary and capricious decision making is difficult to imagine.

The County argues (at page 15 of its Brief) that the 2008 Hearing Examiner’s reliance on *Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997), proves that RCW 58.17.170 applies to Tract B. But *Noble Manor* involved a short plat and vesting, not a long plat such as Pilchuck View Estates. *Noble Manor* focused on assuring that the public process was implemented, not to allow a blanket preclusion of development rights after five years.

**D. The Doctrine of Finality Does Not Apply Because Tract B Was Subject to Specific and Express Rules and Requirements that Span the Passage of Time Since 1993. The Doctrine of Finality Should be Invoked on Behalf of Mr. Olson to Honor the Clear Instructions Provided by the 1993 Hearing Examiner.**

The County argues that Mr. Olson’s (or the plat developer’s) only remedy was to appeal the 1993 Examiner’s *approval* of his development. Such an argument misapplies the doctrine of finality by requiring a “back to the future” appeal 17 years after the favorable 1993 Decision. The County urges this Court to twist the doctrine of finality into the “doctrine

of endless and wasteful appeals.” Applying the doctrine of finality to bar Mr. Olson’s remedy today would encourage participants in the development process to pursue endless appeals of sound results on the chance that an agency, at some point in the indefinite future, will willfully misconstrue and misapply the result.

In 1993, the approved use of Tract B was single-family residential, labeled Private Reserve, subject to future development, not open space. The 1993 Decision clearly prescribed a process by which the plat developer (now Mr. Olson) could begin the land use application process for Tract B. It is important to note the County also did not appeal the 1993 decision. It is a more apt application of the doctrine of finality to require the County to honor its commitment to consider an application for development of Tract B pursuant to the process identified in the 1993 Decision. The County may not collaterally attack a decision it now does not like because some citizens have grown accustomed to Tract B as their own personal open space.

**E. Tract B Has Always Met and Currently Meets the Minimum Lot Size for Development Because Tract B was Legally Established as a Tax Lot in 1993 and Can be Developed as a Non-Conforming Lot as to the Current Zoning Density.**

The County claims at length that the current Pilchuck View Estates Plat would not be approved today based upon current density limitations and that further subdivision of any of the Pilchuck View Estates lots

would also be prohibited. Mr. Olson does not seek to subdivide Tract B or create any new lots within the Pilchuck View estates Plat or create a new plat. Mr. Olson seeks only to build a modest single-family residence on Tract B consistent with the surrounding neighborhood. The 1995 downzone of Fox Island is irrelevant to the proposed development of Tract B. As a lot legally created in 1993, the only change is that Tract B is now non-conforming as to zoning density, although it was conforming when created. The Pierce County Code explicitly allows non-conforming development on legally-created lots which meet minimum lot size standards such as Tract B.

All of Fox Island was down-zoned to R-10 in 1995 when the County adopted its new Comprehensive Plan. Tract B is not the only lot that was rendered legally non-conforming when this occurred. The County Code, PCC § 18A.35.130, specifically deals with non-conforming lots and provides development guidelines for how these lots may be developed. *See* Opening Brief, pp.27-28.

By arbitrarily and impermissibly changing the status of Tract B from private reserve/greenbelt to *de facto* public open space, the County does nothing less than gift Tract B to the public. Pierce County bolsters this illegal gift by including superfluous testimony of neighbors that they thought Tract B would always be open-space. If Mr. Olson found the

1993 Decision, which permitted development of Tract B, then so could the neighbors. Land use laws are not properly used to deny a land use application or proposed development that neighbors do not like. *Parkridge v. City of Seattle*, 89 Wn.2d 454, 573 P.2d 359 (1978).

The County hopes that this Court will accept its argument that the *de facto*, illegal creation of open space has now somehow ripened into an open space *use*. To clarify, Tract B is located in a **residential** zone. It was residential in 1993 when it was created and is residential today despite the 1995 down-zone to R-10. The zoning designation of Tract B has not changed, since it was never intended or designated to be open space. There is no change in use because the County cannot arbitrarily and impermissible declare that Tract B is now public open space. Physically, the appearance of Tract B will change. Trees will be cut, grading will occur, and a modest single-family home will be constructed, but the zoning of Tract B does not change.

The County sidesteps the existence of legally-created, non-conforming lots, because it knows Tract B has vested rights as a legally non-conforming lot. The development rights associated with Tract B cannot be subsumed by the County's declaration that Tract B was always intended to be and will forever will remain open space. This is simply wrong. There are no substantive restrictions on the development of

Tract B that would preclude development (e.g., minimum lot size, inadequate side yard setback distances, restrictions on square footage for on-site sewage capacity, erosion control measures or utility and access restrictions). Tract B was always capable of being developed as a single-family residential lot per the conditions of the 1993 Decision.

Despite the County's fervent claims otherwise, PCC 18A.35.130 (non-conforming buildings uses and lots) is the current code by which Tract B may be developed. By following this prescribed process, the public health safety and welfare is served and Mr. Olson's constitutional rights protected.

**F. The County's Assertion that Mr. Olson's Constitutional Rights Were Not Violated Because He Did Not Own the Property in 1995 is Wrong. The County's Refusal to Accept Mr. Olson's Land Use Application is Both a Procedural<sup>7</sup> and Substantive Violation of His Constitutional Rights.**

The Washington Supreme Court has long-recognized that “[a]lthough less than a fee interest, development rights are beyond question a valuable right in property.” *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 50, 720 P.2d 782, (1986). “Despite the expanding power over land use exerted by all levels of government, ‘[t]he basic rule in land use law is still that, absent more, an individual should be

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<sup>7</sup> There is a constitutional right to be free of arbitrary government decision-making. See Opening Brief, pp.48-49.

able to utilize his own land as he sees fit.” *Id.* (citing *Norco Constr., Inc. v. King County*, 97 Wn.2d 680, 684, 649 P.2d 103 (1982)).

The County contends that Mr. Olson “bought into the problem” because by the time he purchased his property on Fox Island it was already down-zoned. This contention misses the point. What Mr. Olson challenges as unconstitutional is the County’s application of its laws to the facts and circumstances, which preclude his fundamental right to develop Tract B. In this regard, he is not contending that these laws do not apply, but just the reverse. If the County insists its non-conforming lot regulations do not apply, the effect is to take Tract B from Mr. Olson and provide it to the neighbors with no compensation to Mr. Olson. While the County argues that this action does not destroy any fundamental attribute of property ownership, it actually does because it precludes use of property, which is a protected fundamental right. Encompassed in this right is the right to reasonably develop property.

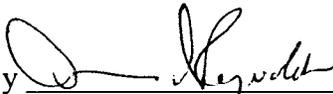
It is true that if Mr. Olson has problems going through the development review process, including crucial areas regulation, those problems are not ripe for adjudication under a takings analysis. The County’s denial of his fundamental right to develop the property is ripe, however. Mr. Olson’s expectations are not “tenuous at best,” because the Plat Note set out the development restrictions on the property and the Pierce

County Code provides a development review process to allow construction of a single-family home if critical area functions and values are protected, which Mr. Olson believes he can do in this case. The County alludes to the Growth Management Act, but that law states that private property “shall not be taken for public use without just compensation having been made.” RCW 36.70A.020(6). Thus, the GMA supports Mr. Olson.

## VI. CONCLUSION

Mr. Olson respectfully requests that this Court reverse the decisions of the Superior Court and the Hearing Examiner and remand with instructions that the County be directed to process Mr. Olson’s application.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of April, 2010.

By   
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 7<sup>th</sup> day of April, 2010, I caused the original and one copy of the document to which this certificate is attached to be delivered for filing via Priority mail to:

Clerk of Court  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402  
(253) 593-2970, tel

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COURT OF APPEALS  
DIVISION II

I further certify that on this 7<sup>th</sup> day of April, 2010, I caused a copy of the document to which this certificate is attached to be delivered to the following via Priority mail:

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Declared under penalty of perjury under the laws of the State of Washington at Bainbridge Island, Washington this 7<sup>th</sup> day of April, 2010.

  
Joy K. Lawrence  
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