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COURT OF APPEALS
DIVISION III

10 FEB -8 PM 3:31

NO. 39687-4-II

STATE OF WASHINGTON

BY 
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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

RUSSELL OLSON,

Appellant,

v.

PIERCE COUNTY,

Respondent.

BRIEF OF RESPONDENT PIERCE COUNTY

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I. INTRODUCTION

This land use case involves an unsuccessful attempt by Appellant Russell Olson (“Olson” or “Appellant”), purchaser at a tax foreclosure sale, to convert a “landslide and erosion hazard area” designated as “Tract B” on a final plat into a building site fifteen years after plat approval.¹ The Hearing Examiner correctly found that the use of Tract B as a private “native growth or greenbelt area” was established at the time of final plat approval by the developer. The Examiner further found that in light of the County’s adoption of a Growth Management Act (“GMA”) comprehensive plan and implementing development regulations in the mid-1990s, Tract B could not now be converted into a residential building site. Accordingly, the Examiner upheld the administrative determination made by the Pierce County Planning and Land Services Department (“PALS”).

Thereafter Olson filed a petition pursuant to the Land Use Petition Act, *ch. 36.70C RCW*, in Pierce County Superior Court Cause No. 09-2-06534-4. The Honorable Linda C.J. Lee heard Olson’s petition and issued a memorandum opinion affirming the decision of the Hearing Examiner.

¹ As shown on Exhibit A to the County’s brief, Tract B also shows the following information: “(reserved area private ownership, see note 5 sh[ee]t 3 of 3).” A natural drainage course crosses Tract B as well. For the convenience of the court, the outline of Tract B has been highlighted in yellow.

An order reflecting Judge Lee's opinion was filed and appealed to this Court by Olson.

II. RESTATEMENT OF ISSUES

In his statement of issues Appellant Olson misstates the facts and fails to set forth the burden of proof as to all of his arguments. For example, Olson refers to Tract B as a **non**conforming lot, which it is not.² Furthermore, Olson incorrectly states that Tract B was "excluded from the Pilchuck View Estates final plat development".³ Accordingly, Respondent Pierce County herein sets forth the relevant issues before the Court in this case.

1. Whether Olson met his burden of proving that any of the stated grounds for reversal of the Hearing Examiner's decision set forth in *RCW 36.70C.130(1)* have been met.
2. Whether the Hearing Examiner correctly found that the doctrine of finality in land use decisions precludes conversion of Tract B from its stated use as a "landslide and erosion hazard area" to a building site.
3. Whether the Hearing Examiner correctly found that Pierce County's current development regulations preclude conversion of Tract B into a building site.
4. Whether the Hearing Examiner correctly found that a plat alteration could not be approved because it would create an additional building site.

² Appellant's Opening Brief, p. 11, issue 6. See Sec. IV, D below.

³ Appellant's Opening Brief, p. 10, issue 2.

5. Whether Olson met his burden of proving equitable estoppel against the County based upon submission of an application for plat alteration.
6. Whether Olson met his burden of proving that the Hearing Examiner's decision was an unconstitutional taking or substantive due process violation.

III. STATEMENT OF FACTS

A. **1993 Approval of Preliminary Plat of Pilchuck View Estates.**

This case began with plat approval proceedings that took place in 1993 before the Pierce County Hearing Examiner. On October 13, 1993, the Examiner convened a public hearing to hear a request for plat approval by then property owner, Ron Marston.⁴ The request described the proposal as follows:

Divide a 23.68-acre parcel into **23 single-family lots**, to be served by private roads and on-site sewage disposal systems, on the west side of 11th Ave., near the 1400 block, Fox Island, in a Rural-Residential Environment, in the NE ¼ of Sec. 13, T20N, R1E, W.M., Council District #7.⁵

The Examiner's 1993 decision includes a summary of the testimony that took place at the hearing, including testimony about Tract

⁴ AR 69. "AR" refers to the Administrative Record that was made before the Hearing Examiner and transferred to the Court of Appeals (under separate cover) by the Pierce County Superior Court Clerk on or about October 9, 2009. Each page of the Administrative Record is numbered (handwritten) in the lower right hand corner. "AR 69" refers to page 69 of the Administrative Record.

⁵ Emphasis added in bold.

B.⁶ It appears from the summary of testimony that the property owner tried to exclude the area known as Tract B, along with another area (shown as Tract A), from the plat:

Ms. Sibon [the planner on the case] stated that the site plan appears in proper form with two exceptions. First, a long, narrow “panhandle” area in the far northwest portion of the parent tract is marked on the preliminary plat map as “Not a Part”, as is a steeply-sloped area in the southwest corner of the parent tract. She stated Jill Guernsey of the Prosecuting Attorney’s Office has written a letter opinion concluding that such designations are improper in a designation of plat boundaries. Ms. Sibon proposed that the two areas in question be temporarily designated as open space, subject to later development.⁷

James Richardson, the property owner’s agent, testified that these two areas were “physically separate from the rest of the subdivision” and “not accessible for road or utility purposes.”⁸ He made it clear, however, that they wanted to be able to develop them “when it becomes practicable to do so, upon availability of utilities.”⁹

Joseph Quinn, the property owner’s attorney, stated that he agreed with the County that all properties within the subdivision boundaries had to be included within the plat, and suggested that these areas be designated as Tracts “A” and “B,” and that a note be added stating that “these tracts

⁶ AR 69-80.

⁷ AR 69-70.

⁸ AR 70.

⁹ AR 70.

are not designated as building lots at the time of plat approval, but are subject to possible future development.”¹⁰

Also appearing was attorney William Lynn, on behalf of his parents who own property nearby.¹¹ The summary of testimony states that Mr. Lynn:

. . . has misgivings about making a final determination as to the status of the two tracts, because there has been no public notice given regarding them, nor have they been reviewed by the County staff or the Peninsula Advisory Commission. In fact, he feels that as a legal matter, probably the only thing that can be done is designate the tracts as open space.¹²

Mr. Richardson responded and asked that they be “designated specifically as being held for future development.”¹³ He further objected to having them designated as “open space.”¹⁴ Attorney Quinn also objected to the term “open space” for these two tracts.¹⁵

The Examiner issued a decision approving the plat on November 19, 1993.¹⁶ Conclusion No. 4(A) specifically addressed the area which is the subject of this appeal:

4. The proposed site plan of Pilchuck View Estates should be approved, subject to the following conditions:

¹⁰ AR 70.

¹¹ AR 70.

¹² AR 70.

¹³ AR 71.

¹⁴ AR 71.

¹⁵ AR 71.

¹⁶ AR 69-80.

- 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 [A and B] have not been proposed by the Applicant as building sites, and information necessary to review them as building sites has not be [sic] 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 requirement of applicable Pierce County Codes, including those pertaining to development, or 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 greenbelt areas. Any proposed use or development of Tracts A and B may only be considered as a major amendment to the plat of Pilchuck [View] 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.**
- 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 law. . . .”¹⁷

B. 1994 Final Plat Approval of a 23-Lot Single-Family Residential Subdivision.

Under state and local subdivision laws, once a preliminary plat is approved, the property owner must comply with the conditions of preliminary plat approval in order to obtain final plat approval. *See RCW 58.17.150.* In this case the property owner sought and received final plat approval in 1994.¹⁸ The recorded final plat drawings are helpful in understanding this case. Sheet 2¹⁹ shows that 23 lots were approved as building sites for single-family residential use. Although not approved as building sites, Tracts A and B were also shown on the final plat. Tract A is in the southwest corner of the plat and Tract B, the subject property in this proceeding, is located in the southeast corner. Tract B has three notations on it:

1. Landslide and Erosion Hazard Area;
2. Natural Drainage Course; and
3. (Reserved Area Private Ownership See Note 5 sh[ee]t 3 of 3).

¹⁷ AR 74 - 75; emphasis added in bold.

¹⁸ See AR 92-94, full size (18” x 24”) copies of the final plat mylars (3 sheets) that were recorded with the Pierce County Auditor under AFN 9411020490. For the convenience of the court, reduced copies of all three sheets of the final plat are included as Exhibits A, B, and C to this brief. Tract B has been highlighted in yellow.

¹⁹ Ex. A to this Brief.

General Note 5²⁰ also made it clear that these tracts were not approved building sites:

5. 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. No clearing, grading, fill or construction of any kind will be allowed within these tracts, except for the removal of diseased or dangerous trees and the placement of underground utility lines and supplemental landscaping. . . . Prior to the development of tract A and B see condition 4(A) of the Office of the Hearing Examiner of Pierce County report and decision dated November 19, 1993.

C. Applicable Laws at Time of Final Plat Approval.

At the time this plat was developed, Fox Island was governed by the Gig Harbor Peninsula Community Plan and Gig Harbor Peninsula Development Regulations (“GHDR”) set forth in *ch. 18.50 PCC*. The GHDR required approval of a site plan whenever a plat or subdivision was approved.²¹ The regulations also allowed site plans to be amended after approval.²²

D. Relevant Events After Final Plat Approval.

Several relevant events took place after the final plat of Pilchuck View Estates was recorded in 1994. First, the County repealed the County

²⁰ Ex. C to this Brief.

²¹ See *PCC 18.50.185(C)(1)* for subdivision of property within the Rural-residential Environment. Copies of referenced provisions of the Pierce County Code are included as Exhibits.

²² *PCC 18.50.915*.

comprehensive plan and development regulations and adopted a County-wide GMA comprehensive plan and implementing development regulations. Second, the property was downzoned, meaning that a proposed plat with this many building sites would no longer be approved. Third, Olson purchased Tract B at a tax foreclosure sale. Fourth, Pierce County amended its subdivision code and prohibited plat alterations which would create additional lots. Each event will be discussed in detail.

1. Repeal of Gig Harbor Peninsula Comprehensive Plan and Development Regulations in 1994/1995.

In 1990 the Washington Legislature passed the Growth Management Act (“GMA”) and participating counties were directed to prepare and adopt new comprehensive plans and implementing development regulations.²³ Pierce County adopted its GMA comprehensive plan in 1994, and implementing zoning regulations in 1995.²⁴ The ordinances that adopted the GMA Comprehensive Plan and implementing development regulations also repealed the Gig Harbor Peninsula Comprehensive Plan and GHDR (*ch. 18.50 PCC*).²⁵ In particular, *PCC 18.50.915*, relied upon by Appellant for the argument that

²³ The Growth Management Act was enacted by the Washington State Legislature by passage of SHB 2929 [1990 1st extra session chapter 17], and is primarily codified at *ch. 36.70A RCW*.

²⁴ Pierce County Ord. Nos. 94-82s, 94-167, and 95-79s.

²⁵ Ord. No. 95-79s, sec. 1.

the site plan that accompanied the plat can be amended, was repealed in its entirety.²⁶

2. Zoning of the Area Changed to Rural 10 in 1995.

Most of Fox Island was rezoned to Rural 10 in 1995, a zoning classification which only allows a density of one dwelling unit per ten (10) acres.²⁷ Under the Rural 10 zoning, a parcel of this size (23 plus acres) could not be divided into 23 building sites as the zoning only allows one dwelling unit per ten acres.²⁸

3. Olson Purchased Tract B at a Tax Foreclosure Sale in 2003.

In late 2003 Olson purchased Tract B at a tax foreclosure sale for \$1,026.55.²⁹ Olson testified that before buying the property he looked at the Planning Department file and read the Examiner's 1993 decision.³⁰ He candidly testified before the Examiner that he thought from reading the file that Tract B could become a building site:

Q³¹ And you said that "they meant it to be a lot." Who were you referring to when you said "they"?

A³² I'm not a lawyer. I don't know. I just -- from what I was reading, it was meant to be a lot. The people that I was

²⁶ Appellant's Opening Brief, pp. 32 - 33.

²⁷ Ord. 95-79s.

²⁸ Ord. 95-79s, *PCC 18A.35.020* Density & Dimension Table, Rural Classification, R10.

²⁹ AR 67.

³⁰ TR 76, line 18 - TR 77, line 3.

³¹ Questioning by DPA Jill Guernsey.

³² Answers by Appellant Olson.

reading about in there meant it to be a lot, and that's what I read.

Q And is it your interpretation of the Hearing Examiner's decision that that's what it was meant to be?

A Well, it could potentially be a lot. Or if you went through the process, and that's what I wanted to do, and that's why I got Carl [Halsan] to help me through it.³³

Not until 2007, more than three years after purchasing Tract B, did Olson hire a former planner, Carl Halsan, to assist him with his efforts to change the use of this tract to a building site.³⁴

4. Pierce County Adopted PCC 18F.40.080 Which Prohibits the Creation of Additional Lots Through the Plat Alteration Process in 2005.

In 2005, between the time Olson purchased Tract B (2003) and the time he sought to convert it to a building site (2007), Pierce County amended its subdivision code and enacted a provision addressing alterations to recorded final plats.³⁵ The applicable code provision, *PCC 18F.40.080*, provides in pertinent part:

18F.40.080 Proposed Alterations to a Recorded Final Plat.

Plat alterations typically apply to those elements which are common to the entire plat such as, but not limited to, trails, roads, buffers, open space, drainage easements, park and recreation sites, etc. A plat alteration provides a process to alter or modify a portion of a recorded final plat.

³³ TR 76, line 18 - TR 77, line 3.

³⁴ TR 47, line 17 - TR 48, line 14. It is important to note that contrary to statements in his brief, Olson never applied for a building permit. See Appellant's Opening Brief, p. 45, wherein he argues that the Examiner's decision not to process Olson's building permit application violates his rights.

³⁵ Ord. 2005-11s2.

A. General Requirements.

1. The provisions of this Section shall not apply to the following:

- g. The creation of additional lots.

While the Planning Department initially worked with Olson's agent to process the matter as an alteration to a final plat, Planning staff ultimately concluded that they could not recommend approval:

PALS [Planning and Land Services Department] struggled to determine what avenue would be appropriate to process your request, and has determined that a plat alteration and/or major amendment is not appropriate. Regardless of what the correct application process is (plat alteration and/or major amendment) when we analyzed the current zoning of R10 and the current density of the plat, the tract (Tract A³⁶) cannot be converted to a building site without further exceeding the current density limitations.³⁷

E. The 2008 Hearing Before the Examiner.

By the time the matter came before the Examiner in 2008, the parties agreed that the plat alteration process could not be used to change or convert the use of Tract B to residential.³⁸ At the hearing Olson's agent, Carl Halsan, argued that the term "lot" in the state and local subdivision laws included "tracts" and "parcels," and therefore Tract B should be considered a buildable "lot."³⁹ In his words, Olson was only

³⁶ AR 43 - 44. Ms. Carlson's letter inadvertently referenced Tract A instead of Tract B.

³⁷ AR 44.

³⁸ TR 28, lines 3 - 8.

³⁹ TR 29, line 18 - TR 30, line 3.

seeking to “implement” the final plat conditions regarding Tract B and trying to find a suitable process to do so.⁴⁰

Olson’s attorney submitted a brief to the Examiner, arguing that he should be allowed to amend the site plan that accompanied the plat pursuant to *PCC 18.50.915*.⁴¹ Olson further argued that Tract B was somehow vested for a specific use.⁴² In closing argument Olson, through his counsel, urged the Examiner to reopen the 1993 plat approval case and “complete the public process that was envisioned.”⁴³

F. The Hearing Examiner Denied Olson’s Request to Convert Tract B into a Building Site.

In a decision dated February 13, 2009, the Hearing Examiner denied Olson’s request.⁴⁴ The Examiner found that the 1993 preliminary plat of Pilchuck View Estates authorized subdivision into “23 building lots plus two tracts.”⁴⁵ The Examiner found that the public notice and hearing on the former owner’s application referred to a 23-lot single-family residential subdivision, and that Tracts A and

⁴⁰ TR 32, lines 20 - 25: “I’m of the opinion there’s nothing on this plat that needs to be changed. We are not altering the plat or the plat conditions, but we are implementing the plat and the plat conditions, and we’re now searching for a process to do that.”

⁴¹ AR 128 - 144.

⁴² AR 138 - 140.

⁴³ TR 89, lines 1 - 18.

⁴⁴ AR 1 - 20.

⁴⁵ AR 11, FOF 16.

B were not considered for any use other than “native growth or greenbelt areas:”

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”.⁴⁶

The Examiner further found that the 1994 approved final plat also showed Tracts A and B as open space areas.⁴⁷ Unfortunately, by the time Olson sought to change the use from open space to residential the development regulations had changed:

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
...⁴⁸

The Examiner rejected Olson’s argument that they were not “creating” a building site or “converting” Tract B but only “implementing” the Examiner’s decision:

Olson 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

⁴⁶ AR 12, FOF 17.

⁴⁷ AR 13, FOF 20.

⁴⁸ AR 13, FOF 21.

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 greenbelt areas....⁴⁹

The Examiner further considered the "divesting" statute, *RCW 58.17.170*, but found it inapplicable as more than five years passed since the final plat was approved in 1994:

22. . . . 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 [v. Pierce County]*, 133 Wn.2d 269, 943 P.2d 1378 (1997)], 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.

24. . . . 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 greenbelt areas" expired five years subsequent to final plat approval.

25. . . . 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 or 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 area" into a building site.⁵⁰

⁴⁹ AR 15.

⁵⁰ AR 13, FOF 22 - AR 15, FOF 25.

The Examiner also ruled that he did not have authority to consider Olson's remaining arguments as his powers are limited.⁵¹ Olson timely appealed the Hearing Examiner's decision to this Court pursuant to the Land Use Petition Act ("LUPA"), *ch. 36.70C RCW*.⁵²

III. STANDARD OF REVIEW

Judicial review of land use decisions is governed by the Land Use Petition Act ("LUPA"), *ch. 36.70C RCW*. *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003). The standard of review in a LUPA proceeding is set forth in *RCW 36.70C.130*. The party who seeks relief from the administrative tribunal has the burden of proving one or more of the grounds for relief set forth in *RCW 36.70C.130(1)*:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

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

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

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

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

⁵¹ AR 17, COL 4.

⁵² CP 1 - 49.

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

RCW 36.70C.130(1). As the party seeking relief from the decision of the Hearing Examiner, the burden is on Olson to prove one or more of the grounds set forth in this statute.

“When reviewing a superior court's decision on a land use petition, the appellate court stands in the shoes of the superior court.” *HJS Development*, at 468, quoting *Citizens to Preserve Pioneer Park v. City of Mercer Island*, 106 Wash.App. 461, 468, 24 P.3d 1079 (2001). Reviewing courts give deference to the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. *Cingular Wireless LLC v. Thurston County*, 131 Wash.App. 756, 768, 129 P.3d 300 (2006). In this case, the Court must give deference to the facts and reasonable inferences therefrom as found by the Hearing Examiner.⁵³

⁵³ Appellant mistakenly argues that the Hearing Examiner functioned as “an appellate body.” Appellant’s Opening Brief, p. 21. The Hearing Examiner held the only “open record public hearing” in this matter, heard testimony, reviewed evidence that was submitted, and was the factfinder as well as the County officer with the highest level of decision-making authority. The Hearing Examiner therefore functioned as that of the “original tribunal” in this matter. See *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wash.App. 614, 622, 829 P.2d 217, review denied, 120 Wash.2d 1008 (1992).

Questions of law are reviewed de novo. *W. Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000).

In the present case Olson takes a “shotgun” approach and argues that the Examiner’s decision is a clearly erroneous application of the law to the facts (*RCW 36.70C.130(1)(d)*), that the decision is not supported by substantial evidence (*RCW 36.70C.130(1)(c)*), that the decision is a clearly erroneous interpretation of the law (*RCW 36.70C.130(1)(b)*), and that the Examiner engaged in unlawful process or procedure (*RCW 36.70C.130(1)(a)*).⁵⁴ In addition, Olson argues that the Examiner’s decision violates his constitutional rights (*RCW 36.70C.130(1)(f)*), and that the doctrine of estoppel applies against the local government.⁵⁵

⁵⁴ See Appellant’s Opening Brief, pp. 22 - 23. Appellant mistakenly claims that “Pierce County did not interpret its own ordinances to preclude relief to Mr. Olson.” Appellant’s Opening Brief, p. 23. Yet that is precisely what the Planning Department, Hearing Examiner, and Superior Court did when they reviewed the Pilchuck View Estates plat, the restrictions the prior owner placed on Tract B, the County’s development regulations at the time of plat approval, as well as the County’s subsequently enacted development regulations.

Surprisingly, Appellant cites *White v. Salvation Army*, 118 Wn. App. 272, 277, 75 P.3d 990 (2003) and argues that the weight to be given an administrative policy depends upon several factors. Appellant’s Opening Brief, p. 23. Yet Appellant fails to identify any administrative policy which applies in this case.

⁵⁵ See Appellant’s Opening Brief, p. 23.

IV. LEGAL ARGUMENT

A. The Doctrine of Finality Precludes Conversion of the Approved Use of Tract B.

The well-settled doctrine of finality in Washington requires that challenges in land use matters be raised quickly. *Skamania County v. Columbia River Gorge Commission*, 144 Wash.2d 30, 49, 26 P.3d 241, quoting *Deschenes v. King County*, 83 Wash.2d 714, at 716-17, 521 P.2d 1181. See also *Chelan County v. Nykreim*, 146 Wash.2d 904, 931-932, 52 P.3d 1 (2002). LUPA recognizes and incorporates the doctrine of finality in its 21-day statute of limitations. *RCW 36.70C.040(3)*.

Thus, had anyone wanted to challenge the use of Tract A and B as native vegetation/greenbelt areas, the time to challenge would have been soon after the final plat was approved in 1994.⁵⁶ It is undisputed that this did not occur. Because the issue of future use of Tract B was not challenged until more than thirteen (13) years after the final plat approval of Pilchuck View Estates, lot owners residing in Pilchuck View Estates understandably thought that Tract B would not be developed as a building

⁵⁶ Although LUPA was not adopted until 1995, prior case law held that challenges to final plat approval must occur within a reasonable time period. See *City of Federal Way v. King County*, 62 Wash.App. 530, 534, 815 P.2d 790, 793 (1991).

site and would remain a privately owned tract restricted to native vegetation/greenbelt area:

My name is Ron Carson. I live at 1021 Paha. That would be Lot 10. My lot is adjacent to Mr. Russell's -- Mr. Olson's.

...

I probably have more property line touching his than any other. One of the things that has been kind of left unsaid, or has been minimized, is the potential for erosion, for landslide, and so forth.

When I bought that property, and in talking with neighbors who had bought property -- bought the original plots, they were of the understanding that Tract B was a mitigating -- a tract that would mitigate anything that could happen: erosion, water runoff; and, in the case of slides or earthquakes, if something should happen, that lot would absorb it. And that was apparently the intent of the development of the tract at the time⁵⁷

To allow a change of use of Tract B from native vegetation/greenbelt area to a building site more than thirteen years after the final plat was approved is contrary to the doctrine of finality. Olson's attempt to sidestep the time limitations period for challenges to final plat approval should be rejected.

⁵⁷ TR 67: 3-20.

B. Current Development Regulations Would Preclude the Development of a Plat of this Size with More Than Four Lots.

The plat of Pilchuck View Estates was developed under the Gig Harbor Peninsula Community Plan and Development Regulations (*ch. 18.50 PCC*) which were repealed in 1994/1995 when the County adopted its GMA Comprehensive Plan and implementing development regulations.⁵⁸ As part of the County's adoption of its GMA comprehensive plan and development regulations the area where Pilchuck View Estates is located was rezoned to Rural 10 ("R10").⁵⁹ Under R10 zoning, a 23 acre parcel could be divided into two building sites or, if part of the property were left in open space, four building sites could be created.⁶⁰ Under the current R10 zoning, a 23-acre parcel could **not** be developed into five building sites, much less 23, 24, or 25 building sites.

Therefore, because Condition 4(H) of the Examiner's 1993 decision required compliance with the law in effect when future development was attempted, and because current regulations do not allow the development of a plat at the density allowed in the 1990s, the

⁵⁸ See Pierce County Ord. Nos. 94-82s, 94-167, and 95-79s, and AR 10, FOF 12.

⁵⁹ AR 10, FOF 12. Olson does not challenge FOF 12, therefore it is a verity on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 808, 828 P.2d 549 (1992).

⁶⁰ *PCC 18A.23.030* Density and Dimension Table for the Gig Harbor Peninsula. These current regulations amended *PCC 18A.35.020*; however, the density limitations for R10 property in the Gig Harbor area have not changed.

Examiner found that the Pilchuck View Estates plat exceeded the density requirements of the R10 zoning classification and that conversion of Tract B into a building site would further exceed current regulations.⁶¹

Olson does not take issue with the Examiner's findings that the density of this development (the plat of Pilchuck View Estates) would be precluded under current zoning. Instead he sidesteps the issue and argues that he is not converting the parcel to a different use, he is not adding a new lot, and that there is no time limitation which precludes him from doing what he wants to do.⁶² Olson's arguments miss the point entirely. It is clear that under current zoning, the real property now known as the plat of Pilchuck View Estates exceeds the density allowed in an R10 zone. The Examiner was therefore correct in finding that this plat exceeds the current density and that allowing another building site would further exceed density. The Examiner's findings in this regard should therefore be upheld.

C. The Examiner Correctly Found that Tract B Could Not Be Converted From Open Space to Residential Use.

Olson repeatedly tries to recharacterize his actions from a request to convert Tract B from a nonbuildable site to a buildable site by saying he

⁶¹ AR 13, FOF 21 and 27..

⁶² See Appellant's Opening Brief, pp. 37 - 40.

is only trying to “implement” the Examiner’s 1993 decision, or try to obtain “removal of the restriction” imposed by the Examiner.⁶³ Olson’s mischaracterization of the facts is not supported by the evidence.

It is undisputed that rather than deal with issues involving steep slopes, lack of access and utilities, the prior owner of the property elected to develop a plat with 23 building sites, rather than 24 or 25 building sites. A review of the Examiner’s 1993 decision establishes why the prior owner chose not to make these areas building sites: these areas contain steep slopes and it was difficult to provide access and utilities to these areas. As the agent stated at the hearing, these areas are different from the rest of the plat because of the steepness of the slopes and their inaccessibility.⁶⁴

The decision not to make these areas building sites with suitable access, utilities, and geotechnical review was a business decision made by the prior owner. Although the prior owner may have contemplated developing Tracts A and/or B into building sites in the future, it is undisputed that the property ended up being sold at a tax foreclosure sale for slightly more than one thousand dollars.⁶⁵ More importantly, what may have started out in the prior owner’s mind as a temporary restriction

⁶³ See, for example, Appellant’s Opening Brief, pp. 24 - 27.

⁶⁴ AR 71, Summary of Testimony of Agent James Richardson.

⁶⁵ AR 65-67.

ended up becoming a permanent restriction due at least in part to changes in the development regulations after final plat approval.⁶⁶

No matter how it is characterized, the fact remains that Olson seeks to change the plat from 23 building sites to 24 building sites, by characterizing the requested change as “implementation,” “restriction removal,” or other words which are nothing more than another way of saying changing the use from open space to residential. Regardless of the term used, this plat was approved for 23 building sites, not 24. The Examiner was correct in his findings that this plat was approved for 23 building sites, not 25.

For the first time Olson argues that *PCC 18.80.020* allows conversion of Tract B to a building site.⁶⁷ This argument was not raised below and was not considered by the Hearing Examiner. It is therefore improper to raise this argument for the first time on appeal.⁶⁸ Nevertheless this argument is without merit as this section of the code is nothing more than a table of the notice requirements for various types of applications. For example, notice of an application for a plat alteration must be

⁶⁶ There is no evidence in the Administrative Record as to why the former owner of the property failed to develop Tracts A or B.

⁶⁷ See Appellant’s Opening Brief, p. 33.

⁶⁸ *Friends of the Law v. King County*, 63 Wash.App. 650, 655, 821 P.2d 539 (1991).

provided to nearby cities, owners of property within the subdivision, and in some cases the Washington State Department of Transportation (WSDOT).⁶⁹

To the same effect is *PCC 18.140.060*, now cited by Olson for the argument that the Examiner has the authority to modify the conditions of plat approval years after final plat approval.⁷⁰ Olson's argument ignores subsection "D" of *PCC 18.140.060* which lists the grounds for revocation or modification of an approved project, including fraud, violation of statute or ordinance, and the like. Had this argument been raised before the Examiner, it is likely that he would have concluded that the grounds did not exist to modify the use approved in the final plat of Pilchuck View Estates.

D. Olson's Nonconforming Arguments are Without Merit.

The term "nonconforming" is used to apply to two types of situations. A nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the

⁶⁹ *Id.*, endnote (1) on page 3 of *PCC 18.80.020*.

⁷⁰ See Appellant's Opening Brief, p. 33-34. It appears that Olson did not raise this argument before the Hearing Examiner, therefore it is not proper to raise it before reviewing courts. A summary of Olson's arguments before the Examiner are listed at AR 11, FOF 15.

zoning restrictions applicable to the district in which it is situated. *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wash.2d 1, 6, 959 P.2d 1024 (1998), citing 1 Robert M. Anderson, *American Law of Zoning* §6.01 (Kenneth H. Young ed., 4th ed.1996).

A typical example of a nonconforming use involves a situation where a lawfully established commercial use was constructed with all necessary permits, and the zoning is subsequently amended to prohibit commercial uses in that zone. In such case, the commercial use is said to be a “nonconforming use.”

It is well-settled that nonconforming uses are not favored under the law, however, local regulations determine whether such nonconforming uses may continue or be phased out over time. *Rhod-A-Zalea & 35th, Inc.*, at 7. In the present case, the use of Tract B as requested by the developer of the plat as a “native growth/greenbelt area” was not prohibited under the zoning in effect at the time the property was platted and it is not prohibited under the present R10 zoning.⁷¹ The use of Tract B for this purpose cannot therefore be said

⁷¹ The zoning code did not and does not specifically address the use of property as “native vegetation/greenbelt”; however, the “basic rule in land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit. U.S. Const. amends. 5, 14.” *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 50, 720 P.2d 782 (1986), quoting *Norco Constr., Inc. v. King Cy.*, 97 Wn.2d 680, 649 P.2d 103 (1982).

to be nonconforming.

Another type of nonconforming situation arises where it is not the use that is nonconforming, but the building or structure is not in compliance with current zoning regulations. For example, where zoning regulations are amended to require a 10-foot side yard setback from the property line, a pre-existing structure built three feet from the property line is considered nonconforming. See 1 Anderson, *American Law of Zoning* §6.01. This type of nonconformity is sometimes referred to as a nonconforming structure, or nonconforming as to bulk regulations. *Id.*

Although Olson frequently uses the term “nonconforming lot” he fails to say why or in what way he believes it is nonconforming.⁷² Nor does he cite to an ordinance or regulation which made Tract B somehow nonconforming. Moreover, the use of Tract B is not a non-conforming use because County regulations do not prohibit a property owner from designating a parcel as native vegetation/greenbelt area as was done by the prior owner in this case.

Nor is Tract B non-conforming because of its size. As Olson points out, under current regulations the minimum lot size in the R10

⁷² See, for example, Appellant’s Opening Brief, pp. 27 - 28.

zoning area is one (1) acre.⁷³

The nonconforming issue raised now by Olson is nothing more than a “red herring,” argued strenuously before Superior Court and this Court but not before the Examiner. It is undisputed that Tract B was not approved as a building site during the plat approval process, and that the use of Tract B as a native vegetation/greenbelt area conforms with both past and present development regulations.

E. The Significance of RCW 58.17.170 and .215.

1. RCW 58.17.170 “Divests” Approved Uses Five Years After Final Plat Approval.

RCW 58.17.170 is sometimes referred to as a “divesting” statute because it allows lots within a final plat to be developed in accordance with the review and approval of the plat for the five year period after final plat approval, even if the zoning changes:

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.

⁷³ *PCC 18A.23.030* footnote (8) to Table: Minimum lot size may be reduced to 1 acre within a short subdivision or a formal subdivision and to 5 acres within a large lot division provided the short subdivision, large lot division, or formal subdivision remains in compliance with the density requirement of the applicable zone.

RCW 58.17.170.⁷⁴ Pursuant to this statute, Olson could have ignored the downzone to R10 if he had sought to change the use of Tract B within five years of final plat approval. The final plat was approved in 1994, therefore the “divesting” provision in *RCW 58.17.170* expired in 1999. The Examiner correctly found that this statute did not apply to the facts of this case.

Olson also argues that *RCW 58.17.170* should not apply because “Tract B was specifically excluded from the plat approval in 1993”⁷⁵ The argument that Tract B should not be included within the plat boundaries was made in 1993 by the prior owner’s agent and discounted by the County, the prior owner’s attorney, and the Hearing Examiner at that time.⁷⁶ To now argue that Tract B should not be considered part of the plat is sixteen years too late and should be rejected.

2. RCW 58.17.215 and PCC 18F.40.085 Allow Plat Alterations That Do Not Create Additional Lots.

Changes to a recorded final plat are governed by *RCW 58.17.215* and corresponding local regulations. The statute provides in pertinent

⁷⁴ See also *PCC 18.160.060.D* which parallels this statute. Appellant ignores subsection (*D*) and cites to *PCC 18.160.060(G)* for the argument that there is no time limit on the vesting provision set out in this local law for use and density. See Appellant’s Opening Brief, p. 29-30.

⁷⁵ Appellant’s Opening Brief, p. 31. Appellant mistakenly cites *RCW 58.17.070* rather than *RCW 58.17.170*.

⁷⁶ AR 70 and 74.

part:

When any person is interested in the alteration of any subdivision or the altering of any portion thereof, . . . that person shall submit an application to request the alteration to the legislative authority of the city, town, or county where the subdivision is located. . . .

Upon receipt of an application for alteration, the legislative body shall provide notice of the application to all owners of property within the subdivision, and as provided for in RCW 58.17.080 and 58.17.090. The notice shall either establish a date for a public hearing or provide that a hearing may be requested by a person receiving notice within fourteen days of receipt of the notice.

The legislative body shall determine the public use and interest in the proposed alteration and may deny or approve the application for alteration. . . .

RCW 58.17.215. The statute sets forth the procedures for a plat alteration, but does not define “plat alteration.” The dictionary defines “alteration” as:

- 1: The act or process of altering; the state of being altered,
- 2: the result of altering: MODIFICATION.

Merriam-Webster's Collegiate Dictionary 35 (11th ed. 2008).

“Alter” is defined as:

- 1: to make different without changing into something else,
- 2: to become different syn., see CHANGE.

Id.

In addition to the procedure specified in *RCW 58.17.215*, since 2005 the County has prohibited plat alterations which create additional lots. *PCC 18F.40.080(A)(1)(g)*. Therefore, once *PCC*

18F.40.080(A)(1)(g) became effective in 2005, Olson could not create an additional buildable lot within the plat of Pilchuck View Estates. The Examiner was therefore correct in denying his request.

F. Equitable Estoppel Does Not Apply in This Case.

Olson argues that based upon the doctrine of equitable estoppel this court should reverse the Hearing Examiner's decision and convert Tract B into a building site.⁷⁷

Equitable estoppel applies when a party has made an admission, statement or act that was justifiably relied upon to the detriment of another party. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 19, 43 P.3d 4 (2002). Equitable estoppel against the government is not favored and application of the doctrine must be necessary to prevent a manifest injustice and must not impair government functions. *Id.* at 20. 43 P.3d 4.

Pacific Land Partners, LLC v. State, Dept. of Ecology, 150 Wash.App. 740, 750, 208 P.3d 586, 591 (2009). Thus, in the *Pacific Land Partners* case, equitable estoppel was not allowed where the Department of Ecology (DOE) had informed the property owner that a foreclosure proceeding against the prior owner excused nonuse of a water right:

Mr. Bernsen contends Ecology advised him that the RECD's foreclosure proceeding was an ongoing legal proceeding that excused nonuse of the water right from 1986 to 1995. He argues he would not have paid the balance on the property if he had not relied on Ecology's statements. Ecology's opinion regarding application of the legal proceedings exception-which was based

⁷⁷ Appellant's Opening Brief, pp. 41 - 44.

on evidence presented by Mr. Bernsen-involved a legal conclusion, rather than an issue of fact. **Equitable estoppel does not apply to statements that are issues of law, even when the statement of law is incorrect.** [*Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d] at 20-21, *Dep't of Ecology v. Theodoratus*, 135 Wash.2d 582, 599-600, 957 P.2d 1241 (1998). Ecology is not estopped from arguing that the water right was relinquished before Mr. Bernsen bought the property. [Emphasis added.]

Pacific Land Partners, supra. So too in the present case equitable estoppel is not warranted even if Olson was advised by Planning Department staff that the law allowed the use of Tract B to be changed to allow a building site. The question is what the law allows, not what a planner thought was allowed.

Similarly, in *Paradise, Inc. v. Pierce County*, 124 Wn. App. 759, 776, 102 P.3d 173 (2004), the Court held that even where the County had issued a permit and the property owner had constructed an addition to his business with the expectation that he could operate a gambling operation equitable estoppel did not apply:

Paradise [Property owner] argues that the County's act of issuing the building permit created a reasonable expectation that the County would allow the gambling operation to continue for a "reasonable period of time," equating a reasonable period of time with a period sufficient to allow it to recoup its investment. But the fact that Paradise might lose money on its investment did not effect a manifest injustice here, where *RCW 9.46.295* clearly and specifically stated that the County could ban all gambling at any time. There is no guarantee in the statute that any gambling operation could recoup its investment if gambling was banned. Paradise knew of this possibility, and chose to take

the risk as a business decision.

Paradise, at 776.

Just as in the *Paradise* and *Pacific Land Partners* cases, Olson took a risk and made a business decision when he purchased Tract B at a tax foreclosure sale for \$1,026.55. The elements of equitable estoppel against the County simply are not satisfied.

Moreover, as to the expense Olson incurred in conjunction with his efforts to change the use of Tract B to a building site, Mr. Olson admitted that many of the expenses were incurred before he and his consultant met with Planning staff for a pre-development conference:

Q⁷⁸ Okay. Can you give us any estimate of: Out of that \$40,000 that you mentioned, how much did you incur before the pre-application meeting and how much after, roughly?

A It's hard to say. I did a lot of it before, and – because I thought I had to, and so I really can't say. I don't know exactly. I put a lot of money into it, though.⁷⁹

Based upon the evidence presented to the Examiner, it is incorrect to state that Olson's expenses were made in reliance on Planning staff. Olson made a business decision to invest a small sum on an undeveloped tract of land in hopes of converting the tract to a building site. There was

⁷⁸ Questions by DPA Jill Guernsey. Answers by Petitioner Olson.

⁷⁹ TR 83, lines 13 - 18. See also AR 160 - 183, Olson's geotechnical report, dated January 2, 2006, one year before he and his consultant met with the Planning Department.

no guarantee that he would be successful. Under these facts, equitable estoppel clearly does not apply.

G. The Hearing Examiner Did Not Shift the Burden to Olson.

Olson argues that the Examiner “misassigned” the burden to him to prove that a process existed to alter the plat.⁸⁰ Olson is incorrect. Planning staff was candid with the Examiner in advising him that initially they thought the plat alteration process would allow the conversion of Tract B into a building site.⁸¹ The simple fact was that the applicable laws prohibited conversion of Tract B into a building site. What Olson argues is “misassignment” is nothing more than the Examiner’s offer to allow Olson to present any options that he may have in resolution of the issues in the case.

H. The Hearing Examiner’s Decision Does Not Violate Olson’s Constitutional Rights.

Olson argues that the County’s decision “as a whole” violates both the United States and Washington Constitutions.⁸² Olson is incorrect for several reasons.

First, it must be noted that the Hearing Examiner did not rule on

⁸⁰ Appellant’s Opening Brief, p. 33.

⁸¹ See AR 27, chronology for October 24, 2007.

⁸² Appellant’s Opening Brief, pp. 44 - 49.

these issues because he has no authority to rule on constitutional issues.⁸³

Although Olson argued before the Superior Court that his constitutional rights were violated, the Court did not reach his constitutional rights arguments when it upheld the Examiner's decision.⁸⁴

Second, this is not a case where a subsequently enacted regulation prevented Olson from developing property he already owned. When Fox Island was downzoned to Rural 10 in 1995, Olson did not yet own Tract B; therefore, he had no rights to lose.

Third, even if the Court considers Olson's constitutional claims, he cannot meet his burden of proving that the Examiner's decision constituted a violation of due process or an unconstitutional taking.⁸⁵ The heavy burden of proving a due process violation is on the party asserting the violation. *Isla Verde Int'l. Holdings, Inc. v. City of Camas*, 146 W.2d 740, 766, 49 P.3d 867 (2002); *Lund v. Dep't of Ecology*, 93 Wash.App. 329, 339, 969 P.2d 1072 (1998).

⁸³ *Chaussee v. Snohomish County Council*, 38 Wash.App. 630, 636, 689 P.2d 1084 (1984). The Examiner's authority is set forth in *PCC 1.22.080*.

⁸⁴ See *RCW 36.70C.130(1)(f)*, CP 95 - 98, CP 219 - 221, and CP 223 - 229.

⁸⁵ "It is well established that if a case can be decided on nonconstitutional grounds, an appellate court should decline to consider the constitutional issues." *HJS Dev.*, at 470, footnote 74, citing *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867, 874 (2002).

When a party challenges a land use regulation⁸⁶ on both substantive due process and takings grounds, reviewing courts analyze the takings claim first. *Peste v. Mason County*, 133 Wash.App. 456, 470, 136 P.3d 140 (2006).

For the takings analysis, courts consider whether the challenged regulation destroys any fundamental attribute of property ownership, specifically, the rights to possess, exclude others, dispose of, and make some economically viable use of the property. *Peste*, at 471, citing *Guimont v. Clarke*, 121 Wn.2d 586, 600-02, 605, 854 P.2d 1 (1993) (*Guimont I*). In the present case no fundamental attribute of property ownership is destroyed by the Examiner's decision. Olson still possesses the property, he can still exclude others from the property, and he can dispose of it as he sees fit. There is no evidence that it is worthless and in fact it is likely to be worth at least the \$1,026.55 that he paid for it in 2003.

Where a land use regulation does not destroy any fundamental attribute of property ownership, the reviewing court analyzes whether the regulation goes beyond preventing a public harm to producing a public benefit. *Peste*, at 472-3, citing *Guimont I*, at 601. Where a public benefit

⁸⁶ Cases addressing constitutional issues do not distinguish between "regulations" in the form of legislatively adopted regulations and "conditions" of project approval which are imposed by the local government decision-maker. Both are considered "regulations" for purposes of the analysis.

results or the regulation infringes on a fundamental attribute of property ownership, the reviewing court conducts an “as applied” challenge and determines whether the regulation substantially advances a legitimate state interest and whether the adverse economic impact on the affected landowner outweighs legitimate state interests. *Id.*

In doing so the court considers (1) the regulation's economic impact on the property; (2) investment-backed expectations; and (3) the character of the government action. *Id.*, citing *Guimont I*, at 604.

An “as applied” takings claim is not ripe until “the initial government decision maker has arrived at a definite position, conclusively determining whether the property owner was denied ‘all reasonable beneficial use of its property.’ ” *Id.*, citing *Guimont v. City of Seattle*, 77 Wash.App. 74, 85, 896, P.2d 70 (1995) (*Guimont II*) and quoting *Orion Corp. v. State*, 109 Wn.2d 621, 632, 747 P.2d 1062 (1987).

Only after a court concludes that a permit application for any use would be futile is an “as applied” regulatory takings claim ripe for review. *Orion Corp.*, 109 Wash.2d at 632, 747 P.2d 1062; *Ventures Nw. Ltd. P'ship v. State*, 81 Wash.App. 353, 368-69, 914 P.2d 1180 (1996).

This determination is necessary because an “as applied” regulatory takings claim requires the court to compare the present value of the regulated property and the value of the property before imposition of the regulation to determine whether the regulation has diminished the economic uses of the land to such an extent that an unconstitutional taking has occurred. *Ventures Nw.*, 81 Wash.App. at 368, 914 P.2d 1180.

The court in *Presbytery* explained that “[o]ur cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.” 114 Wash.2d at 338, 787 P.2d 907 (quoting *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986)).

Id., at 473.

In the present case Olson’s “as applied” challenge is not yet ripe. The only issue before the Examiner was whether this tract could be converted into a building site. The Hearing Examiner did not determine what other uses would be permitted on the property, and Olson has not shown that it would be futile to pursue other uses of this tract.

With respect to Olson’s substantive due process challenge, reviewing courts apply a three prong test:

- (1) whether the regulation is aimed at achieving a legitimate public purpose;
- (2) whether it uses means that are reasonably necessary to achieve that purpose; and
- (3) whether the regulation is unduly oppressive on the landowner.

Id., at 474. Factors considered by the court in determining whether a regulation is “unduly oppressive” or uses reasonable means to achieve a legitimate public purpose include the nature of the harm sought to be avoided, the availability and effectiveness of less

drastic protective measures, and the economic loss to the landowner. *Id.* The court further considers additional factors from the relative perspectives of both the public and the landowner. *Id.*

On the public's side, relevant factors we consider are the seriousness of the public problem; the extent to which the owner's land contributes to it; the degree to which the regulation solves it; and the feasibility of less oppressive solutions. *Presbytery*, 114 Wash.2d at 331, 787 P.2d 907. On the owner's side, we consider the amount and percentage of value lost; the extent of remaining use; past, present and future uses; the temporary or permanent nature of the regulation; the extent to which the owner should have anticipated such regulation; and the feasibility of the owner altering present or currently planned uses.

Id.

In this case, Olson argues that there allowing Tract B to become a building site provides a public benefit in that it “promotes infill development.”⁸⁷ Contrary to Olson’s argument, this is not a situation involving a preference for “infill development” as this property is within a designated Rural area, as opposed to Urban area.⁸⁸

The reality is that Olson knew at the time he purchased the property at a bargain price that it was questionable whether he could

⁸⁷ Appellant’s Opening Brief, p. 47.

⁸⁸ See Appellant’s Opening Brief, p. 47.

convert the property into a building site. His expectations, if any, regarding conversion of the property into a building site were tenuous at best. On balance, the factors are clearly in favor of upholding the Examiner's decision. As the Examiner concluded, allowing a 23 lot plat to become a 25 lot plat under similar circumstances would encourage others to pursue devious ways around density limitations adopted pursuant to the Growth Management Act.⁸⁹

Accepting Olson's position would adversely impact comprehensive planning under GMA, especially in rural areas . . . In the present case, Olson 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.⁹⁰

The Examiner was correct. Olson's substantive due process rights have not been violated, and his constitutional claims should be denied.

⁸⁹ Although Appellant mentions that his "procedural due process rights" were violated, he fails to set forth argument in support of a procedural due process challenge. See Appellant's Opening Brief, pp. 44 - 49. In the absence of adequate briefing to support constitutional arguments, courts will not address such arguments. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994).

⁹⁰ AR 17.

I. Substantial Evidence Supports the Examiner's Findings.

Olson argues that substantial evidence does not support several of the Examiner's findings, yet his arguments do not actually challenge specific factual findings made by the Examiner but rather contest the following conclusions of the Examiner:⁹¹

- That Olson is trying to create a new building site or convert the use of Tract B into a building site;⁹²
- That because the final plat of Pilchuck View Estates was approved more than five years ago and because the property has been downzoned to R10 Olson cannot alter the plat;⁹³ and
- That because of the passage of time and the downzone to R10, what started out as a temporary restriction on Tract B became permanent.⁹⁴

The only factual finding challenged by Olson is Finding 10 which states at the end:

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.⁹⁵ Contrary to Olson's argument, substantial evidence clearly

supports this finding. The Hearing Examiner's 1993 decision, which was

⁹¹ Appellant's Opening Brief, pp. 34 - 40.

⁹² See Appellant's Opening Brief, pp. 34 - 37.

⁹³ See Appellant's Opening Brief, pp. 35 - 36, 38 - 40.

⁹⁴ See Appellant's Opening Brief, pp. 37 - 38, 40

⁹⁵ AR 10. See Appellant's Opening Brief, p. 37.

an exhibit before the Examiner in the 2008 case, states in the summary of testimony that the developer's attorney agreed with the County that all of the original or parent parcel must be included within the subdivision and reflected in the plat.⁹⁶ Similarly, the first paragraph in conclusion 4(A) of the unchallenged 1993 decision states that "[t]he entire parcel **must** be included in the subdivision."⁹⁷

The Examiner was correct in stating that the facts of this case were not in dispute and that the definitive issues involve interpretation and application of the law to the undisputed facts.⁹⁸

J. Respondent Pierce County Is Entitled to Reasonable Attorney's Fees.

In accordance with *RCW 4.84.370* Pierce County requests that if the decisions of the Hearing Examiner and Superior Court are upheld, the County be awarded reasonable attorneys' fees. Under applicable law the County, as the prevailing party, is entitled to an award of reasonable attorneys' fees and costs associated with defending this appeal. *See Gig Harbor Marina, Inc. v. City of Gig Harbor*, 94 Wash.App. 789, 973 P.2d

⁹⁶ AR 70, Testimony of Attorney Joseph Quinn.

⁹⁷ Emphasis in original. AR 74. It is unclear what Appellant means when he states in his opening brief that Tract B was "explicitly excluded from the plat layout" as it is undisputed that Tract B was shown on the final plat of Pilchuck View Estates.

Appellant's Opening Brief, p. 37. See the final plat of Pilchuck View Estates, included as Exhibits A, B, and C to Pierce County's Brief.

⁹⁸ AR 7, FOF 5.

1081 (1999); *Bellevue Farm Owners Association v. State of Washington Shorelines Hearings Board*, 100 Wash.App. 341, 335-336, 997 P.2d 380 (2000).

IV. CONCLUSION

Property development has always involved a fair amount of risk. Sometimes it results in windfall profits and other times the investment is lost. In this case Olson purchased a native vegetation/greenbelt area tract at a tax foreclosure sale for very little money in hopes of converting it into a building site. His gamble did not pay off. While the former property owner might have been able to convert Tract B to a building site at the time of final plat approval or soon thereafter, once Fox Island was rezoned to Rural 10 (R10) that opportunity was lost.

Olson has not met his burden of proving that the standards set forth in LUPA have been met. The Examiner correctly interpreted and applied the law, and substantial evidence was presented to support his factual determinations. Nor has Olson met his burden of proving that the Examiner's decision violated his constitutional rights or should be

reversed on the basis of equitable estoppel. The County respectfully requests that the Examiner's decision be upheld.

DATED: February 8, 2010

MARK LINDQUIST
Prosecuting Attorney

By 
Jill Guernsey
Deputy Prosecuting Attorney
Attorneys for Pierce County
Ph: (253)798-7742 / WSB # 9443

DECLARATION OF SERVICE

I, Jill A. Anderson, declare that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. As a legal assistant in the Office of the Pierce County Prosecuting Attorney, I sent a true and correct copy of the foregoing Brief of Respondent Pierce County electronically and U. S Mail, postage prepaid, to:

Dennis D. Reynolds
Attorney at Law
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
dennis@ddrlaw.com

I certify under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct. Dated at Tacoma, Pierce County, Washington, this 8th day of February, 2010.


JILL A. ANDERSON

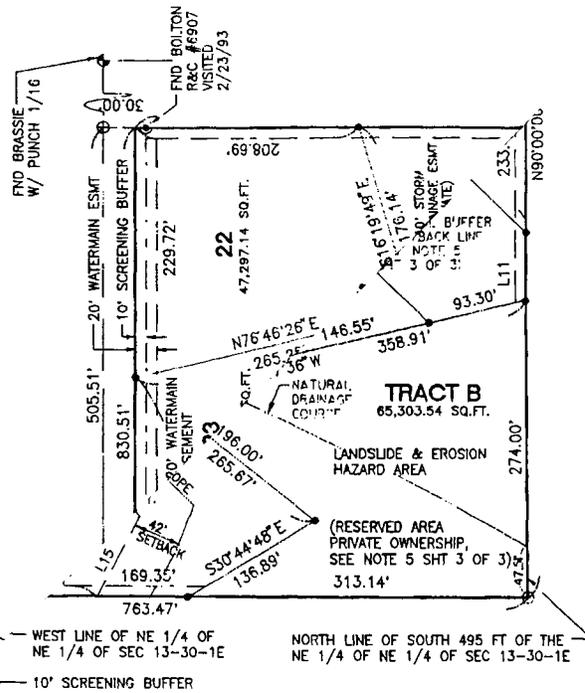
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BY  DEPUTY

EXHIBIT A

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SHEET 2 OF 3

ESTATES
OF THE NE 1/4 AND OF
20 N., R. 1 E., W.M.

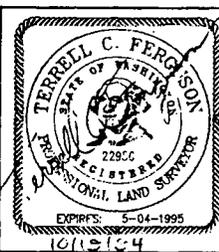
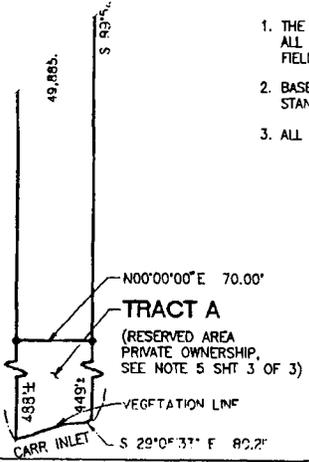
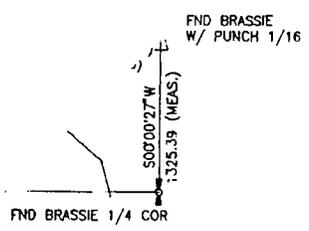


EQUIPMENT BASIS OF BEARING

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TDS-48 DATA COLLECTOR NE 1/4 OF SECTION 13-20-1E (1E: N0°00'00\"/>

SURVEY'S NOTES:

1. THE DRAWING SHOWN HERON DOES NOT NECESSARILY CONTAIN ALL OF THE INFORMATION OBTAINED BY THE SURVEYOR IN HIS FIELD WORK, OFFICE WORK, OR RESEARCH.
2. BASELINE'S FIELD TRAVERSE PROCEDURES MEET OR EXCEED ACCURACY STANDARDS AS PER W.A.C. 332-120-090, PARAGRAPHS 1(a) AND 1(b).
3. ALL MONUMENTS VISITED 6-28-94.



BASELINE ENGINEERING, INC.

Land Development Professional Services
(206)565-4491 • Seattle (206)924-1205 • FAX (206)565-8583
Land Planning & Use • Engineering • Surveying
7017-27th Street West, Suite 8 • Tacoma, WA 98466

DRAWN BY	LPL	DATE	4/11/94	JOB NO.	00984
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EXHIBIT B

189217

SHEET 1 OF 3

W ESTATES
1/4 OF THE NE 1/4 AND OF
T. 20N., R. 1E., W.M.
STON

APARTMENT

CONDITIONS: MAINTENANCE OR REPAIR OF THE PRIVATE ROADS OR
HIGH AND ELEVATED AREAS ASSOCIATED WITH THE PLAT
CONTROLLING ALL STORM WATER THAT WILL BE
IN THE PLAT FOR DETENTION OR MARK-
THE ROADS FOR DETENTION THE ROADS
DESIGN AND CONSTRUCTION STANDARDS.

10/21/94
DATE

AND SERVICES
EFFECTIVE
SYSTEM
10-25-94
DATE

9/29/94
DATE

HEREINAFORE LEVIED ON THE PROPERTY DESCRIBED HEREIN
OFFICE HAVE BEEN FULLY PAID AND DISCHARGED.

10-28-94
DATE

Nixon

AUDITOR'S CERTIFICATE

FILED FOR RECORD AT THE REQUEST OF BASELINE ENGINEERING INC. ON THIS 2nd DAY OF November
1994 AT 0 MINUTES PAST 1:00 P.M., RECORDED IN VOLUME _____ OF PLATS AT _____

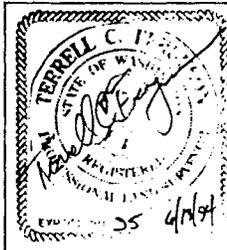
RECORDS OF THE PIERCE COUNTY AUDITOR
Cathy Pearsall-Atipek
PIERCE COUNTY AUDITOR

BY Dally Walters

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PERSONS HAVE
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AL THEREOF.



BASELINE ENGINEERING, INC.

Land Development Professional Services
(206)565-4491 • Seattle (206)824-1205 • FAX (206)565-8563
Land Planning & Use • Engineering • Surveying
7017-27th Street West, Suite 6 • Tacoma, WA 98466

DRAWN BY	JSW	DATE	8/11/94	JOB NO.	00884
CHECKED BY	TCF	SCALE	1" = 60'	SHEET	1 OF 3
				00884-1.DWG	

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189217

EXHIBIT C

Original

NEW ESTATES

SHEET 3 OF 3

1/4 OF THE NE 1/4 AND OF
13, T. 20 N., R. 1 E., W.M.
INGTON



BASELINE ENGINEERING, INC.

Land Development Professional Services
(206)585-4491 • Seattle (206)824-1205 • FAX (206)585-8583
Land Planning & Use • Engineering • Surveying
7017-27th Street West, Suite 6 • Tacoma, WA 98466

DRAWN BY	LPL	DATE	4/11/94	JOB NO.	00984
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EXHIBIT D

OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

REPORT AND DECISION

CASE NO.: SITE PLAN REVIEW Case No. SPR7-92, Pilchuck View Estates

APPLICANT: Ron Marston & Associates
1010 Nootka Drive FI
Fox Island, WA 98333-9657

SUMMARY OF REQUEST: Divide a 23.68-acre parcel into 23 single-family lots, to be served by private roads and on-site sewage disposal systems, on the west side of 11th Ave., near the 1400 block, Fox Island, in a Rural-Residential Environment, in the NE 1/4 of Sec. 13, T20N, R1E, W.M., Council District #7.

SUMMARY OF DECISION:

Request approved, subject to conditions.

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 October 13, 1993, at 1:08 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" - Site plan
- EXHIBIT "3" - Supplemental geotechnical report
- EXHIBIT "4" - Brief submitted by Jill Guernsey
- EXHIBIT "5" - Brief submitted by Joseph Quinn
- EXHIBIT "6" - Letter submitted by William Lynn to Hearing Examiner dated October 18, 1993
- EXHIBIT "7" - Letter submitted by Joseph Quinn to Hearing Examiner dated October 21, 1993

ANNA MARIE-SIBON appeared and presented the Planning Division Staff Report. The Hearing Examiner asked whether there had been a geotechnical report prepared or not, as Andy Greatwood's memo had requested that a geotechnical study be required as a condition of approval. It appeared, however, that no such condition of approval was being requested.

Ms. Sibon stated that there has been a study and report done, and therefore none is being requested as a condition of approval. In fact, the geotechnical report was the basis for some other requested conditions of approval that appear in the staff report. Ms. Sibon stated that the site plan appears in proper form with two exceptions. First, a long, narrow "panhandle" area in the far

northwest portion of the parent tract is marked on the preliminary plat map as "Not a Part", as is a steeply-sloped area in the southwest corner of the parent tract. She stated Jill Guernsey of the Prosecuting Attorney's Office has written a letter opinion concluding that such designations are improper in a designation of plat boundaries. Ms. Sibon proposed that the two areas in question be temporarily designated as open space, subject to later development.

The second area of concern regards the requirement for a minimum ten-foot natural screening buffer required by Section 18.50.390.B(6), Pierce County Code. The County's position is that this buffer needs to be dedicated as a separate tract rather than as an easement as indicated in the preliminary plat map. She stated that there are also proposed subdivisions to the west and south, as to which preliminary approval has been granted.

Appearing was JAMES RICHARDSON, agent for the applicant. He stated that Exhibit "3" addresses the suitability of locating a retention pond at the proposed site at the end of a cul-de-sac. It basically states that the dense glacial till composition of the soil makes it suitable for developing a control pond.

With regard to the ten-foot buffer issue, he stated that the preliminary plat map indicates a 25-foot buffer along 11th Avenue in lieu of providing such a buffer around Lot 10. He requested that this requirement not be adhered to with regard to Lot 10, as well as Lots 11 through 18. First, with regard to Lot 10, it is only 77 feet wide, and requiring a 10-foot buffer all the way around it seems unnecessary. Providing the additional buffer width along the heavily traveled 11th Avenue would be more practical. Also, with regard to Lots 11 through 18, these all border on a bluff top, for which a 50-foot building setback is required in any event. Therefore, the steep slope of those Lots provides a built-in open space buffer.

With regard to the issue of the "Not A Part" exclusions, the tracts are physically separate from the rest of the subdivision and are not accessible for road or utility purposes. The applicant wants to be able to develop them later when it becomes practicable to do so, upon availability of utilities.

Appearing was JOSEPH QUINN, attorney for the applicant. He stated his agreement with the County's position that the subdivision of a parent tract into smaller lots requires all parts of the original property so divided to be reflected in the plat. He suggested that the Lots in question could be designated as Tracts "A" and "B" or whatever designation the Hearing Examiner wishes to use. He would recommend that a note be required on the final plat stating that these tracts are not designated as building Lots at the time of plat approval, but are subject to possible future development. He stated that the lot sizes in the subdivision satisfy the regulations on lot density for Fox Island requiring one-acre lots, and that therefore no open space need be designated to offset any otherwise-undersized lots. He would recommend against giving the tracts "open space" designation in order to preclude confusion in the future as to whether the lots may be developed or not.

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lot

Appearing was WILLIAM LYNN, on behalf of his parents who own property to the north of the subject subdivision. He recommended that the two tracts in question be designated as open space, but not as required open space. He has misgivings about making a final determination as to the status of the two tracts, because there has been no public notice given regarding them, nor have they been reviewed by the County staff or the Peninsula Advisory Commission. In fact, he feels that as a legal matter, probably the only thing that can be done is designate the tracts as open space. He offered

X

to draft and submit suggested conditions of approval dealing with both this issue and the 10-foot buffer.)

Appearing was ANDY GREATWOOD of the Development Engineering Section. He stated that on a second reading of his report, he believes that the drainage plan could be more flexible than what he originally stated was necessary. For instance, piping could be used instead of designating a surface runoff channel for some surface drainage. He stated that with regard to Lot 12, there is a very small building footprint, because of the steep drop-off of the bluff and the setback requirements. He suggested that this might be studied to possibly allow for a reduced setback so a buyer would know what he could build on the site.

Appearing again was JAMES RICHARDSON, who responded to a question from the Hearing Examiner regarding the present actual state of the vegetation in the buffer area. He stated that there has been selective cutting as needed for development, but that otherwise the buffers are pretty much in place. He stated that as to Tracts "A" and "B", he would ask that they be designated specifically as being held for future development. They are different from the rest of the plat because of the steepness of the slopes and the inaccessibility. There should be a new process undertaken for determining whether to develop these tracts. As to Mr. Lynn's concerns about notice, he stated that the 300-foot distance for notification of adjacent property owners was taken from the entire perimeter of the subdivision. He would recommend against designation of Tracts "A" and "B" as open space tracts, based on the possibility of confusion in the future as to whether they may be developed or not. He had no problem with the requirement to designate the perimeter buffer as a separate tract. }

Appearing again was JOSEPH QUINN, who stated that there was a risk of what others might think is meant by use of the term "open space." The term as used in Pierce County implies that the property will be kept in a natural state permanently.

Appearing again was ANNA MARIE SIBON who proposed that language of notes in the plat regarding Tracts "A" and "B" should state that development of those tracts is subject to the development regulations in place at the time of application. She also stated that the staff has no problem with excepting Lot 10 from the 10-foot buffer requirement. }

No one spoke further in this matter and so the Examiner took the request under advisement and the hearing was concluded at 2:20 p.m.

The Hearing Examiner stated that he would keep the record open for one week to receive proposed wording of conditions of approval and plat notes from Mr. Lynn. The record was then to be kept open for an additional week to enable Mr. Quinn to respond to the proposed language. The Hearing Examiner stated that the record would remain open until October 27, 1993, in anticipation of receipt of those documents only.

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, viewed the property, heard testimony, and taken this matter under advisement.

2. The Pierce County Environmental Official designate reviewed this project and issued a Determination of Nonsignificance on May 27, 1993, with comment period ending on June 11, 1993. No appeal was filed and in accordance with the State Environmental Policy Act, RCW 43.20(C) and the Pierce County Environmental Regulation, Pierce County Code Chapter 17.08, the Environmental Official's determination is final.
3. Notice of this request was advertised on two weeks prior to hearing, in accordance with Section 18.50.620 (9.270A.090) of the Gig Harbor Development Regulations. The notice was published in the Peninsula Gateway and The Northwest Dispatch newspapers. Property owners within 300 feet of the site were sent written notice. Property has been posted for the required minimum 30 days.
4. The Peninsula Advisory Commission heard the request at its regularly scheduled meeting on August 25, 1993. By a vote of 4-3, the Commission recommended disapproval of the proposal based on inadequate screening and buffering, and clearing beyond that needed for road preparation.
5. The site as located is subject to the Gig Harbor Peninsula Comprehensive Plan. The site is designated Rural-Residential per the Development Regulations, but lies within both the Rural and Residential Environments of the Plan. The Rural Environment is characterized by low density, low-intensity land uses, and low-density single-family development is the fourth-ranked predominant use. The Residential Environment is an area of medium intensity land use, having uses, types, and densities which do not imply large scale alterations to the natural environment.
6. Goals of the Residential Environment include permitting orderly growth which can be supported by existing natural resources and systems until such time that economically viable alternatives are developed; assuring that development meets the real needs of local residents, travelers and newcomers without encouraging unnecessary growth; encouraging development and/or preservation of neighborhoods which will provide a diversity of housing forms and densities; neighborhood shopping, service and recreational facilities; adequate water, sewage, and transportation services; and a sense of scale consistent with the Peninsula Environment; and assuring that all residential development preserves the semi-rural open space characteristics that are desired in the area.
7. Goals of the Rural Environment include preserving and encouraging agricultural uses of land including small residential farms and silviculture; preserving water courses, drainage systems, and the natural hydrological cycle in as natural a state as possible; and providing for an adequate transportation system.
8. Under the Interim Growth Management Policies for Pierce County, providing for adequate and affordable housing is a pressing need. Applicable policies include encouraging diverse housing for all lifestyles, income levels, and ages; providing a variety of residential densities based on community values, development type and compatibility, proximity to facilities and services, immediate surrounding densities, and natural system protection and capability; accommodating demand for urban-density living only within Urban Growth Areas; providing open space and recreational facilities for residential development; locating and designing new residential developments and improving existing ones, to facilitate access and circulation by transit, car/van pools,

pedestrians, bicyclists, and other alternative transportation modes; restricting residential districts outside of Urban Growth Areas to rural, low-density residential; and encouraging cluster development of residential lands within Urban Growth Areas.

9. Under Section 16.08.030, Pierce County Code, in evaluating a proposed subdivision for approval, the Examiner is required to inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. Appropriate provisions shall be made for, but not limited to, the public health, safety, and general welfare for open spaces, drainage ways, streets, alleys, other public ways, water supplies, sanitary waste, fire protection, parks, playgrounds, sites for schools and school grounds, public trail easements to and around water areas and areas of public interest, and shall consider all other relevant facts and determine whether the public interest will be served by the subdivision and dedication. If the Examiner finds that the proposed plat does not make such appropriate provisions or that the public use and interest will not be served, then the Examiner may disapprove the proposed plat.
10. Under Section 18.50.180, Pierce County Code, the purposes of the Rural-Residential Environment are as follows:
 - A. The Rural-Residential Environment serves as an area of low density land developments, that is, having development types and densities which do not imply large scale alterations to the environment. It is also an area that will serve to protect and preserve the rural-residential character of an area; to protect rural, agricultural land from urban-suburban sprawl, to create a community-wide sense of identity, to protect aquifer recharge areas from pollution sources, to promote recreational opportunities; bird and other wildlife habitats including migratory patterns and to promote agricultural and proper forestry management practices.
 - B. The Rural-Residential Environment is also intended to provide for these land uses in a manner which leaves as much land as possible in its natural state and maximizes the use of natural drainage patterns.
11. Under Section 18.50.185.C, Pierce County Code, the proposed development is permitted after review and approval of a site plan by the Hearing Examiner after at least one public hearing.
12. Specific criteria of the applicable Performance Standards are addressed as follows:
 - A. Site Coverage: Under Section 18.50.250, the maximum allowable site coverage in the Rural-Residential Environment for residential development is 25%. The proposed site coverage for the subject project is 12%.
 - B. Basic Density: The Rural-Residential Environment has a basic density requirement for one dwelling unit per acre for residential developments, under Section 18.50.225.D.
 - C. Screening Buffers: Under Section 18.50.390.B(6), Pierce County Code, a minimum 10-foot natural screening buffer on all property boundary lines is required. Section 18.50.390.A requires that the buffer be designated as a separate tract.

13. The proposed site plan designates two areas as being "Not A Part" of the proposed site plan. One is a long, narrow, rectangular strip of land at the northwest boundary of the site, and the other is a steep area downhill from a bluff top in the southwest corner of the site. It appears that neither of these tracts is capable of development at this time, due to topography and inaccessibility from the internal street plan of the site.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.
2. Although the proposal does not serve all of the goals and purposes of the Gig Harbor Comprehensive Plan, the Pierce County Interim Growth Management Policies, and the Development Regulations for the Rural-Residential Environment, it does satisfy the regulatory requirements of the Development Standards and Section 16.08.030, Pierce County Code, upon satisfaction of the conditions of approval stated below.
3. Applicant has satisfied his burden of proof under Section 16.08.030, Pierce County Code, to show that the public use and interest will be served by the establishment of the subdivision and dedication.
4. The proposed site plan of Pilchuck View Estates should be approved, subject to the following conditions:

Did
B:R Lynn
draft?

- 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.

(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.

B. A final plat for this proposal shall be submitted to the Pierce County Hearing Examiner for approval and signature within three (3) years of the effective date of the Hearing Examiner's decision on the preliminary plat, subject to the conditions for one year time extensions as outlined in Sec. 67.02.130 of the Pierce County Subdivision Code.

C. The following note shall be placed on the face of the final plat:
"The maximum allowable impervious surface area of 25%, per Section 18.50.250(B), in the Rural-Residential Environment may not be exceeded."

D. Any proposed monument entry signage must meet all requirements of Section XX as it relates to ground graphics and cannot be located within an open space area unless approved at the time of preliminary plat approval.

E. Per Section 18.50.390(B)(6), a minimum 10-foot natural screening buffer must be provided on all property boundary lines with the exception that designation of such a buffer shall not be required along the perimeter of Lot 10. Per Section 18.50.390(A), the buffer must be designated as a separate tract.

F. Per Section 18.50.225.D, no lot may be less than one acre in size.

G. The following note shall appear on the face of the final plat:
"No logging, clearing, grading or filling shall be conducted on the property until such time as erosion control and storm water drainage plans have been approved by the Development Engineering Section. Subsequent to said approval, tree removal, clearing, grading and filling shall be limited to those areas reasonably necessary to construct roads and utilities. Building envelopes may not be cleared until such time as a building permit is issued for each lot. This restriction shall not be read to prohibit or limit tree removal or vegetation clearing by lot purchasers where applicable."

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. No clearing, grading, fill or construction of any kind will be allowed within these tracts, except for the removal of diseased or dangerous trees and the placement of underground utility lines and supplemental landscaping. A diseased tree shall be defined as one that has a strong likelihood of infecting other trees or brush in the area or becoming dangerous as a result of the disease, as determined by an expert approved by Pierce County. A dangerous tree shall be any tree which, in the opinion of an expert approved by Pierce County (such as, but not limited to, an experienced landscaper), has a strong likelihood of falling in the event of a 60 mph wind."

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- I. The following note shall appear on the face of the final plat:
"The lots within this subdivision have been approved by Pierce County for single-family residential use only."
- J. Utility easements shall be provided on the face of the final plat which are necessary to the provision of water, power, sewer, natural gas and mail delivery to the lots within the subdivision. The affected purveyors should be contacted prior to development of the final plat for their specific easement requirements.
- at the time of approval*
K. A storm drainage plan must be submitted to the Development Engineering Section as part of the site development plans. The applicant's engineer shall meet with Development Engineering to determine design criteria for the storm drainage system. The engineer shall determine the amount of flow through Lots 4, 5, 11, 12, 13, 20 and 21. If a substantial flow is determined, a 25-foot buffer shall be placed on each side of the centerline of the swale.
- L. Erosion control facilities must be installed, and subsequently inspected and approved by Pierce County prior to site clearing. All necessary erosion control facilities must be properly maintained during all phases of site development to prevent debris, dust, and mud from accumulating on the County right-of-way and/or adjacent property.
- M. All work associated with stabilizing slopes and other disturbed areas shall be in accordance with Section 8-01 of the 1988 Standard Specifications for Road, Bridge, and Municipal Construction, or the latest version thereof, unless approved otherwise by Pierce County.
- N. If cleared, the County right-of-way must be seeded, mulched, and stabilized as required by the County.
- O. A clearing and grading plan must be submitted to the Development Engineering Section as part of the site development plans.
- P. All clearing and grading limits outside of the road easement/right-of-way shall be shown on the site development plans.
- Q. All proposed accesses must be accurately depicted on the applicable plan and submitted to the Development Engineering Section for review and approval. The following information must be provided on the plans: distance from the proposed approach to the nearest side street, approach or intersection (on the opposite side of the street), two spot elevations at the edge of the existing pavement, measured distance from right-of-way line to existing edge of pavement, any above-ground utilities within 50 feet of the approach and all applicable approach dimensions. The driveway must be constructed or placed under a financial guarantee prior to project approval.
- R. All lots must access off internal plat roads.
- S. All roads must be completed and approved by the County prior to issuance of building permits on individual lots.

*CHANGED
BY
HE*

All private roads within and providing access to this plat must conform to Ordinance 92-120, "The Pierce County Private Road and Emergency Vehicle Access Standards."

The setback and buffer limit, as shown in the geotechnical report, must be field located, flagged, and accurately shown on the site development plans and plat document. The top and/or bottom of slope must also be shown on the plat document. The geotechnical engineer shall review the road and storm drainage plans for conformance to the report prior to submittal to Development Engineering.

Prior to issuance of a permit, the applicant may be required to submit a financial guarantee to the County to assure compliance with the provisions of the Site Development Regulations, the permit, and accepted plans.

All fences, pillars, signs, structures, etc., must be located on private property and must not impair sight distance to the County road.

A site stabilization plan must be submitted to the Development Engineering Section as part of the site development plans.

The site stabilization plan must include erosion control measures for development of the project up through completion of all structures.

The intent of the erosion control facilities is to protect downstream property owners from landslides, sediment buildup, and downstream channel scouring. If the intent of the requirement is not met, then all building and construction activity on site shall be discontinued and directed to meeting the intent of the requirement.

Development proposals which are to utilize on-site sewage disposal must meet the density and lot size requirements (if applicable) of WAC 246-272 (The State Board of Health On-Site Sewage System Regulations) and Pierce County Board of Health Resolution 87-900 (The Rules and Regulations of the Tacoma-Pierce County Board of Health, on-Site Sewage Disposal).

Prior to approval of the water supply for this development, a Certificate of Water Availability and Washington Department of Health approval of the water system facilities are required per WAC 246-290 and Pierce County Ordinance 86-116S4.

The water facilities to serve this development must be constructed or bonded prior to final subdivision approval.

which are?

Stormwater shall meet or exceed guidelines set forth in the Washington State Department of Ecology's Storm Water Management Manual.

The minimum amount of water necessary to satisfy the fire flow requirements shall be 500 gallons per minute at 20 p.s.i. for a period of 30 minutes from any hydrant serving this project. Pierce County Code, Section 15.40.030(F) (Ordinance #86-108).

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- AF. A hydrant shall be located within 350 feet of the center of all lots. Hydrant spacing shall not exceed 700 feet. Pierce County Code, Section 15.40.060 (I) (Ordinance #86-108).
- AG. Hydrant flow test results and water system "As-Built" plans shall be submitted to, and approved by, the Office of Fire Prevention and Arson Control prior to issuance of building permits. Pierce County Code, Section 15.40.050 (Ordinance #86-108)
- AH. Prior to preliminary and final plat approval, requirements of minimum standards Fire Flows, Water Mains, and Fire Hydrants, Pierce County Code, Section 15.40.050 Procedure for Compliance (Ordinance #86-108), shall be met.
- AI. ~~Emergency vehicle access requirements shall be met per Pierce County Code Chapter 12.52.~~
- AJ. All trees greater than 12" diameter at breast height (dbh) shall remain in the shoreline area.
- AK. In order to allow the finding that appropriate provisions are made for schools and school grounds, the applicant may offer to pay a voluntary mitigation fee under the authority of, and in compliance with, the terms and conditions set forth in RCW 82.02.020. Since according to RCW 82.02.020 the mitigation fee must be voluntary, both the Peninsula School District and the applicant shall have an opportunity to challenge the amount of the mitigation fee proposed by either party by submitting documentation to substantiate their positions to the Examiner. However, if any part of this decision, with respect to school mitigation and/or impact fees, is included in any request for reconsideration, appeal, and/or litigation, the finalization of the plat shall not be delayed since both the applicant and the Peninsula School District shall be required to abide by the ultimate final decision rendered by the Pierce County Hearing Examiner, Pierce County Council, or Pierce County Superior Court, depending upon when and in which forum the decision becomes final. In other words, either party's opportunity to challenge this decision is intended to satisfy the requirement that the mitigation agreement be voluntary.

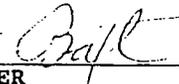
After the decision becomes final the applicant and the Peninsula School District shall promptly enter into a mitigation agreement incorporating all of the terms and conditions stated above and the following conditions together with any other mutually agreeable terms and conditions not in conflict with RCW 82.02.020 and/or this decision:

1. Payment of the mitigation fee shall be made at the time that each individual building permit for a single family dwelling is issued by the Pierce County Building Department.
2. The agreement shall be in accordance with the terms and conditions contained in RCW 82.02.020.

DECISION:

The request for site plan review and preliminary plat approval of Pilchuck View Estates is hereby granted subject to the conditions contained in the conclusions above.

ORDERED this 19th day of November, 1993.



BRUCE F. BAXTER
Deputy Hearing Examiner

TRANSMITTED this 19th day of November, 1993, to the following:

APPLICANT: Ron Marston & Associates
1010 Nootka Drive FI
Fox Island, WA 98333-9657

AGENT: James Richardson
Subdivision Development & Design, Inc.
3505 Grandview St.
Gig Harbor, Washington 98335

William Lynn
Attorney at Law
P.O. Box 1157
Tacoma, WA 98401-1157

Peninsula Advisory Commission
c/o Bill Pierce
5801 28th Ave. NW
Gig Harbor, WA 98335

Peninsula Advisory Commission
c/o Joe Myers
11106 36th Ave. NW
Gig Harbor, WA 98335

New Construction Services
Attention: Eric Simons
17233 140th Avenue S.E.
Renton, WA 98058

PIERCE COUNTY PLANNING AND LAND SERVICES
PIERCE COUNTY BUILDING DIVISION
PIERCE COUNTY DEVELOPMENT ENGINEERING DEPARTMENT
PIERCE COUNTY UTILITIES DEPARTMENT
TACOMA-PIERCE COUNTY HEALTH DEPARTMENT
FIRE PREVENTION BUREAU
PIERCE COUNTY PARKS AND RECREATION
PIERCE COUNTY COUNCIL

NOTICE

Pursuant to Pierce County Code, Chapter 61.20, this decision becomes final and conclusive on December 7, 1993, unless:

1. Reconsideration: Any aggrieved person feeling that the decision of the Examiner is based on errors of procedure or errors of misinterpretation of fact may make a written request for review by the Examiner. The request must be filed on forms provided by the Planning Department with a reconsideration fee as required by the Department of Planning and Land Services, and filed not later than 4:30 p.m. on December 2, 1993, with the Planning Department. This request shall set forth the alleged errors or misinterpretations, and the Examiner may, after review of the record, take such further action as he deems proper and may render a revised decision.

2. Appeal of Examiner's Decision: The final decision by the Examiner on:

1. Any land use matter within his jurisdiction other than a decision on the appeal of a decision of the Pierce County Environmental Official pursuant to the State Environmental Policy Act (SEPA) may be appealed to the Council by any aggrieved person directly affected by the Examiner's decision. Said appeal procedure is as follows:

(a) The appellant must file written notice of appeal with the Department of Planning and Land Services on forms provided by the Development Center with an appeal fee as required by the Department not later than 4:30 p.m. on December 7, 1993.

(b) Provided that if the Examiner was requested to reconsider the decision, then the appeal must be filed within ten (10) working days of the mailing of the Examiner's final order or decision on the reconsideration report. The notice of appeal shall concisely specify such error and/or issue which the Council is asked to consider on appeal.

2. An appeal of a decision of the Pierce County Environmental Official pursuant to the State Environmental Policy Act (SEPA) must be filed with a court of competent jurisdiction in accordance with the procedures and timeframes set forth in RCW 43.21c.080.

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

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EXHIBIT E



February 13, 2009

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

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

Dear Appellant:

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

Very truly yours,


STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

SKC/ca

- cc: Parties of Record
- PIERCE COUNTY PLANNING AND LAND SERVICES
- PIERCE COUNTY CODE ENFORCEMENT
- 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



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. Grotefendt
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 13th day of February, 2009.



STEPHEN K. CAUSSEaux, JR.
Hearing Examiner

TRANSMITTED this 13th day of February, 2009, to the following:

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EXHIBIT F

Cited Sections of the Gig Harbor Development
Regulations (Repealed by Ordinance No. 95-79s)



Pierce County

Planning & Land Services

TITLE 18.50
Gig Harbor Peninsula
Development Regulations

Adopted: June 30, 1975
Last Revision: July 1, 1992
PALS Printing Date: November 1993

IX.

RURAL-RESIDENTIAL ENVIRONMENT

Sections:

18.50.180 Purpose.

18.50.185 Developments or Uses Permitted.

18.50.180 Purpose.

In the furtherance of the Gig Harbor Peninsula Comprehensive Plan, the purposes of the Rural-Residential Environment are as follows:

- A. The Rural-Residential Environment serves as an area of low intensity land developments, that is, having development types and densities which do not imply large scale alterations to the environment. It is also an area that will serve to protect and preserve the rural-residential character of an area; to protect rural, agricultural land from urban-suburban sprawl, to create a community-wide sense of identity, to protect aquifer recharge areas from pollution sources, to promote recreational opportunities; bird and other wildlife habitats including migratory patterns and to promote agricultural and proper forestry management practices.
- B. The Rural-Residential Environment is also intended to provide for these land uses in a manner which leaves as much land as possible in its natural state and maximizes the use of natural drainage patterns.

(Ord. 89-140 § 1 (part), 1989; prior Code § 9.185.010)

18.50.185 Developments or Uses Permitted.

Developments or uses permitted in this environment are divided into three categories as follows: A. Developments or uses permitted outright; B. Developments or uses permitted after administrative review and approval of a site plan by the Planning Department; and C. Developments or uses permitted after review and approval of a site plan by the Examiner after at least one public hearing.

Developments or uses permitted outright are those uses which have been determined to have only an insignificant impact upon the environment, the immediate neighborhood or the community. The Planning Department shall approve a site plan when it is determined that the requirements of this Regulation have been met or shall deny or refer to the Examiner any site plan which does not comply with the provisions of this Regulation.

- A. Developments or uses permitted outright are as follows:
 - 1. One family dwellings (not requiring a variance) and which are proposed to be located on a lot of record or a lot which existed as such on the effective date of this Regulation which subdivision was approved pursuant to the site plan review process herein specified.

2. Agriculture. Any agricultural use which is capable of operating within the air, noise, and water pollution standards of this Regulation, as well as applicable State and Federal Regulations.
 3. Raising of livestock, small animals and poultry provided that the numbers of animals kept relates specifically to the carrying capacity of the fenced grazing area as designated in the applicable Farm Management Plan and that no building, cage, nor pen housing and feeding such animals shall be located closer than forty five (45) feet to any property boundary line. Also, a farm management plan, completed in conjunction with the local Soil Conservation District, shall be filed with the Planning Director and implemented by the landowner.
 4. Accessory buildings and structures related to outright permitted uses as determined by the Planning Department in conformance with the intent of the Plan.
 5. Changes in occupancy to existing commercial or industrial buildings or uses, provided, that the new use is of an intensity equal to or less than the former use.
 6. Commercial harvesting of timber in conformance with Washington Forest Practices Rules and Regulations (Chapter 76.09 RCW and Chapter 222-08 WAC) and further provided that the applicant receives County approval for conversions from timber production prior to application for their Forest Practices Permit.
 7. Double-wide mobile homes or manufactured homes (not in a mobile home park) affixed on permanent foundations.
- B. Developments or uses permitted after review and approval of a site plan by the Planning Department are as follows:
1. Structural changes or alterations to an existing commercial or industrial use, provided, the changes and alterations will bring the use or building into greater conformity with the intent of this Regulation. The Planning Department may waive site plan approval in any instance where the change or alteration would have an insignificant impact.
 2. Public facilities and uses, including both new and changes to existing facilities, except those which require an environmental impact statement.
 3. Any use or activity proposed immediately adjacent to the Natural or Conservancy-Historic Environments which would, in the opinion of the Planning Department, have a potential impact upon the adjacent environment.
- C. Developments or uses permitted after review and approval of a site plan by the Examiner after at least one public hearing are as follows:

1. Any use or activity which requires a public hearing or public meeting according to any other law, ordinance, regulation, or Code. In the event any use or activity requires approval over and beyond the requirements of this Regulation and the Examiner has the authority to review the matter under the other regulations or Code, the Examiner may consider the separate applications concurrently, but action shall be taken upon each matter separately. This Section shall be applicable, but not necessarily limited to, subdivisions and Shoreline Substantial Development Permits.
2. Any use or building located wholly or partially within a "sensitive area" as defined by WAC 173-34-020(2), except one family dwellings which are proposed to be located wholly or partially within "Shorelines of the State."
3. Any other use, building, structure or activity including new and changes to existing uses not covered under Subsection A. above provided the use, building structure, or activity complies with the intent of the Comprehensive Plan, this Chapter, and pertinent density and other performance standards of this Regulation; provided further, the uses must be consistent with the rural, residential surroundings, the immediate neighborhood, and further provided that expansion of existing non-residential developments shall not be of a substantial nature (e.g., neighborhood commercial areas).

Future development occurring on the basis of these levels of achievement in each Environment will result in the accomplishment of the protection of the public health, safety and welfare of the general public. The principal means by which the desired level of achievement will be determined are: Density and Site Coverage, Performance Standards and Physical Limitations inherent to the community.

Lots of record, created prior to the effective date of this Ordinance (Ord. No. 89-140, effective date November 13, 1989) and that do not meet the density requirements for this environment, shall still be granted the right to seek development permits for uses allowed. If permits are granted for development, screening and buffering requirements as set forth in Section 18.50.390 of this Chapter shall be applied.

(Ord. 89-140 § 1 (part), 1989; prior Code § 9.185.020)

XXIV.

MISCELLANEOUS

Sections:

- 18.50.910 Limitations on Refiling of Applications.
- 18.50.915 Site Plan Amendment Reapplication.
- 18.50.920 Transcript Costs.
- 18.50.925 Filing of Final Site Plan.
- 18.50.930 Building Permits - Compliance Site Plan.
- 18.50.935 Certificate of Compliance Required.
- 18.50.940 Phased Development Plan.
- 18.50.945 Non-Site Plan - Administrative Decision Review.
- 18.50.950 Site Plan Review Procedure for Short Plats.
- 18.50.955 Staff Correction of Map Errors.
- 18.50.960 Plat Exemption from Procedural Requirements of the Site Plan Review Process.
- 18.50.965 Miscellaneous.

18.50.910 Limitations on Refiling of Applications.

No application for site plan approval or other permit required pursuant to the Development Regulations shall be accepted for filing by the Planning Director within one (1) year following final action in denying an application for a similar approval or permit for the same property. In determining whether an application for site plan approval or other permit is required pursuant to the Development Regulations, the Director shall be guided by the following standards:

- A. An application for a site plan approval or other permit required pursuant to the Development Regulations, shall be deemed similar if the proposed site plan will permit uses, building locations or relaxation of site coverage requirements which are the same or substantially the same as those considered and disallowed by the earlier final action;
- B. An application for a permit shall be deemed similar if the use to which the property is proposed to be put is the same or substantially the same as that which was considered and disallowed by the earlier final action;
- C. An application for a Variance shall be deemed similar if the special circumstances which the applicant alleges as a basis for a Variance are the same or substantially the same as those considered and rejected in the earlier final action.

In every instance, the burden of proving dissimilarity to the Planning Director's satisfaction shall be upon the applicant. (Ord. 88-72S § 1 (part), 1988; Res. 18124 § 1 (part), 1975; prior Code § 9.270D.010)

18.50.915 Site Plan Amendment Reapplication.

Any proposed amendment to the site plan after final approval shall be submitted to the Department for review. Insignificant or minor proposed amendments may be approved by the Department by letter and a copy of such letter shall be sent to the Examiner. In the event the Examiner believes the amendment is significant,

the Examiner shall schedule the matter for public hearing and notice of hearing shall be given the same as was given for the original application. All significant proposed amendments shall be processed in the same manner as an original site plan application. (Ord. 88-72S § 1 (part), 1988; Res. 22894 § 1 (part), 1981; Res. 18124 § 1 (part), 1975; prior Code § 9.270D.020)

18.50.920 Transcript Costs.

Appeals from the decisions of the Pierce County Council to the Superior Court, shall be made as provided by law. The costs of transcription of all records ordered certified by the Court for such review shall be borne by the appellant. If a court reporter has taken and preserved the record, then the appellant shall make arrangements with said reporter for transcriptions and payment thereof. When the County staff is required to transcribe any record, the actual transcribing cost shall be determined by the Pierce County Budget Director and shall be paid prior to said case being reviewed. (Ord. 88-72S § 1 (part), 1988; Res. 18124 § 1 (part), 1975; prior Code § 9.270D.030)

18.50.925 Filing of Final Site Plan.

A site plan shall not be deemed approved and filed until all the following occurs:

- A. The approving authority has signed the site plan application as "as approved";
- B. A copy of the approved application is filed with the Planning Department and Building Department; and
- C. Any deed for land accepted by the Council as open space is recorded with the Auditor. Such deed shall legally describe such lands and clearly state that certain development rights therein are dedicated to the County and deed restrictions consistent with the "open space" definition shall be placed thereon.

(Ord. 88-72S § 1 (part), 1988; Res. 18124 § 1 (part), 1975; prior Code § 9.270D.040)

18.50.930 Building Permits - Compliance Site Plan.

No building permit shall be issued unless an approved site plan is presented to the Building Official except where such a plan is not necessary as specified herein. The Building Official shall issue building permits only where the approved site plan is being totally followed. (Ord. 88-72S § 1 (part), 1988; Res. 18124 § 1 (part), 1975; prior Code § 9.270D.050)

18.50.935 Certificate of Compliance Required.

A certificate of occupancy shall be obtained from the Building Inspection Department before the premises are occupied by the future resident or user of commercial, industrial or multiple dwelling structure or any development requiring site plan approval. A certificate shall not be issued unless the development conforms with the approved site plan; provided, that said certificate may be conditionally issued in some cases where full compliance is not practicable and in such cases, a date certain shall be established for full compliance and approval.

EXHIBIT G

PCC 18A.35.020, 18F.40.080, 18A.23.030,
18.80.020, 18.140.060, 18.160.060, 1.22.080

Chapter 18A.35

DEVELOPMENT STANDARDS

Sections:

- 18A.35.020 Density and Dimension.
- 18A.35.030 Landscaping.
- 18A.35.040 Loading Area Requirements and Offstreet Parking.
- 18A.35.050 Open Space and Set Aside.
- 18A.35.060 Home Occupations and Cottage Industries.
- 18A.35.070 Day-Care Facilities.
- 18A.35.080 Accessory Dwelling Units.
- 18A.35.090 Agricultural Uses and Animals.
- 18A.35.100 Adult Businesses.
- 18A.35.110 Mobile Home Parks.
- 18A.35.120 Solid/Hazardous Waste Handling, Treatment, and Storage Facilities.
- 18A.35.130 Nonconforming Standards.
- 18A.35.140 Signs (Except for Gig Harbor).
- 18A.35.150 Signs (Gig Harbor/Peninsula).

18A.35.020 Density and Dimension.

A. Purpose. The purpose of this Section is to establish density and dimensional standards for development. These standards are established to provide flexibility in project design and promote high density development in urban areas when utilizing incentives.

B. Tables.

1. Interpretation of Tables. The density and dimension tables are arranged in a matrix format on two separate tables; Table 1 includes Urban Zone Classifications and Table 2 includes Rural Zone Classifications. Development standards are listed down the left side of both tables and the zones are listed across the top. The matrix cells contain the minimum dimensional requirements of the zone. The footnotes in the matrix identify specific requirements applicable either to a specific use or zone. A blank box indicates that the cell is not applicable.

2. Density and Dimension Tables.

Density and Dimension	Urban Zone Classifications											
	Employment Centers		Urban Centers				Urban Districts		Urban Res.	Overlays		
	HEC	High Intensity Employment Center	MUC	Major Urban Center	CC	Community Center	MUD	Mixed Use District	MSF	Moderate Density Single-Family	AO	Agricultural Overlay
	MEC	Moderate Intensity Employment Center	AC	Activity Center	UNC	Urban Neighborhood Center	HRD	High Density Residential District				
	HEC	MEC	MUC	CC	AC	UNC	MUD	HRD	MSF	AO		
Base Density (du/ac) ⁽¹⁾			20	20	20	16	20	20	6 ⁽¹⁾	0.1		
Maximum Density (du/ac)			25 ⁽²⁾	25 ⁽²⁾	25 ⁽²⁾	25 ⁽²⁾	25 ⁽²⁾	25 ⁽²⁾	6 ⁽¹⁾	0.1		
Minimum Density (du/ac) ⁽³⁾			8	8	8	4	8	8	2			
Setback, State Highways and Major Arterials	35'	35'	0 ⁽⁹⁾	0 ⁽⁹⁾	25'	25'	25'	25'	25'	35'		
Setback, Other Roads	25'	25'	0 ⁽⁹⁾	0 ⁽⁹⁾	25'	25'	25'	25'	25'	25'		
Setback, Rear	0 ⁽⁴⁾	0 ⁽⁴⁾	0 ⁽⁴⁾	0 ⁽⁴⁾	0 ⁽⁴⁾	0 ⁽⁴⁾	0 ⁽⁴⁾	0 ⁽⁴⁾	10'	30'		
Setback, Interior	0 ⁽⁴⁾	0 ⁽⁴⁾	0 ⁽⁴⁾	0 ⁽⁴⁾	0 ⁽⁴⁾	0 ⁽⁴⁾	0 ⁽⁴⁾	0 ⁽⁴⁾	5'	30'		
Height				60'	60'	60'	60'	40'	35'	40'		

Density and Dimension	Rural Zone Classifications									
	Rural Centers			Rural Residential					Resource Lands	
	RAC	Rural Activity Center	RSep	Rural Separator	FL	Forest Lands		Agriculture		
	GC	Gateway Community	RS	Rural 5	A	Agriculture				
RNC	Rural Neighborhood Center	R10	Rural 10	Rsv	Reserve					
	RAC	GC	RNC	RSep	RS	R10 ⁽⁸⁾	Rsv	RUR-F ⁽¹⁰⁾	FL	A
Base Density (du/ac) ⁽¹⁾	(6)	(6)	(6)	0.4	0.2	0.1	0.1 ⁽⁷⁾	0.1	0.0125	0.1
Maximum Density (du/ac)	(6)	(6)	(6)	0.4	0.4 ⁽²⁾	0.25 ⁽²⁾	0.1 ⁽⁷⁾	0.2	0.0125	0.1
Minimum Lot Dimension				60'	60'	60'		60'	60'	60'
Setback, State Highway and Major Arterials	25'	25'	25'	25'	25'	25'	25'	25'	25'	25'
Setback, Other Roads	15 ⁽⁹⁾	15 ⁽⁹⁾	15 ⁽⁹⁾	25'	25'	25'	25'	25'	25'	25'
Setback, Rear	0 ⁽⁵⁾	0 ⁽⁵⁾	0 ⁽⁵⁾	30'	30'	30'	10'	30'	30'	30'
Setback, Interior	0 ⁽⁵⁾	0 ⁽⁵⁾	0 ⁽⁵⁾	10'	10'	10'	5'	30'	30'	30'
Height	40'	40'	40'	40'	40'	40'	35'	40'	40'	40'

Note: All footnotes are described on the following two pages.

- 1 **3. Footnotes to Tables.** This subsection pertains to the
2 parenthetical numbers in the above table, Section
3 18A.25.020 B.2.
- 4 **(1) Base Density.** These densities may be achieved
5 outright by following the development standards of
6 Chapter 18A.35, Development Standards.
- 7 **(2) Maximum Density.** These densities shall only be
8 achieved through one of the following methods: the
9 application of residential density incentives,
10 transfer of development rights, planned development
11 district, or planned unit developments.
- 12 **(3) Minimum Density.** If a lot is more than 300 feet
13 from a sewer hook up and is unable to meet the
14 minimum density requirement due to on-site sewage
15 disposal standards, the minimum density requirement
16 shall not apply.
- 17 **(4) Urban Centers and Districts, Setbacks.** The minimum
18 setback for any new multi-family or commercial
19 building abutting a MSF classification shall be 30
20 feet. The minimum setback for an industrial
21 building or use abutting a MSF or HRD
22 classification shall be 100 feet.
- 23 **(5) Rural Centers, Setbacks.** The minimum setback for
24 any new senior and assisted-living center or
25 commercial building abutting a rural residential
26 classification shall be 30 feet. The minimum
27 setback for an industrial building or use abutting
28 a rural residential classification shall be 100
feet.
- (6) Rural Centers, Density.** The residential densities
in rural centers shall be the same as permitted in
the adjacent rural designations. If the rural
center is abutting more than one rural designation,
the least restrictive density provisions will
apply. If the rural center is surrounded by
resource lands, the density of the resource lands
will apply. The densities for senior and assisted-
living centers shall be based upon the requirements
of the Health Department.
- (7) Reserve.** The maximum lot size permitted in a
reserve classification shall be 10,000 square feet.
The balance of the original tract shall be held for
future development in set-aside lands or placed in
permanent open space.
- (8) Rural 10.** The minimum lot size permitted when
creating new lots in the R10 classification shall
be one acre.
- (9) State Highways, Major Arterials, and All Other
Roads.** These setbacks are minimum requirements
abutting the specific right-of-way classification
except that when abutting rights-of-way that have
been identified for improvement in the County Six-
Year Road Plan, or most current version thereof,
the minimum setback shall be 25 feet.

1 (10) Rural Adjacent to Forest Lands. All structures
2 shall maintain a minimum setback of 50 feet from
3 property zoned FL.

4 C. Density Standards. All density provisions shall be
5 calculated in dwelling units per acre (du/ac).

6 1. Urban Centers and Districts Density Incentives. A
7 density incentive of one additional dwelling unit per
8 acre above the base density shall be granted to attain
9 the maximum density in exchange for every 5 percent of
10 the total gross acreage of the project site designated
11 as urban open space.

12 2. Rural Density Incentive. A property owner may designate
13 a portion of a development project as open space or set-
14 aside lands. If open space or set-aside land incentives
15 are utilized, the maximum densities shall be as follows:

16 a. Rural Five. Two dwelling units per five acres (0.4
17 du/ac), when 50 percent of the property is
18 designated as open space, set-aside lands, or when
19 the development is served by a Group "A" water
20 system which is regulated by the State Department of
21 Health and has an approved comprehensive water
22 system plan, is designated as a satellite system
23 management agency, and has 100 or more hookups.

24 b. Rural Ten.

25 (1) Two dwelling units per 10 acres (0.2 du/ac)
26 when 50 percent of the property is designated
27 as open space.

28 (2) Two and one-half dwelling units per 10 acres
(0.25 du/ac) when 75 percent of the property is
designated as open space.

3. Shoreline Density Exception. For the creation of new
lots abutting a marine or lake shoreline as described in
Title 20, Shoreline Management Use Regulations, the
maximum densities shall be as follows:

a. The density requirements of the zone classification
shall not apply to the first tier of lots abutting
the shoreline, provided that all newly created lots
maintain 75 feet of shoreline frontage and comply
with the applicable densities in Title 20, Shoreline
Management Use Regulations. The minimum lot size
required for the creation of new lots abutting the
shoreline shall be subject to the requirements of
the Health Department.

b. For that portion of the original lot lying upland
from the first tier of proposed lots abutting the
shoreline, the density requirement shall be that of
the applicable zone classification. The area of the
first tier of newly created lots abutting the
shoreline shall not be used when calculating the
density in the upland portion of the lot.

D. Setback Standards.

1. Setback Measurement. A setback is measured from the
edge of a street right-of-way, access easement, or
private road. Where there is no street right-of-way,

18F.40.080 Proposed Alterations to a Recorded Final Plat.

Plat alterations typically apply to those elements which are common to the entire plat such as, but not limited to, trails, roads, buffers, open space, drainage easements, park and recreation sites, etc. A plat alteration provides a process to alter or modify a portion of a recorded final plat.

A. General Requirements.

1. The provisions of this Section shall not apply to the following:
 - a. Boundary line adjustments (See Chapter 18F.70);
 - b. Vacation of a public road in a final plat (Road vacations shall follow the procedures established in Chapter 36.87 RCW);
 - c. An affidavit of correction pertaining to scrivener's errors;
 - d. Alteration or replatting of any plat of state-granted tidelands or shorelands;
 - e. Short plats or large lots;
 - f. Binding site plans; or
 - g. The creation of additional lots.
2. A revised drawing of the approved alteration shall be recorded with the County Auditor and shall replace and supercede that portion which is being altered.
3. If any land within the alteration is part of an assessment district, any outstanding assessments shall be equitably divided and levied against the remaining lots, parcels or tracts, or be levied equitably on the lots resulting from the alteration.
4. If any land within the alteration contains a dedication to the general use of persons residing within the subdivision, such land may be altered and divided equitably between the adjacent properties.
5. The application shall contain the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered.
6. Application material shall be routed to Planning, Assessor-Treasurer, Development Engineering, Utilities, Tacoma-Pierce County Health Department, Fire Prevention Bureau or other reviewing Department or Agency as determined by the Planning Department.

B. Public Hearing Required.

1. A public hearing shall be required for a plat alteration if any of the following occurs:
 - a. The proposed alteration contains significant changes to the plat, as determined by the Hearing Examiner; or
 - b. The Director receives a request for a public hearing from a person receiving notice within 14 days of notice.

2. The Planning Department shall set a date for public hearing before the Examiner after all requests for additional information or plan correction, as set forth in Section 18.60.020 C., have been satisfied, and environmental review of the proposal has occurred. Any required public hearing shall follow the procedures set forth in Chapter 18.80, Development Regulations-General Provisions, and Chapter 1.22 PCC.
- C. **Hearing Examiner's Authority.** If a public hearing is required, the Examiner has the authority to approve or deny the proposed plat alteration and may impose additional or altered conditions and requirements as necessary to assure that the proposal conforms with the intent of the Comprehensive Plan, applicable community plans, and other applicable County codes and state laws.
- D. **Required Written Findings and Determinations.** The Director's/Examiner's written decision on the plat alteration shall include findings and conclusions, based on the record, to support the decision. A proposed plat alteration shall not be approved unless the Director/Examiner makes written findings that the proposed plat alteration conforms with the intent and goals, objectives and policies, and standards of the County's current Comprehensive Plan and County regulations. In the event that a public hearing is required for a plat alteration, the Examiner shall make additional findings to establish that the public use and interest will be served by the proposed plat alteration.
- E. **Approval.** The Examiner may approve or approve with conditions, the proposed plat alteration if the criteria contained in this Section have been met.
 1. Approvals shall include a note on the face of the plat that states:

"This altered plat of _____ lot(s) _____, supercedes lot(s) of the final plat of _____."

2. A brief written narrative explaining what is being altered shall also be included on the plat.

(Ord. 2005-11s2 § 1 (part), 2005)

18A.23.030 Density and Dimension.

A. **Purpose.** The purpose of this Section is to establish density and dimensional standards for development. These standards are established to provide flexibility in project design and promote high density development in urban areas when utilizing incentives.

B. **Tables.**

1. **Interpretation of Tables.** The density and dimension tables are arranged in a matrix format on two separate tables; Table 18A.23.030 B.2.-1 includes Urban Zone Classifications and Table 18A.23.030 B.2.-2 includes Rural Zone Classifications. Development standards are listed down the left side of both tables and the zones are listed across the top. The matrix cells contain the applicable requirements of the zone. The footnotes in the matrix identify specific requirements applicable to a specific use or zone. A blank box indicates that the cell is not applicable.

2. Density and Dimension Tables.

Density and Dimension	GIG HARBOR PENINSULA Urban Zone Classifications (Table 18A.23.030 B.2.-1)					
	Urban Residential			Employment Centers		
	MSF - Moderate Density Single-Family	SF - Single-Family	[Reserved]	CE - Community Employment	PI - Public Institutional	[Reserved]
	MSF	SF	[Reserved]	CE	PI	[Reserved]
Base Density (du/ac) (1)(11)(12)	4	4				
Maximum Density (du/ac) (11)(12)	6(2)	4				
Minimum Density (du/ac) (3)(12)	4	4				
Minimum Street Frontage						
Minimum Lot Size (sq ft)	7,000 for divisions of 4 lots or less	7,200 for divisions of 4 lots or less				
Average Lot Size (sq ft)						
Minimum Lot Width	50' (24)(39)	70' (24)			100'	
Minimum Setback, State Highways and Major Arterials (13)	25'	25'		20' (4)	50'	
Minimum Setback, Other Roads (13)(16)	25' (34)	25' (34)		20' (4)	50'	
Maximum Setback						
Minimum Setback, Rear (13)	30'	30'		20' (4)	50'	
Minimum Setback, Interior (13)	8'	8'		20' (4)	15'	
Height	35'	35'		35'	35'	
Maximum Gross Floor Area (sq ft)						
Note: All footnotes are described in Section 18A.23.030 B.3						

Density and Dimension	GIG HARBOR PENINSULA Urban Zone Classifications (Table 18A.23.030 B.2.-1)				
	Urban Centers				
	CC - Community Center	AC - Activity Center			
	NC - Neighborhood Center				
	CC	AC	NC	[Reserved]	[Reserved]
Base Density (du/ac) (1)(11)(12)	4	3.5			
Maximum Density (du/ac) (2)(11)(12)	12	3.5			
Minimum Density (du/ac) (12)					
Minimum Street Frontage					
Minimum Lot Size (sq ft)		6,000 per du res 15,000 non-res	15,000 non-res		
Average Lot Size (sq ft)					
Minimum Lot Width		50' per single-family residence or 100'	70'		
Minimum Setback, State Highways and Major Arterials (13)(16)	20'	20'	20' (45)		
Minimum Setback, Other Roads (13)(16)	20'	20'	20' (45)		
Maximum Setback					
Minimum Setback, Rear (13)	20'	20'	25' (45)		
Minimum Setback, Interior (13)	5'	10'	10' (45)		
Height	35'	16'	35'		
Maximum Gross Floor Area (sq ft)	35,000	5,000 non-res			

Note: All footnotes are described in Section 18A.23.030 B.3

Density and Dimension	GIG HARBOR PENINSULA Rural Zone Classifications (18A.23.030 B.2.-2)						
	Rural Residential and Resource Lands				Rural Centers		
	R10	Rsv5	RSR	ARL	RNC	EPF-RAS	EPF-RAN
	Rural 10	Reserve 5	Rural Sensitive Resource	Agricultural Resource Lands	Rural Neighborhood Center	Essential Public Facility- Rural Airport South	Essential Public Facility- Rural Airport North
	R10	Rsv5	RSR	ARL	RNC	EPF-RAS	EPF-RAN
Base Density (du/ac) (1)(11)	0.1 (8)	0.2 (7)	0.1 (8)	0.1			0.1 (8)
Maximum Density (du/ac) (11)	0.2 (2)(8)	0.2 (7)	0.2 (8)	0.1			0.2 (2)(8)
Minimum Lot Dimension							
Minimum Lot Size	10 acres (8)		10 acres (8)	10 acres	5,000 sq. ft.	(42)	
Setback, State Highway and Major Arterials (13)(16)	25'	25'	25'	25'	10'	(42)	25'
Setback, Other Roads (13)	25'	25'	25'	25'	10'	(42)	25'
Setback, Rear (13)	50' (21)	10'	50' (21)	50' (21)	0'	(42)	50' (21)
Setback, Interior (13)	50' (21)	5'	50' (21)	50' (21)	0'	(42)	50' (21)
Height	40'	35'	40'	40'	40'	(42)	40'
Note: All footnotes are described in Section 18A.23.030 B.3.							

3. **Footnotes to Tables.** This subsection pertains to the parenthetical numbers in Tables 18A.23.030 B.2.-1 and B.2.-2.
- (1) **Base Density.** These densities may be achieved outright by following the development standards of Chapter 18A.35, Development Standards, and any applicable Design Standards and Guidelines in Title 18J.
 - (2) **Maximum Density.** In an MSF classification sanitary sewers are required to achieve the maximum density. In all other classifications maximum densities shall be achieved through one of the following methods: the application of density incentives (18A.35.020 C.), transfer of development rights, or planned unit developments. An applicant may plan for maximum density through shadow platting (see also 18J.15.020 F).
 - (3) **Minimum Density.** If a lot is more than 300 feet from a sewer hook-up and within a zoning classification with a minimum density of four dwelling units per acre, the minimum density requirement shall not apply, provided that only one lot of the proposed short plat or subdivision may exceed the minimum square footage necessary to accommodate an on-site sewage disposal system (as determined by the Tacoma-Pierce County Health Department). If a lot is more than 300 feet from a sewer hookup and within a zoning classification with minimum densities of 6 or more dwelling units per acre, the minimum density requirement shall not apply, provided that only one lot of the proposed short plat or subdivision may exceed 7,260 square feet in size. (See Figure 6, Section 18A.35.020)
 - (4) **Transitional Areas, Setbacks.** All new multi-family or commercial buildings shall be setback a minimum of 30 feet from MSF, SF, RR, or Rural Residential classifications. When a proposed multiple-level multi-family development abuts property classified as MSF, SF or RR, or is across a residential street or collector arterial adjacent to MSF, SF or RR, a setback equal to the height of the multi-family structure shall be required but in no case be less than 30 feet. The minimum setback for an industrial building or use from an MSF, SF, RR, HRD or Rural Residential classification or residential use shall be 100 feet except for industrial uses or buildings within the CE zone which shall have a minimum 50 foot setback to any residential zone or use.
 - (7) **Reserve 5.** The maximum lot size permitted in a reserve classification shall be 12,500 square feet. The maximum lot size may be increased to 21,780 square feet within the Gig Harbor Peninsula Plan area if the density of the development does not exceed one dwelling unit for every 10 acres. The balance of the original tract shall be held for future development in set-aside lands.
 - (8) **Minimum Rural Lot Size Reduction.** Minimum lot size may be reduced to 1 acre within a short subdivision or a formal subdivision and to 5 acres within a large lot division provided the short subdivision, large lot division, or formal subdivision remains in compliance with the density requirements of the applicable zone.

(11) **Allowable Dwelling Units – Calculating.**

- (a) Within urban zone classifications, the allowable number of dwelling units shall be calculated by multiplying the net developable acreage of the site by the allowed density in dwelling units/acre. The number of dwelling units allowed shall be adjusted accordingly if a site-specific evaluation (i.e., wetland analysis, geotechnical report, etc.) changes the net developable acreage. Within rural zone classifications, the allowable number of dwelling units shall be calculated by multiplying the gross site acreage by the allowed density in dwelling units/acre. The result of these calculations shall equal the number of dwelling units allowed.
- (b) If a calculation results in a partial dwelling unit, the partial dwelling unit shall be rounded to the nearest whole number. Less than .5 shall be rounded down. Greater than or equal to .5 shall be rounded up.

Examples:

- 9.2 acres x 4 du/acre = 36.8 (rounded to 37 allowable dwelling units)
17 acres x 1 du/5 acres = 3.4 (rounded to 3 allowable dwelling units)
15 acres x 1 du/10 acres = 1.5 (rounded to 2 allowable dwelling units)

In no case shall the rounding provision set forth in (b) above prevent a project within an urban zone classification from achieving the minimum density required for the zone. In such cases where the minimum density required for the zone would not otherwise be achieved, rounding up of allowable dwelling units shall be used, regardless of whether or not the fractional unit is greater than or less than .5.

Example of Project within an SF zone:

Minimum density required for SF zone: 4 du/acre

Project area: 11.1 acres (net)

Allowable units pursuant to (a): $11.1 \times 4 \text{ du/ac} = 44.4$

Rounding of units pursuant to (b): 44.4 units, rounded down to 44 units

Resulting Density After Rounding: $44 \text{ units}/11.1 \text{ acres} = 3.96 \text{ units/acre}^*$

*Does not meet required minimum density, rounding down shall not apply.

Allowable dwelling units shall be rounded up from 44.4 to 45, resulting in a density of 4.05 du/acre.

- (12) On a lot containing both residential and non-residential uses, the density shall be based only on that portion of the lot not utilized by the non-residential use, including parking and storage associated with the non-residential use. If the residential development is located within the same structure as the non-residential use, the entire lot may be used to calculate density.
- (13) Landscape buffer requirements of Section 18A.35.030 may result in setbacks greater than indicated in Section 18A.35.020 B.2.
- (16) See Section 18A.35.030 J.3. for highway and arterial buffer standards for the Gig Harbor and Key Peninsula areas.
- (17) Average lot size with the MSF zone shall be 5,000 square feet with no individual lot less than 4,000 square feet. An average lot size of less than 5,000 square feet or individual lots smaller than 4,000 square feet are allowed with a Planned Development District (PDD) permit pursuant to 18A.75.050.

- (21) Lots that are 100 feet or less in width may reduce the interior yard setback to 10 percent of the lot width. In no case shall the setback be less than 3 feet unless a variance is approved. Lots between 101 feet and 150 feet wide may reduce the interior yard setback to 15 percent of the lot width. Lots between 151 and 200 feet wide may reduce the interior lot setback to 25 percent of the lot width. Existing lots of record that are less than 150 feet in depth may reduce the required rear yard setback one foot for each foot the lot is less than 150 feet in depth, provided a rear yard setback of at least 25 feet shall be maintained.
- (24) In divisions of 5 or more lots, the minimum lot width shall be calculated by multiplying the lot area by 0.007.
- (34) The following front yard setbacks shall apply within the Gig Harbor Peninsula Community Plan area: House – 20 feet; Garage – 26 feet; Porch – 12 feet.
- (39) Lot dimension and setbacks may be reduced to the following when it is determined that application of critical area requirements would otherwise prevent a density of 5 dwelling units per acre from being achieved:
 - (a) Minimum lot width may be reduced 1 foot for each 100 foot reduction in lot size below 5,000 square feet up to a maximum reduction of 10 feet (example: a 4,000 square foot lot would have a minimum lot width of 40 feet).
 - (b) Interior yard setback may be reduced to 5 feet.
 - (c) Rear yard setback may be reduced to 10 feet.
- (42) **Essential Public Facility-Rural Airport.** For areas within the PUD, the density and dimension standards described in the PUD shall control. New developments adjacent to 26th Street NW shall provide Level 3 landscaping (18A.35.030 H.3.) adjacent to the road right-of-way.
- (45) New uses in the NC zone shall provide a 50-foot wide natural buffer area between the development and adjacent residential land uses and Rural Residential zone classifications.

(Ord. 2007-85s § 2 (part), 2007; Ord. 2007-6 § 2 (part), 2007; Ord. 2006-9s § 1 (part), 2006; Ord. 2005-84s § 2 (part), 2005; Ord. 2005-10s § 1 (part), 2005; Ord. 2005-15 § 1 (part), 2005; Ord. 2004-58s § 2 (part), 2004; Ord. 2005-9 § 3 (part), 2005; Ord. 2004-87s § 6 (part), 2004; Ord. 2004-129 § 1 (part), 2004; Ord. 2004-52s § 3 (part), 2004)

Chapter 18.80

NOTICE

Sections:

- 18.80.010 Introduction.
- 18.80.020 Public Notice Matrix.
- 18.80.030 Notice Types.
- 18.80.040 Methods of Notice.

18.80.010 Introduction.

Refer to Table 18.80.020 Public Notice Matrix for specific cross-references between methods of notice, notice types and permit categories. The following text is provided to supplement the provisions outlined in the Public Notice Matrix. (Ord. 96-19S § 1 (part), 1996)

18.80.020 Public Notice Matrix.

	Notice of Application	Notice of Threshold Determination	Notice of Public Hearing	Notice of Final Decision
Categories:	Day 0-14	Day 30-79	Day 30-90	Day 30-120
Building Permits, Administrative Design Review, Site Development Permits, Boundary Line Adjustments, Lot Combinations, Forest Practice Request for Single-Family Dwelling Exceptions (no SEPA, no public hearing)	<ul style="list-style-type: none"> • Exempt 	<ul style="list-style-type: none"> • N/A 	<ul style="list-style-type: none"> • N/A 	<ul style="list-style-type: none"> • Mail to Applicant
Building Permits, Site Development Permits Class IV-General Forest Practice Permits (SEPA, no public hearing)	<ul style="list-style-type: none"> • Departmental Posting • Send SEPA Checklist to Reviewing Agencies 	<ul style="list-style-type: none"> • Publish in Newspaper • Mail to Applicant • Mail to Reviewing Agencies 	<ul style="list-style-type: none"> • N/A 	<ul style="list-style-type: none"> • Mail to Applicant and Parties of Record
Administrative Permits: Admin. Nonconforming Use Permits, Admin. Use Permits, Minor Amendments, Class IV-General Forest Practice Permits, Plat Alterations (1) (SEPA, no public hearing)	<ul style="list-style-type: none"> • Departmental Posting • Send SEPA Checklist to Reviewing Agencies • Mail to Adjacent Property Owners • Post Property 	<ul style="list-style-type: none"> • Publish in Newspaper • Mail to Applicant • Mail to Reviewing Agencies 	<ul style="list-style-type: none"> • N/A 	<ul style="list-style-type: none"> • Mail to Applicant and Parties of Record
Site Plan Review (no SEPA, public meeting required)	<ul style="list-style-type: none"> • Departmental Posting • Mail to Adjacent Property Owners 	<ul style="list-style-type: none"> • N/A 	<ul style="list-style-type: none"> • Post Property • Publish in Newspaper • Mail to Applicant 	<ul style="list-style-type: none"> • Mail to Applicant and Parties of Record

	Notice of Application	Notice of Threshold Determination	Notice of Public Hearing	Notice of Final Decision
Categories:	Day 0-14	Day 30-79	Day 30-90	Day 30-120
Administrative Permits: Admin. Nonconforming Use Permits, Admin. Use Permits, Minor Amendments, Plat Alterations (1), Binding Site Plans (no SEPA, no public hearing)	<ul style="list-style-type: none"> • Departmental Posting • Send Application to Reviewing Agencies • Mail to Adjacent Property Owners • Post Property 	<ul style="list-style-type: none"> • N/A 	<ul style="list-style-type: none"> • N/A 	<ul style="list-style-type: none"> • Mail to Applicant and Parties of Record
Conditional Use Permits, PDDs, PUDs, Nonconforming Use Permits, Public Facility Permits, Shoreline Substantial Dev. Permits, Shoreline Nonconforming Use Permits, Shoreline Conditional Use Permits, Rezones, Plat Alterations (1) (SEPA, public hearing required)	<ul style="list-style-type: none"> • Departmental Posting • Send SEPA Checklist to Reviewing Agencies • Mail to Adjacent Property Owners • Post Property 	<ul style="list-style-type: none"> • Publish in Newspaper • Mail to Applicant • Mail to Reviewing Agencies 	<ul style="list-style-type: none"> • Mail to Adjacent Property Owners • Publish in Newspaper • Mail to Applicant 	<ul style="list-style-type: none"> • Mail to Applicant and Parties of Record
Zoning Variances, Shoreline Variances, Wetland Variances, Fish and Wildlife Habitat Stream Buffer Variances, Reasonable Use Exceptions, Forest Practice Request for Removal of Development Moratorium, Plat Alterations (1) (no SEPA, public hearing required)	<ul style="list-style-type: none"> • Departmental Posting • Send Application to Reviewing Agencies • Mail to Adjacent Property Owners 	<ul style="list-style-type: none"> • N/A 	<ul style="list-style-type: none"> • Post Property • Publish in Newspaper • Mail to Applicant 	<ul style="list-style-type: none"> • Mail to Applicant and Parties of Record
Short Plats, Final Short Plats, Forest Practice Conversion Option Harvest Plans (no SEPA, no public hearing)	<ul style="list-style-type: none"> • Departmental Posting • Post Property • Mail to Adjacent Property Owners 	<ul style="list-style-type: none"> • N/A 	<ul style="list-style-type: none"> • N/A 	<ul style="list-style-type: none"> • Mail to Applicant and Parties of Record
Short Plats, Large Lots (SEPA, no public hearing)	<ul style="list-style-type: none"> • Departmental Posting • Send SEPA Checklist to Reviewing Agencies • Post Property • Mail to Adjacent Property Owners 	<ul style="list-style-type: none"> • Publish in Newspaper • Mail to Applicant • Mail to Reviewing Agencies 	<ul style="list-style-type: none"> • N/A 	<ul style="list-style-type: none"> • Mail to Applicant and Parties of Record
Preliminary Plats (2) (SEPA, public hearing required)	<ul style="list-style-type: none"> • Departmental Posting • Send SEPA Checklist to Reviewing Agencies • Post Property • Mail to Adjacent Property Owners 	<ul style="list-style-type: none"> • Publish in Newspaper • Mail to Applicant • Mail to Reviewing Agencies 	<ul style="list-style-type: none"> • Mail to Adjacent Property Owners • Publish in Newspaper • Mail to Applicant 	<ul style="list-style-type: none"> • Mail to Applicant and Parties of Record

	Notice of Application	Notice of Threshold Determination	Notice of Public Hearing	Notice of Final Decision
Categories:	Day 0-14	Day 30-79	Day 30-90	Day 30-120
General Wetland Review, Single Family Wetland Review, Agricultural Wetland Review, and Fish and Wildlife Review (no SEPA, no public hearing required)	<ul style="list-style-type: none"> • Post Property 	<ul style="list-style-type: none"> • N/A 	<ul style="list-style-type: none"> • N/A 	<ul style="list-style-type: none"> • Mail to Applicant and Parties of Record

Notes:

- (1) Notice of the filing of a plat alteration shall be given to the State, municipalities, public utilities, and adjacent property owners in the following cases and manner:
 - a. When a proposed plat alteration is located within one mile of any city or town, within a city's or town's Urban Growth Area or Urban Service Area, or which contemplates the use of any public utilities, notice shall be given to the city's or town's legislative body and to the public utilities governing body.
 - b. When a proposed plat alteration is located adjacent to the right-of-way of a State highway or within two miles of the boundary of a state or municipal airport, notice shall be given to the Secretary of Transportation.
 - c. Notice shall be given to all the owners of property within the subdivision.
 - d. The notice shall include a date for a public hearing or provide that a hearing may be requested by a person receiving notice within the notice of application comment period, as set forth in Section 18.80.030 A.
- (2) Notice of the filing of a preliminary plat shall be given to the State, municipalities, public utilities, and school districts in the following cases and manner:
 - a. When a proposed subdivision which is to be located within one mile of any city or town, within a city's or town's urban growth area (UGA) or urban service area (USA), or which contemplates the use of any public utilities, notice shall be given to the city's or town's legislative body and to the public utilities governing body.
 - b. When a proposed subdivision which is to be located adjacent to the right-of-way of a State highway or within two miles of the boundary of a State or municipal airport, notice shall be given to the Washington State Secretary of Transportation.
 - c. Notice shall be given to the school district within which the subdivision is proposed.
 - d. When the proposed subdivision lies within a designated flood control zone pursuant to Chapter 86.16 RCW, notification shall be given to the Washington State Department of Ecology, or its successor.

(Ord. 2009-18s3 § 1 (part), 2009; Ord. 2005-11s2 § 2 (part), 2005; Ord. 2004-52s § 1 (part), 2004; Ord. 2002-113s § 1 (part), 2002; Ord. 99-68 § 2, 1999; Ord. 98-87 § 1 (part), 1998; Ord. 97-84 § 1 (part), 1997)

18.140.060 Revocation, Modification and Expiration.

The purpose of this Section is to provide the authority and procedures for the revocation, modification, and expiration of permits and approvals granted pursuant to the Pierce County regulations.

- A. **Hearing Examiner's Authority.** The Hearing Examiner has the authority to revoke or modify any permit or approval which was issued pursuant to his or her review. Prior to such revocation or modification, a public hearing shall be held by the Examiner and procedures concerning notice, reporting, and appeals shall be the same as required for the initial consideration thereof, provided that when any permit or approval is not exercised within the time specified in such permit or approval or, if no date is specified, within one year from the approval date of said permit or approval, the permit or approval shall automatically become null and void and no public hearing shall be required on the matter.
- B. **Director's Authority.** The Director or designee has the authority to revoke or modify any permit or approval which was issued pursuant to his or her review. Prior to such revocation or modification, the Director or designee shall follow procedures concerning notice and appeals as required for the initial consideration thereof, provided that when any permit or approval is not exercised within the time specified in such permit or approval or, if no date is specified, within one year from the approval date of said permit or approval, the permit or approval shall automatically become null and void and no public hearing shall be required on the matter.
- C. **Initiation of an Action.** An action to revoke or modify any matter set forth in subsections A. and B. may be initiated by:
 - 1. The Examiner;
 - 2. The Director; or
 - 3. The petition of any aggrieved party directly affected by the project or use together with a filing fee listed in Chapter 2.05, PCC, and filed with the Department.
- D. **Grounds for Revocation or Modification.** Such revocation or modification shall be made on any one or more of the following grounds:
 - 1. That the approval or permit was obtained by fraud;
 - 2. That the use for which such approval or permit was granted is not being exercised;
 - 3. That the use for which such approval or permit was granted has ceased to exist or has been suspended for one year or more;
 - 4. That the approval or permit granted is being, or recently has been, exercised contrary to the terms or conditions of such approval or permit, or in violation of any statute, resolution, code, law, or regulation.
 - 5. That the use for which the approval or permit was granted was so exercised as to be detrimental to the public health or safety, or so as to constitute a nuisance.
- E. **Expiration.** When any permit or approval is not exercised by the expiration date indicated on the approval or permit or, if no expiration date, is specified, one year from the approval date, the permit or approval shall expire. No extension of the expiration date for a permit or approval shall be granted unless such extension is approved pursuant to specific provisions for the relevant permit or approval.

(Ord. 2003-57s § 1 (part), 2003; Ord. 97-84 § 1 (part), 1997)

18.160.060 Duration of Approvals.

- A. **Use Permits.** An approved use permit shall be allowed to develop for a period of one year from the effective date of the permit approval unless a different time limitation was specifically authorized in the final approval. The development of an approved use permit shall be governed by the terms of approval of the permit unless the legislative body finds that a change in conditions creates a serious threat to the public health, safety or welfare.
- B. **Preliminary Plat.** Development of an approved preliminary plat shall be based on the controls contained in the Hearing Examiner's decision. A final plat meeting all of the requirements of the preliminary plat approval shall be submitted within five years of the effective date of the Hearing Examiner's decision. Any extension of time beyond this five year limitation may contain additional or altered conditions and requirements based on current development regulations and other land use controls.
- C. **Use Permits Associated with a Preliminary Plat.** Use Permit applications, such as Planned Development District applications, that are approved as a companion to a preliminary plat application, shall remain valid for the duration of the preliminary and final plat as provided in subsections B. and D.
- D. **Final Plat.** The lots in a final plat may be developed by the terms of approval of the final plat, and the development regulations in effect at the time the preliminary plat application was deemed complete for a period of five years from the recording date unless the legislative body finds that a change in conditions creates a serious threat to the public health, safety or welfare.
- E. **Short Plat, Large Lot Division.** The lots in a short plat or large lot division may be developed by the terms and conditions of approval, and the development regulations in effect at the time the application was deemed complete for a period of five years from the recording date unless the legislative body finds that a change in conditions creates a serious threat to the public health, safety or welfare.
- F. **Binding Site Plan.** The lots in a Binding Site Plan may be developed by the terms of approval of the Binding Site Plan, and the development regulations in effect at the time the application was deemed complete for a period of five years from the recording date unless the legislative body finds that a change in conditions creates a serious threat to the public health, safety or welfare.
- G. All approvals described in this Section shall be vested for the specific use, density, and physical development that is identified in the permit approval.

(Ord. 98-66S § 1 (part), 1999)

1.22.080 Examiner – Powers and Duties.

- A. The Examiner shall have the power to appoint Deputy Hearing Examiners subject to confirmation by the Council. The Deputy Hearing Examiners shall assist the Examiner in the performance of the duties conferred upon the Examiner and shall have all the powers and duties of the Examiner.
- B. The Examiner shall receive and examine available relevant information, including environmental documents, conduct public hearings, cause preparation of the official record thereof, prepare and enter findings of fact and conclusions of law, and issue final decisions for:
 - 1. Land Use Matters.
 - a. Applications for zone changes or amendments to the classification of specific parcels of land; provided that area-wide amendments to the Zoning Atlas, amendments to the text of the Zoning Code, community plans, Countywide Comprehensive Plan initiated in whole or part by the County Council, County Departments or Planning Commission are not within the Examiner's jurisdiction.
 - b. Appeals of decisions or orders of a County Administrative Official under the Site Development Regulations.
 - c. Applications for preliminary and final plats.
 - d. Applications for, and major amendments to, Planned Development Districts – PDDs.
 - e. Application for Transfer of Development Rights.
 - f. Applications for Shoreline Management Substantial Development Permits, Variances, Conditional Use Permits and Nonconforming Use Permits pursuant to the Shoreline Management Use Regulations.
 - g. Appeals from any final administrative order or decision of the Planning and Land Services Department in the administration, interpretation or enforcement of the Pierce County Code.
 - h. Appeals contesting the approval or denial of short plats and large lot divisions.
 - i. Applications for, and major amendments to, variances, conditional use permits, public facility permits, permits for the alteration, or expansion or replacement of a nonconforming use.
 - j. Amendments to plats.
 - k. Appeals from the following environmental determinations: Appeals of final and revised threshold determinations; determinations of adequacy of final and supplemental environmental impact statements; and the exercise of SEPA substantive authority to condition or deny actions; PROVIDED, SEPA appeals of legislative actions taken by the Council pursuant to the requirements of the Growth Management Act or Shoreline Management Act shall be appealed to the Central Puget Sound Growth Management Hearings Board and are not within the Examiner's jurisdiction.
 - l. Petitions for Plat Vacations, Alterations, Time Extensions, Revocations, Modifications, Reclassifications.

- m. Appeals of Cease and Desist Orders.
 - n. Applications for Youth Cabaret licenses.
 - o. Wetland variances and appeals of any order or decision of the Planning Department under the Pierce County Wetland Management Regulations.
 - p. Reasonable use exceptions and any order or decision of the Planning Department under the Critical Areas and Natural Resource Lands Regulations.
 - q. Applications for a request for removal of development moratorium pursuant to Title 18H, Development Regulations – Forest Practices.
 - r. Appeals of decisions or orders of the Planning Department under Title 18H, Development Regulations – Forest Practices.
 - s. Any other land use matters assigned by the Council to the Examiner.
2. Non Land Use Matters.
- a. Appeals of issuance, denials, revocations, or suspensions of business licenses. (Title 5)
 - b. Appeals of potentially dangerous dog declarations. (6.07)
 - c. Appeals of Notice of Violation and Abatement (Public Nuisances) (8.08)
 - d. Appeals of Notice of Violation and Abatement (Public Nuisance Vehicles). (8.10)
 - e. Appeals of denials of Solid Waste Handling Facility designations. (8.30)
 - f. Referrals from City of Tacoma's Human Rights and Human Services Department regarding complaints alleging violations of Fair Housing Regulations. (8.68)
 - g. Appeals from decisions of County in the administration or enforcement of the Road and Storm Drainage Design and Construction Standards. (Title 17A)
 - h. Appeals from decisions of Public Works Director regarding underground utility installations. (11.22)
 - i. Sewer Assessment Protests. (13.20)
 - j. Appeals from administrative decisions or orders of the Building Official or Fire Marshal regarding the Uniform Construction Codes. (Title 17C)
 - k. Appeals from decisions of the Building and Fire Codes Board of Appeals regarding water mains, fire hydrants, and fire flow standards. (Title 17C)
 - l. Appeals from any final administrative order or decision of the Planning Department in administration, interpretation or enforcement of the Pierce County Code.
 - m. Any other non land use matter assigned by the Council to the Examiner by ordinance.
 - n. Latecomers Agreement appeals (13.10.080)
 - o. Appeals concerning impact fees for parks, schools and roads. (4A)
 - p. Appeals of denials of permits for parades, motorcades, runs and assemblies. (12.44)
- C. Subpoena Authority. The Examiner shall have the authority to issue subpoenas compelling the appearance of witnesses and the production of documents.
- 1. A subpoena issued by the Hearing Examiner may be served by any person 18 years of age or over, competent to be a witness, but who is not a party to the matter in which the subpoena is issued.
 - 2. Each witness subpoenaed by the Hearing Examiner as a witness shall be allowed the same fees and mileage as provided by law to be paid witnesses in courts of record in Washington State.

3. If a person fails to obey a subpoena issued by the Hearing Examiner in an adjudicative proceeding, or obeys the subpoena but refuses to testify or produce documents when requested concerning a matter under examination, the Hearing Examiner or attorney issuing a subpoena may petition the Pierce County District Court for enforcement of the subpoena. The petition shall be accompanied by a copy of the subpoena and proof of service, shall set forth in what specific manner the subpoena has not been complied with, and shall request an order of the court to compel compliance. Upon such petition, the court shall enter an order directing the person to appear before the court at a time and place fixed in the order to show cause why the person has not obeyed the subpoena or has refused to testify or produce documents. A copy of the court's show cause order shall be served upon the person. If it appears to the court that the subpoena was properly issued, and that the particular questions the person refused to answer or the requests for production of documents were reasonable and relevant, the court shall enter an order that the person appear before the Hearing Examiner at the time and place fixed in the order and testify or produce the required documents, and on failing to obey this order the person shall be dealt with as for contempt of court.
- D. Decision of Hearing Examiner. When acting upon any of the above specific applications or appeals, the Examiner shall have the power to attach any reasonable conditions found necessary to make a project compatible with its environment and to carry out the goals and policies of the applicable comprehensive plan, community plan, Shoreline Master Program, or other relevant plan, regulations, Federal or State law, case law or Shorelines Hearing Board decisions. In his/her decision, the Hearing Examiner shall consider the recommendations of the applicable Land Use Advisory Commission, the applicant, Planning and Land Services staff, and all other comments and recommendations, and the reason such recommendations are included or not included in the decision.
- E. The Examiner shall prescribe rules and regulations for the conduct of public hearings before the Examiner and shall provide a copy of the rules and regulations to the Council and to each County Department. The Examiner's rules may also include, but are not limited to: provisions for the issuance of preliminary decisions in complex cases; authorization for parties to propose draft findings of fact; and criteria for determining "expert witnesses" establishment of prehearing conference procedures and mediation sessions.

(Ord. 2009-69s § 1 (part), 2009; Ord. 2008-61 § 4, 2008; Ord. 2008-88 § 2, 2008; Ord. 2006-60s § 5, 2006; Ord. 2005-95 § 4, 2005; Ord. 2004-78 § 1 (part), 2004; Ord. 2003-32s2 § 3 (part), 2003; Ord. 2002-133 § 1, 2003; Ord. 98-87 § 2, 1998; Ord. 96-19S § 4 (part), 1996; Ord. 94-112S § 1 (part), 1994; Ord. 90-154 § 1 (part), 1990; Res. 22571 § 2, 1980; Res. 21132 § 2, 1978; Res. 20489 § 1 (part), 1978)