

NO. 42490-8-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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NORTHSHORE INVESTORS, LLC, a Washington limited liability company, and NORTH SHORE GOLF ASSOCIATES, INC., a Washington corporation, and SAVE NORTHEAST TACOMA, a Washington nonprofit corporation,

Petitioners / Appellants,

vs.

CITY OF TACOMA, a Washington municipal corporation,

Respondent / Cross-Appellant.

**NORTHSHORE INVESTORS, LLC'S
RESPONSE BRIEF TO OPENING BRIEFS OF
CITY OF TACOMA AND SAVE NE TACOMA**

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I. INTRODUCTION¹

Northshore responds to the opening briefs of the City and Save NE Tacoma, each of whom seeks reversal of the Superior Court's denial of their motions to dismiss Northshore's Amended Land Use Petition Act petition on grounds that Northshore failed to timely serve the LUPA petition. This Court should reject their appeals. The City's "Notice of Appeal Results," which was mailed two days after the hearing on April 15, 2010, was the written decision both LUPA and under Tacoma Municipal Code 1.70.030. Service on May 6, 2010, only 19 days after the City's written decision issued, was within the 21-day period. Northshore timely served the Amended LUPA petition in compliance with the City's own code provisions, which require the City's decision to be in writing. This Court should reject the arguments of the City and Save NE Tacoma that Northshore failed to timely serve them, which arguments ignore the requirement of TMC 1.70.030 that the decision be in writing, and are inconsistent both with precedent and LUPA's purpose to establish clear and consistent service deadlines.

Save NE Tacoma also appeals two aspects of the City's land use decisions in an effort to create alternate grounds to affirm the City's denial of the permits. This effort fails. To prevail, Save NE Tacoma must meet its burden to show that two legal conclusions of the City were erroneous.

¹ Citations to the Clerk's Papers are designated CP ____ with parenthetical descriptions of the cited material. Citations to the Administrative Record are designated AR ____ followed by a bracketed [] reference to the document (exhibit), page and (where applicable) page or line numbers.

This Court should reject Save NE Tacoma's appeal, and hold that the City was correct regarding these two issues. First, the City's longstanding construction of "usable, landscaped recreation areas" as including private yards is consistent with the plain meaning of those terms. The construction also is consistent with another provision of the Code (TMC 13.04.240(C)(1)(a)&(b)), which refers both to "common" and "private" "open space." The construction that "usable, landscaped recreation areas" includes private yards, applied by the City for years, is reasonable and does not, as Save NE Tacoma argues, render portions of the ordinance superfluous. Moreover, and even if this Court were to find ambiguity (which it should not because the plain meaning accords with the City's construction), this Court owes deference to the City's construction and application of its Code and should uphold it.

Second, this Court also should reject Save NE Tacoma's argument that RCW 58.17.215 required Northshore to submit multiple applications for plat amendments, and that its failure to do so supports denial of the project. This part of the parties' dispute has already been judicially resolved against Save NE Tacoma and is the law of the case; Save NE Tacoma nonetheless seeks to re-open it. Save NE Tacoma seeks to establish that the proposed project cannot proceed without the consent of its members. It argues incorrectly that additional plat applications were required that needed its members' signatures. Such applications were not required. As recognized by the City, RCW 58.17.215 does not apply. This issue was fully and finally decided in 2007 when the completeness of the

application packet was litigated by these parties. Under LUPA, the prior resolution is binding and no longer subject to review. The prior resolution of the completeness of the application packet also precludes relitigation under the doctrine of collateral estoppel. Save NE Tacoma's attempt to assert RCW 58.17.215 also is precluded by the February 4, 2009 Declaratory Judgment, where the statute should have been raised and where related issues were finally decided contrary to Save NE Tacoma's position. The Court, thus, need not reach the issues.

This Court should deny Save NE Tacoma relief from the City's decision, and reject its arguments to affirm on alternate grounds.

II. ISSUE STATEMENTS

1. Did the Superior Court correctly deny the motions to dismiss for untimely service where the City issued a written "Notice of Appeal Results" on April 15, 2010 consistent with TMC 1.70.030's requirement that the decision be in writing, making the decision one that "issued" on April 18, 2010 and making service on May 6, 2010 timely? (City's Assignment of Error; Save NE Tacoma's Assignment of Error 1).

2. Did the City correctly construe its former ordinance TMC 13.06.140(F)(6) to include private yards as "usable, landscaped recreation areas," where no wording in the ordinance excludes private yards and such a construction is consistent with another provision of the Code which recognizes both "common" and "private" "open space"; and where, if the provision is ambiguous, this Court owes deference to the City's construction and application? (Save NE Tacoma's Assignment of Error 2).

3. Should this Court reject Save NE Tacoma's argument that Northshore's application was incomplete and necessitated applications to amend multiple plats which required the signatures of its members where (1) the issue of the completeness of the application is not subject to review or is subject to issue preclusion because it was fully and finally decided in proceedings that included Save NE Tacoma and not timely appealed under LUPA, (2) the Superior Court declared that Save NE Tacoma's members had no enforceable right to maintain the open space designation or require their consent, and that the plats at issue contained no open space dedication or use restriction, precluding assertion of RCW 58.17.215, and

(3) RCW 58.17.215 does not apply as a matter of law? (Save NE Tacoma's Assignment of Error 3).

III. STATEMENT OF THE CASE

Northshore incorporates Section IV.D. of its Statement of the Case provided in its Opening Brief filed Tuesday, January 3, 2012, which addresses the declaratory judgment action in Superior Court between the parties ("the Declaratory Judgment Action"). The judgments are attached at Appendix C to that brief, and their affirmance at Appendix D.

A. The Hearing Examiner Determined the Issue of the Completeness of Northshore's Application in 2007.

When the City notified Northshore in February 2007 that its applications were incomplete, the parties (including Save NE Tacoma) litigated the issue. *See* CP 2734 (Land Use Decision ("Decision") at Finding 26) (App. A to Northshore's Opening Br.). Northshore appealed the determination of incompleteness. *Id.* The Examiner determined that the applications were complete and reversed the Land Use Administrator's determination. *Id.*; *see* AR 6653-54 (Ex. 220: July 2007 Reversal Order); AR 5845 (Ex. 162: September 2007 Notice of Complete Application); AR 6250-53 (Ex. 195: letter and attachment) (all attached at App. 1).

Save NE Tacoma participated in these proceedings. Specifically, Save NE Tacoma asserted that RCW 58.17.215, which governs the alteration of recorded subdivisions, as well as the PRD code precluded submittal of the application to redevelop the Northshore Golf Course without such signatures. *See* AR 6250-53 (Ex. 195); AR 6697-98 (Ex. 227: 7/30/07 Order on Clarification). The Examiner deemed the

applications complete notwithstanding these arguments. AR 6643-54. Save NE Tacoma did not appeal the Examiner's decision on completeness.

B. When Northshore Appealed A Different Examiner's Recommendation to Deny the Rezone Modification Application, the City Sent Northshore a "Notice of Filing an Appeal" Containing Appeal Procedures Including the Provision in TMC 1.70.030 That "The Council's decision shall be in writing"

Northshore later appealed the Examiner's recommendation to deny the Rezone Modification Application. *See* CP 537. After Northshore initiated this appeal process before the City Council, the City sent Northshore various materials. *See* CP 537-38; CP 549-54. Among the materials, the City directed Northshore's attention to TMC 1.70.303. *Id.*; *see* City's Appendix D (TMC 1.70). This provision states that the decision on the appeal "shall be in writing." *Id.*

C. The City Heard Northshore's Appeal of the Rezone Modification Application on April 13, 2011 and Mailed a Written "Notice Of Appeal Rights" To Petitioners on April 15, 2011.

The City held the hearing of Northshore's appeal on April 13, 2010. *See* CP 2728. Two days later, on April 15, 2010, the City mailed its written "Notice of Appeal Results." *See* CP 2728-49 (Decision). This notice sets forth the results of the appeal and indicates that it was served on all parties to the appeal. *Id.* It attaches the Findings, Conclusions and Recommendation adopted by the City Council. *Id.* The City concedes that the City mailed this writing to all parties in the appeal on April 15, 2010.

See City's Opening Br., at 10. The Petitioners received the Notice of Appeal Results on April 16, 2010. *See* CP 541-42 (Laing Decl., ¶ 18; CP 601-602 (Moomaw Decl., ¶ 10).

D. Northshore Served its Petition By May 6, 2011, in Advance of the Calendared Due Date of May 10, 2010, Calculated from the Written "Notice of Appeal Results."

The City and Save NE Tacoma concede service on May 6, 2010 via email as agreed by the parties. *See City's Opening Br.*, at 11; *Save NE Tacoma's Opening Br.*, at 19. The Amended LUPA Petition was filed earlier on May 3, 2010. The filing date is not at issue.

The City and Save NE Tacoma refer to the explanation given in the Corrected Certificate of Service (*see* CP 353-54) that Northshore's attorneys had believed the petition was going to be e-served at the time of filing. *See City's Opening Br.*, at 11, citing CP 354; *Save NE Tacoma's Opening Br.*, at 11, citing CP 353. The explanation was offered to explain the incorrect Certificate of Service, not as any attempt to explain a failure to timely serve the petition. Northshore's attorneys always had calendared the due date based on the written decision mailed by the City. *See* CP 543 (Laing Decl., ¶¶ 22-23).

This calculation shows the filing and service deadline was May 10, 2010. A written decision mailed on April 15, 2010, is considered "issued" three days later, that is, on April 18, 2010. *See* RCW 36.70C.010(a). A party has 21 days from issuance to file and serve a LUPA petition. *See* RCW 36.70C.040(3). The 21st day from April 18, 2010 was May 9, 2010,

a Sunday. Accordingly, the deadline for filing and serving Petitioners' Amended LUPA Petition would be Monday, May 10, 2010. *See* CR 6; RCW 36.70C.030(2) (civil rules apply where consistent with LUPA).

The Petitioners relied on the City's Code, which requires that the decision would be in writing, relied on the City's mailing of the Notice of Appeal Results on April 15, 2010 to be that writing, and complied with the LUPA deadline calculated from that writing. *See* CP 536-598; CP 599-606; 6/18/10 Verbatim Report of Proceedings ("VRP") (City's Appendix B) at 10-20.

E. The Superior Court Denied the Motions to Dismiss, Determining that the Written "Notice of Appeal Results" Was the Relevant Decision.

The Superior Court denied the motions to dismiss. *See* CP 1390-1392. The Superior Court heard oral argument and then ruled that the City's decision was the written one mailed April 15, 2010. *See* VRP 20.

IV. STANDARD OF REVIEW

The City's and Save NE Tacoma's appeals involve only matters of law. An appellate court reviews *de novo* a motion to dismiss. *See Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998). Questions of law are reviewed *de novo*. *State v. Schwabe*, 163 Wn.2d 664, 671, 185 P.3d 1151 (2008). The City appears to agree that the foregoing standard of review is the applicable one. *See City's Opening Br.*, at 14, 16. Save NE Tacoma does not address the standard of review relevant to the motions to dismiss. *See Save NE Tacoma's Opening Br.*, IV.A, IV.B. This

Court should review *de novo* whether the Amended LUPA Petition timely was filed, and specifically whether TMC 1.70.030 required a written decision.

Save NE Tacoma also asks this Court to reject the City's construction of "usable, landscaped area" under the City's own ordinance, and to hold that pursuant to RCW 58.17.215 additional applications were necessary. *See Save NE Tacoma's Opening Br.*, at 19-30. Under LUPA, this Court should decide these issues pursuant to the legal error standard of RCW 36.70C.130(1)(b)(relief shall be granted if "[t]he land use decision is an erroneous interpretation of the law."). Whether a decision involves an erroneous interpretation of the law under standard (b) is a question of law that courts review *de novo*. *See Lauer v. Pierce County*, 157 Wn. App. 693, 238 P.3d 539 (2011); *see also Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 175-76, 4 P.3d 123 (2000) (statutory construction is a question of law reviewed *de novo* under the error of law standard).

Save NE Tacoma challenges whether the City's construction of its ordinance is legal error. *Id.*, Assignment of Error 2. Save NE Tacoma also challenges whether RCW 58.17.215 applies, where the City has not applied it. *Id.*, Assignment of Error 3. These also are questions of law reviewed *de novo* under the error of law standard. The Court should reject Save NE Tacoma's assertion that its challenge regarding construction of the ordinance invokes an issue of substantial evidence. *See Save NE Tacoma's Opening Br.*, at 24 ("The conclusion that the PRD open space may be satisfied by private yards is not supported by substantial evidence

and is therefore in contravention of RCW 36.70A.130(1)(c) [sic].”). It does not. Save NE Tacoma only puts at issue the legal correctness of the standard, not whether sufficient evidence exists to support the standard if it is correct. *See Save NE Tacoma’s Opening Br.*, at 2, Issue 2.

V. ARGUMENT AND AUTHORITY

This Court should deny the relief sought by the City and Save NE Tacoma (“the Respondents”).

A. **This Court Should Affirm Denial of the Motions to Dismiss Because Northshore Timely Served the LUPA Petition.**

The Superior Court correctly denied the motions to dismiss, concluding that Northshore timely served its LUPA petition after the City mailed its written decision to Northshore and the Golf Course owners on April 15, 2011. *See* CP 1390-92; VRP 20. The Superior Court held that the City’s decision had to be in writing, and that the City’s written decision dated April 15, 2010 and mailed that day was the operative one. *See* CP 1390-92; VRP 20. This Court should agree and hold that the City’s Code required the decision to be in writing.

The Respondents contest the issue of when the land use decision “issued.” A land use petition must be filed in the Superior Court “within twenty-one days of the *issuance* of the land use decision.” *See* RCW 36.70C.040(3) (emphasis added). *See also City’s Opening Br.*, at 2; *Save NE Tacoma’s Opening Br.*, at 14. If “issuance” is determined based on the City’s admitted mailing on April 15, 2010 of its “Notice of Appeal

Results” to all the parties to the appeal, then service was timely. The City and Save NE Tacoma argue, however, that there was no written decision to which the statute applies but that, contrary to Northshore’s argument, the City’s decision “issued” on April 13, 2010, *i.e.*, the date of the City Council hearing. Their argument is legally incorrect under LUPA, inconsistent with the City’s Code at TMC 1.70.030 (*see* Appendix D to City’s Opening Brief for TMC 1.70), and contrary to case law.

The legislative purpose in enacting LUPA was to “establish[] uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.” *See* RCW 36.70C.010. LUPA provides that the date on which a land use decision “issues” is either:

(a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available; [or]

(b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; [or]

(c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

See RCW 36.70C.040(4) (emphasis added). *See also* *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 408-09, 120 P.3d 56 (2005) (applying RCW 36.70C.040(4)).

Here, subsection (a) applies because the City mailed “a written decision” to the parties the day after the hearing. The Notice of Appeal Results is a writing that states the results reached, attaches the Findings, Conclusions and Recommendation of the Hearing Examiner as adopted by the City Council in compliance with TMC 1.70.040, and establishes that the City mailed the writing to all parties of record on April 15, 2010. Subsection (a) thus establishes the date of issuance of the City’s decision.

a. Finding Issuance Based on the Written “Notice of Appeal Results” Is Required by the City’s Code.

The City’s Code requires the conclusion that subsection (a) above is satisfied because the City’s decision was written. The City’s act of mailing this written decision to the parties is consistent with the City’s Code provision requiring the decision *be in writing*. TMC 1.70.030, which the City provided to the parties when they appealed, states the requirement that the decision be in writing. It provides:

The Council’s decision shall be in writing and shall specify findings and conclusions whenever such findings and conclusions are different from those of the appealed recommendation.

TMC 1.70.030 (CP 553 at City’s App. D) (emphasis added). The provision could not be plainer.

The City asks this Court to construe this provision contrary to the rules of grammar. The City argues that the qualifying phrase in the second compound phrase “whenever such findings and conclusions are different from those of the appealed recommendation” applies not just to the

requirement that the Council specify findings and conclusions, but to the first requirement that the decision be in writing. *See City's Opening Br.*, at 25. This is incorrect. The two compound phrases stand alone. Only the second compound phrase contains a subjunctive clause limited to itself by specifying "whenever *such* findings and conclusions are different." (emphasis added).

In the alternative, the City attempts to discount the clear language of TMC 1.70.030 by asking the Court to "harmonize" its multiple Code provisions to obviate the writing requirement. *See City's Opening Br.*, at 26. Northshore respectfully suggests that it is the work of the City, not this Court, to "harmonize" various provisions of its Code, assuming that any disharmony exists. In any event, and as the Code is presently written, the meaning of TMC 1.70.030 could not be plainer, nor the provision more express. This Court should reject the Respondents' argument that "the decision" is the City's vote, rather than the writing which officially memorializes that vote and which the City promised it would issue. This argument both ignores the fact that the City *did* put the decision in writing and begs the question of why it did so, if it was not so required.

The Washington Supreme Court has stated, "We have recognized that the regulation of land use must proceed under an express written code and not be based on *ad hoc* unwritten rules so vague that a person of common intelligence must guess at the law's meaning and application." *City of Seattle v. Crispin*, 149 Wn.2d 896, 905, 71 P.3d 208 (2003). A local jurisdiction should not be permitted to refute its own express written

code. The certainty required by the land use process cannot tolerate the obfuscation urged by the City. Its Code required a written decision; it mailed one the day after the hearing. This compels the conclusions that the decision issued three days after the mailing under RCW 36.70C.040(4)(a), and that the Amended LUPA petition was timely filed.

b. Precedent and Policy Support Finding Issuance Based on the written “Notice of Appeal Results”

Case law construing LUPA supports the conclusion that the decision issued based on the written “Notice of Appeal Results.” The Supreme Court’s *Habitat Watch* decision recognized that LUPA “designates the exact date a land use decision is ‘issued,’ based on whether the decision is written, made by ordinance or resolution, or in some other fashion.” *Id.* at 408 (citing RCW 36.70C.040(a)). In *Habitat Watch*, the Washington Supreme Court recognized that, per the statute’s plain language, the catchall time bar of subsection (c) applies only when “neither of the above categories apply.” *Id.* In the case at bar, subsection (a) applies and the catchall does not come into play.

In quasi-judicial proceedings, the date of a land use decision is “the date on which the decision is reduced to writing, as opposed to an earlier date on which it may be orally announced.” *Kings Way Foursquare Church v. Clallam County*, 128 Wn. App. 687, 691-92, 116 P.3d 1060 (2005); *see also Hale v. Island County*, 88 Wn. App. 764, 768, 946 P.2d 1192 (1997) (written decision mailed fifteen days after board voted to adopt planning commission’s recommendation was written decision

determining “issuance”). Here, the Council’s oral vote was reduced to writing and mailed to the parties, per TMC 1.70.030. As in *Kings Way Foursquare Church* and *Hale*, this Court should conclude that the written decision was the operative one here.

Recognition of the written decision is also consistent with *Vogel v. City of Richland*, 161 Wn. App. 770, 255 P.3d 805 (2011), in which the Court of Appeals recognized that most decisions require memorializing, as follows:

Whether an oral land use decision is simple or complex, until its scope and terms have been memorialized in some tangible, accessible way, even the most diligent citizen cannot know whether the decision is objectionable or, if it is, whether there is a viable basis for a challenge. Moreover, a citizen challenging the decision has nothing to present to the superior court, or to us, for review. This case exemplifies the problem; there is literally nothing in our record that purports to tell us exactly what the city staff authorized Mr. Bauder to do.

Vogel, 161 Wn. App. at 780; see also *Applewood Estates Homeowners Ass’n v. City of Richland*, ___ P.3d ___, 2012 WL 246629 (Jan. 26, 2012, Cause Number 29806-0-III) (distinguishing *Vogel* where, as here, “the decision was written”). Here, the City memorialized the decision in writing and provided that written decision to the Petitioners. This is consistent with the intent of LUPA. Apposite case law supports this Court’s recognition of the Notice of Appeal Results as the written decision for the commencing an appeal under LUPA.

Denial of the motions to dismiss is consistent with this Division's decision in *Overhulse v. Thurston County*, where the county board affirmed the hearing examiner's decision and mailed its decision to the parties of record two days later. 94 Wn. App. at 596 n.1. This Court analyzed the situation based on the mailed written decision as follows:

In this case, the Board mailed its decision to the parties on January 7, 1997. Thus the decision was issued on January 10, 1997. The period for filing and service expired on January 31, 1997, or the first business day following (February 2, 1997).

Id. The timing in the *Overhulse* case exactly mirrors that of the present case: a written decision mailed two days after the hearing, with the 21st day falling on a weekend. This Court should follow its own analysis in *Overhulse* and affirm the Superior Court's denial of the motions to dismiss.

Further, recognition that the Notice of Appeal Results is a written decision constituting "issuance," as that term is used in RCW 36.70C.040(3), is consistent with the analysis found in *Hale v. Island County, supra*. In *Hale*, the Court of Appeals analyzed whether a preliminary use approval was in writing. The court first examined whether the local jurisdiction required the decision to be in writing. *Id.*, 88 Wn. App. at 768. It concluded, "Nothing in the ICC mandates that the decision be made in writing." *Id.* The court then went on to find that the decision was in writing for other reasons. *Id.*

This Court should begin its analysis by agreeing with the *Hale* court's conclusion that the starting point for such an analysis is the language of the applicable code. Here, TMC 1.70.030 expressly requires that a decision be in writing. This Court therefore should conclude that the City's decision could only issue through a writing.

Additionally, under the additional analysis of *Hale*, the April 15, 2010 Notice of Appeal Results would nevertheless constitute the City's written decision under LUPA for purposes of RCW 36.70C.040(4), even if TMC 1.70.030 did not expressly require a written decision. *See id.* The *Hale* court rejected the argument that the document mailed to the parties was "merely a document memorializing the BICC's earlier action in voting at the public hearing," where the document had indicia that it was the decision, including being timely signed and mailed to the parties as the decision document. 88 Wn. App. at 769. That also occurred here. The City created the "Notice of Appeal Results" the day after the hearing, attached the Finding, Conclusions and Recommendation of the Hearing Examiner adopted by the City Council, and mailed it to the parties as the decision document. Nothing in the Notice of Appeal Results stated that it was not the decision document.

The City's and Save NE Tacoma's arguments that the Notice of Appeal Results was not "*the* decision" ignores the language and structure of the LUPA provision. They argue that because the City's "voice vote" came first, it is "*the* decision." *See City's Opening Br., at 3 at Issue Statement, pp. 15-23; Save NE Tacoma's Opening Br., at 14-19.* If the

Court were to accept this argument, there often could never be a written decision because logically a vote must occur before a decision is expressed in writing. According to the City's position, a televised or "streamed live" hearing where the Council votes will always trump any subsequently mailed writing. This argument impermissibly inverts the statute. LUPA speaks first to "a written decision" that is "mailed by the local jurisdiction." *See* RCW 36.70C.040(a). Here, there is unquestionably "a written decision" in the Notice of Appeal Results that explains the decision reached, includes the Findings, Conclusions and Recommendation adopted by the City, and was mailed by the City to the parties in accordance with the City's Code. Pursuant to *Habitat Watch*, this is the end of the inquiry because subsection (a) governs "issuance" of written decisions that are mailed by their jurisdictions. In order to reach subsection (c), where the City and Save NE Tacoma wish to start the analysis, there would have to have been no written decision mailed out by the jurisdiction. Those are not the facts of this case.

Respondents rely on *Habitat Watch*, where the record was "not clear" as to when the decisions in question issued; *however, our state Supreme Court did not rely on subsection (c) in that case*. Instead, the Supreme Court analyzed issuance from when the local jurisdiction provided the written decisions to the petitioner in response to a public disclosure request by the petitioner. *Id.* The *Habitat Watch* court passed on the opportunity to apply the 21-day time bar from the date the decision was "entered into the public record" under subsection (c). *See id.* at 409.

The case thus does not support the Respondents' position and, if anything, appears to stand for the proposition that the outcome for which Respondents argue is disfavored where facts support a finding of issuance based upon communication of a writing.

This Court should affirm the Superior Court's correct determination that the Notice of Appeal Results was a written decision constituting "issuance." The Court should reject Respondents' position that in order to determine if the writing it drafted and mailed was "the decision," the Court should disregard the Code's requirement that the City's decision be in writing and instead scrutinize the Notice of Appeal Results to see if it uses the passive or present voice, or that the parties should look back to see if the writing was prepared in advance of the hearing. This nuanced approach has no place here in light of the City's Code and the intent of LUPA for firm, clear deadlines *which can be identified by members of the public, instead of solely by those who are inside the local government's decision-making process*. Those firm, clear deadlines are supplied by the plain language of the City's Code that requires that the decision be in writing.

The City's and Save NE Tacoma's arguments against application of subsection (a) are not compelling. They are inconsistent with the City's act in mailing out a document titled Notice of Appeal Results. They are inconsistent with the City's Code, which requires the decision be in writing. They are inconsistent with the structure of RCW 36.70C.040(4) which supports finding "issuance" from the jurisdiction's mailing of "a

written decision.” They are inconsistent with applicable case law which recognizes writings issued after an oral vote to be a written decision under LUPA. And they are inconsistent with LUPA’s objective to provide clear land use procedures including clear timelines for appeals. This Court should reject the arguments, and affirm denial of the motions to dismiss.

Finally, the Respondents incorrectly suggest that Northshore may have initially believed the service deadline preceded May 6, 2010, and raised its arguments for timely service only in hindsight. *See City’s Opening Br.*, at 11, 17; *Save NE Tacoma’s Opening Br.*, at 11. Not only is the Respondents’ premise false, it attempts to make a factual issue out of a legal one. Northshore’s filing was timely because the relevant law made it so. The subjective mindset of counsel, whether they believed that it was timely, hoped it was timely, or feared that it was not, is beside the point. Respondents’ attempt to trump up a factual issue on this score is meritless.

B. This Court Should Reject Save NE Tacoma’s Arguments to Reverse Legal Rulings of the City in Order to Affirm the Land Use Denials on Alternate Grounds.

Save NE Tacoma pursues its own appeal of the City’s decision to deny the Rezone Modification. It seeks to establish alternate grounds to sustain the denial, grounds that even the City rejected. Save NE Tacoma has not met its burden. This Court should reject its appeal. Regarding “usable landscaped recreation areas” under the City Code, Save NE Tacoma attempts to force a definition that is not within the plain meaning.

This Court should reject its arguments. Regarding RCW 58.17.215, Save NE Tacoma attempts to resurrect issues already decided and not subject to review. Even if reviewable, moreover, Save NE Tacoma's arguments fail.

1. The City correctly concluded that private yards are “usable landscaped recreation areas” under former TMC 13.06.140(F)(6).

Save NE Tacoma takes issue with the City's conclusion that, under former TMC 13.06.140(F)(6) (applicable here), private yards count toward “usable landscaped recreation areas.” *See* CP 2742 (Decision, Finding Nos. 69-70). The City's construction is legally correct. This Court should reject Save NE Tacoma's appeal based on its incorrect argument that private yards cannot count based on the plain language of the Code.

To oppose the City's construction, Save NE Tacoma makes two arguments. It argues, first, that the City's construction is inconsistent with the 1981 approval of PRD, and, second, that this construction defies general rules of construction because it is against common sense and renders parts of the code superfluous. *See Save NE Tacoma's Opening Br., at* 19-24. This Court should reject those arguments. Save NE Tacoma offers no authority to support its theory that inconsistency with the 1981 Staff Report somehow would invalidate the City's current decision. There was no inconsistency, moreover, because the issue was never decided in the 1981 proceedings. The City's construction not only conforms to rules of construction, it embodies the plain meaning of the words in the Code. If there is any ambiguity, this Court is to defer to the City's construction, which it has been applying for years. *See* AR 6140-45 (Ex. 190 at 8-9);

AR 6292-96.483 (Ex. 201 at Haynes-Castro testimony at 56:4-25). This Court should reject the challenge and affirm the City's construction.

The City correctly required the project to comply with the following requirement for "usable open space":

6. Usable open space. A minimum of one-third of that area of the site not covered by buildings or dedicated street right-of-way shall be developed and maintained as usable landscaped recreation areas. All open space shall be maintained free of litter and of conditions constituting a potential public nuisance.

Former TMC 13.06.140(F)(6) (AR 6740 (Ex. 235)). *See* CP 2735 and 2741 (Decision at Findings 33 & 63); *see also* AR 6140-54 (Ex. 190); AR 6250-53 (Ex. 195); AR 6292-96.483 (Ex. 201: Day 1 Vesting Appeal – May 17, 2007, Katich Test. at 10:8-12:17, 12:19-13:25; Day 3 Vesting Appeal – May 29, 2007, Haynes-Castro Test. at 45:11-47:10 & 56:4-25; Day 3 Vesting Appeal – May 29, 2007, Hanberg Test. at 64:14-69:24; Day 3 DS Appeal – April 10, 2008, Katich Test. at 42:18-53:9, 53:10-60:22; *and* Day 3 DS Appeal – April 10, 2008 Haynes-Castro Test. at 139:2-141:2 & 157:7-159:16). It is undisputed that, if private yards count toward the usable open space required by former TMC 13.06.140(F)(6), as the City held, the project satisfies the requirement.

The City's construction is consistent with the plain meaning of the words in the former code. The Washington Supreme Court has held that courts should apply the plain meaning of the statutory language where possible. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005); *see also Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990

(2007) (local ordinances are interpreted the same as statutes). An undefined term in a statute will be given its “plain and ordinary meaning,” and the court may use a dictionary definition to determine that meaning. *Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dep’t*, 120 Wn.2d 394, 403, 842 P.2d 938 (1992)). Courts are not “to search for an ambiguity by imagining a variety of alternative interpretations.” *Am. Cont’l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004).

Save NE Tacoma does not argue that the terms are ambiguous. Northshore agrees. The plain meaning validates the City’s construction. Former TMC 13.06.140(F)(6) begins with the requirement that one-third of the site “not covered by buildings or dedicated street right-of-way” be open space. “Building” is plainly defined by TMC 13.06.700.B. Dedicated street rights-of-way are readily identified without ambiguity through the City’s records. The provision requires calculation of the amount of land represented by one-third of that area “not covered,” a mathematical exercise. Finally, the provision requires that an area of land equal to at least that one-third of the uncovered area be maintained as “usable landscaped recreation areas.” There is no reason to exclude private yards as “usable landscaped recreation areas.” They are usable. They are landscaped. They are recreation areas.

Save NE Tacoma requested that the City provide a formal code interpretation of its definition. Though not formally issued, the City’s draft of this detailed analysis is found at AR 6140-54 (Ex. 190); *see also* AR 6292-96.483 (Ex. 201 at Katich Test. at 51-52). This draft code

interpretation demonstrates that “landscape” as defined by the TMC generally “requires the planting and maintenance of some combination of trees, ground cover, shrubs, vines, flowers or lawn.” *See* AR 6140-54 (Ex. 190). The draft code interpretation concludes that *Webster’s* definition of “landscaped” “generally aligns with the TMC . . .” *Id.* In discussing the notion of “recreation”, the code interpretation relies on the dictionary definition as “refreshment and relaxation of one’s body or mind after work through amusing or stimulating activity.” *Id.* A place for refreshment and relaxation containing trees, shrubs, flowers or lawn is an accurate description of many residential yards, and could describe all of them. These terms unambiguously include private residential yards.

Additionally, the City’s construction in these proceedings is consistent with another provision in the Code. “To ascertain a provision’s plain meaning, we examine the ordinance as well as other provisions in the same code.” *Griffin v. Board of Health*, 137 Wn. App. 609, 618, 154 P.3d 296 (2007). TMC Chapter 13.04 expressly contemplates and distinguishes between “common” and “private” open space, as follows:

1. Lot Area. Lot sizes required for plats within PRD Districts shall be the same as for the residential district with which the PRD District is combined; provided, however, the Hearing Examiner or Land Use Administrator may modify said lot sizes where the following factors have been considered:

- a. Type of dwelling structures involved;

b. Amount of common and private open space to be provided and the location of such open space in relation to the dwelling structures involved; . . .

TMC 13.04.240(C)(1)(a)&(b)) (Appendix 3 hereto) (emphasis added). The Code acknowledges the dual nature of “open space” as including both “common” and “private” areas. The City’s construction of former TMC 13.06.140(F)(6) is consistent with this provision.

Save NE Tacoma argues that the City applied a different construction of “open space” in 1981, but that argument is incorrect. The absence of any analysis of the type alleged by Save NE Tacoma was confirmed by the 2010 Decision, which states at Finding No. 22:

The [1981] decision provides no mathematical analysis of the open space provided by the golf course, nor any reference to the definition of open space used, but the golf course in its entirety, as graphically shown on the approved Site Plan, was an integral part of the design.

See also AR 5431-42 & 6180-87 (Exs. 136 & 192). Further, the 2010 Decision stated at Finding 65 that “[w]hether private yards could be included as open space was not addressed in the 1981 decision.” *See* CP 2741 (Emphasis added.) Save NE Tacoma failed to assign error to these findings or conclusions in its LUPA Petition and Opening Brief, making them verities on appeal. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992) (en banc).

Save NE Tacoma’s own citations do not establish that the issue was decided. *See Save NE Tacoma’s Opening Br.*, at 20-21 (citing CP 125, 1488-1606; AR 35-48 (Ex. 8); AR 5124-35 (Ex. 105); CP 2741 (Decision,

Finding No. 65)). Save NE Tacoma fails to explain its position that it was necessary in 1981 to determine if private yards could count toward the City's open space requirements when the Golf Course alone obviously satisfied the requirements. It was not necessary. It was not decided.

Save NE Tacoma makes the conclusory argument that including private yards as open space is "absurd" and renders parts of the Code superfluous. *See Save NE Tacoma's Opening Br.*, at 22-23. It fails to demonstrate why. The Court should reject the argument. Save NE Tacoma ignores that the Code's requirement is not that one-third of a PRD be kept as open space, but that one-third of the area *not covered* by buildings or rights-of-way "be developed and maintained as usable landscaped recreation areas." *See* former TMC 13.06.140(F)(6). PRDs typically have a number of areas that are not covered by buildings or rights-of-way, but which are not landscaped and used for recreation such as storm water facilities, steep slopes, and sensitive habitat areas. Requiring that at least one-third of uncovered land be maintained as "usable landscaped recreation areas" is not superfluous, since not being covered by buildings or right-of-way does not imply being "landscaped" or suitable for "recreation." Allowing private yards to be counted is not superfluous because otherwise nothing requires that yard area equal one-third of the land in the PRD not covered by buildings or right-of-way.

Allowing private yards to count as "usable landscaped recreation area" is a rational legislative judgment. Yards provide a landscaped area usable for recreation. Save NE Tacoma simply disagrees with the City's

policy. Save NE Tacoma seeks to read into the provision more stringent policies than the Code articulates. But courts must give effect to the plain meaning and assume the drafters meant exactly what they said. *Chelan County v. Nykreim*, 146 Wn.2d 904, 926, 52 P.3d 1 (2002).

The Court should reject Save NE Tacoma's appeal of the City's construction of its own Code. The City has committed no legal error: its construction conforms to the plain meaning of the provision construed in the context of the entire Code.

Even if this Court were to find the provision ambiguous, LUPA requires deference to the local jurisdiction's interpretation of its own rules. 36.70C.130(1)(b); *see also Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 127, 186 P.3d 357 (2008) (courts "should give great weight to the contemporaneous construction of an ordinance by the officials charged with its enforcement."); *In re Sehome Park Care Center (All Seasons Living Ctrs. v. State)*, 127 Wn.2d 774, 780, 903, P.2d 443 (1995) (deference is even greater where construction of a statute "by officials charged with its enforcement" has persisted "over a long period," implying legislative acquiescence). This Court should defer to the City's construction.

The City's construction is reinforced by the circumstances of its 2007 amendments to the Code. In 2007 the City revised its PRD code, changing the definition of "open space" in order to *remove* private yards

from the definition.² This was done after the Point at Northshore project had vested. If a law is amended and a material change is made in its wording, it is presumed that the legislature intended a material change in the law. *See Home Indem. Co. v. McClellan Motors, Inc.*, 77 Wn.2d 1, 3,

² New TMC 13.06.140(F)(6) states in relevant part:

Common Open Space. A minimum of one-third of the gross site area of the PRD District shall be provided as common open space. For the purpose of this section, common open space shall be defined as land which is provided or maintained for the general enjoyment of the residents of the PRD District or the general public and not used for buildings, dedicated public right-of-ways, private access/road easements, driveways, traffic circulation and roads, private yards, required sidewalks, utility areas, stormwater facilities (unless developed as a recreational area, parking areas, or any kind of storage. Common open space includes, but is not limited to woodlands, open fields, streams, wetlands, other bodies of water, habitat areas, steep slope areas, landscaped areas, parks, beaches, gardens, courtyards, or recreation areas.

Evident changes include that the name of the provision has changed from “Usable Open Space” to “Common Open Space,” common open space is required and not just usable open space, common open space requires general use by residents or the public, and private yards are specifically excluded from the definition. Record evidence addressing the amendment is found at AR 6140-54 (Ex. 190); AR 6180-87 (Ex. 192); AR 6188-6219 (Ex. 193); AR 7276-76.1 (Ex. 253); AR 7481-82 (Ex. 265); AR 7483-7513 (Ex. 266); *see also* AR 6292-96.483 (Ex. 201: Day 1 Vesting Appeal – May 17, 2007, Katich Test. at 10:8-12:17, 12:19-13:25, 32:6-33:25, 62:14-65:25; Day 3 Vesting Appeal – May 29, 2007, Haynes-Castro Test. at 45:11-47:10 & 56:4-25; Day 3 Vesting Appeal – May 29, 2007, Hanberg Test. at 64:14-69:24; Day 3 DS Appeal – April 10, 2008, Katich Test. at 42:18-53:9, 53:10-60:22; *and* Day 3 DS Appeal – April 10, 2008 Haynes-Castro Test. at 139:2-141:2 & 157:7-159:16).

459 P.3d 389 (1969). Here, the material changes to the open space provisions indicate that the City intended a material change in the law. The legislative history also demonstrates the intent of the City to redefine open space as common space that does not include private yards. *See* AR 7483-7513 (Ex. 266 (Findings at 8, 13, 14)); *see also* footnote 2 above.

The City's construction is proper. Save NE Tacoma fails to establish legal error. This Court should affirm the City's analysis, and the resulting conclusion that the project satisfies applicable usable open space requirements. No alternative grounds for denial of the project exist.

2. The City correctly concluded that RCW 58.17.215 does not apply to the project and that Northshore was not required to file additional applications to alter plats.

This Court should reject on any of numerous grounds Save NE Tacoma's argument that the City should have required Northshore to file additional applications to alter numerous plats. First, the issue whether Northshore's applications were complete was fully and finally decided. In 2007 Northshore's applications were deemed complete, preventing Save NE Tacoma from re-litigating or obtaining review of that issue here.

Second, Save NE Tacoma had the opportunity in the Declaratory Judgment Action to establish any rights that it alleged existed under RCW 58.17.215 (set forth at Appendix 4 hereto) to prevent the modification of the open space designation. It established no such rights. To the contrary, the Superior Court declared that Save NE Tacoma's members had no right that would prevent modification of the Golf Course's open space

designation, rejecting the proposition that their consent was required to modify the designation, and also declared that the surrounding plats do not contain “any dedication of open space or other use restrictions that affect the Golf Course property.” *See* AR 415-506 (Ex. 25, Ex. E at 4:11-17) (emphasis added); *see also* CP 2734-35 (Decision, Findings.29-31). Based on these declarations, Save NE Tacoma’s present challenge should be precluded by issue or claim preclusion. Even if the challenge is not precluded, Save NE Tacoma’s argument is faulty: RCW 58.17.215 does not apply.

- a. The completeness of Northshore’s application was already litigated and the decision is final under LUPA, preventing Save NE Tacoma’s current argument that additional applications were required.**

The issue of the completeness of Northshore’s January 29, 2007, application package has been fully and finally litigated by the parties, including Save NE Tacoma. *See* CP 2731. Pursuant to RCW 36.70C.040(3), the Examiner’s decision on completeness is final and no longer subject to review. Additionally, the prior result prevents re-litigation here of whether the application was complete or required multiple plat amendment applications as Save NE Tacoma argues. The Court should reject the argument based on the doctrine of issue preclusion.

After Northshore submitted its applications in January, 2007, the City notified Northshore that the application was incomplete. *See* CP 2734 (Decision, Finding Nos. 26 & 27). Northshore appealed and a Hearings Examiner reversed, holding that the applications were complete. *See* AR

6250-53 (Ex. 195). Save NE Tacoma was a party to those proceedings. Save NE Tacoma raised the issue whether the application could be accepted without the written consent of a majority of those persons owning property within the PRD. *See* AR 6292-96.483 (Ex. 201 at Vesting Appeal Day 1 - May 17, 2007, Katich Test. at 46:6-25) *and* AR 6697-98 (Ex. 227). Specifically, Save NE Tacoma asserted that RCW 58.17.215, which governs the alteration of recorded subdivisions, and the PRD code precluded submittal of the application to redevelop the Northshore Golf Course without such signatures. *See id.* The Hearing Examiner deemed the applications complete notwithstanding these arguments. *See* Ex. 227. Save NE Tacoma failed to appeal the Examiner's decision or the City's subsequent issuance of a notice of completeness. The Examiner's completeness decision and the City's notice became final.

LUPA requires that these prior land use decisions are no longer subject to review. *See* RCW 36.70C.040(3) (requiring timely appeal of land use decisions).³ Under the City's Code, the Land Use Administrator's decision that the application was incomplete was subject to appeal to the Examiner. *See* TMC 13.05.101.E; TMC 13.05.050.O (Appendix 3 hereto); *see also* RCW 36.70B.070 (requiring local governments to issue notice of completeness or incompleteness within 28 days of receiving permit application). Northshore brought the determination of incompletes to the

³ Save NE Tacoma concedes this rule of law in its Opening Brief, pp. 14-19, when it argues against reviewability of Northshore's appeal.

Examiner, who reversed and found the applications complete. *See* TMC 1.23.050.B.2 (Appendix 2 hereto). Any party wishing to dispute that determination was obliged to appeal to the Superior Court. *See* TMC 1.23.160.B (Appendix 2 hereto). Where no appeal was pursued, Save NE Tacoma cannot now dispute whether the applications were complete.

Application of LUPA's bar to this appeal is supported by *Wenatchee Sportsmen Ass'n*, 141, Wn.2d at 182. In that case, a party challenged plat approval by arguing that development outside of an IUGA zone was inconsistent with the zoning. *Id.* at 181. The Supreme Court held that whether IUGA applied to bar the development was no longer reviewable because the challenger failed to raise it when the property was rezoned. *Id.* "If there is no challenge to the decision, the decision is valid, the statutory bar against untimely petitions must be given effect, and the issue of whether the zoning ordinance is compatible with the IUGA is no longer reviewable." *Id.* Under LUPA, "even illegal decisions must be challenged in a timely matter." *Vogel v. City of Richland*, 161 Wn. App. at 770, 777.

Here, the Examiner's decision that the application package was complete was the final determination, and the City issued a notice of completeness consistent with the Examiner's decision. Save NE Tacoma's present challenge that additional applications were required under RCW 58.17.215 is untimely and barred. To prevail on the issue, Save NE Tacoma was required to appeal the City's determination that the applications were complete. It did not.

The doctrine of collateral estoppel also requires this result. Save NE Tacoma is precluded from litigating now the same issue whether Northshore's applications are complete. "Collateral estoppel, or issue preclusion, bars litigation of an issue in a subsequent proceeding involving the same parties." *Yakima County*, 157 Wn. App. at 331; *see also Christensen v. Grant County Hosp.*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). Collateral estoppel prevents a second litigation of issues between the parties, even where a different claim or cause of action is asserted. *Id.* "The party seeking to avoid litigation of an issue based on collateral estoppel must show 'that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.'" *Id.* at 331-32 (quoting *Christensen*, 152 Wn.2d at 307, 96 P.3d 957).

Here, all four elements of collateral estoppel are met as a result of Northshore's appeal of the City's determination that its application packet was incomplete, and the reversal of that determination. Save NE Tacoma raised in those proceedings the issue of applications required by RCW 58.17.215 but lost when the Examiner declared the applications complete.⁴

⁴ Save NE Tacoma may argue in reply that the Examiner did not decide the express issue based on its purported attempt to withdraw from the Examiner's consideration RCW 58.17.215. Leaving aside Save NE Tacoma's tactical reasons for making that request, any argument that this

This Court should reject this aspect of Save NE Tacoma's appeal, in which it attempts to demonstrate alternate grounds to affirm the land use denials based on RCW 58.17.215. The issue whether additional applications are required is no longer reviewable under LUPA and is further precluded by the doctrine of collateral estoppel.

- b. The Superior Court's Declaratory Judgment precludes relitigation here of issues necessary to require application of RCW 58.17.215, including whether modification of the open space designation requires the consent of the neighbors and whether the plat contains any dedications or restrictions that would prohibit modification.**

This Court also should preclude Save NE Tacoma's challenge pursuant to RCW 58.17.215 on grounds of issue or claim preclusion. Save NE Tacoma failed to establish any rights under this statute or the plats in the Declaratory Judgment Action that determined the parties' rights arising from the 1981 documents. In that action, the Superior Court determined that the members of Save NE Tacoma asserted no rights that could prevent a change of the open space designation and that its members' consent was not necessary to change the open space designation. Save NE Tacoma is precluded from relitigating here whether its members' signatures are required to submit complete applications to

prevents application of collateral estoppel is unpersuasive. The issue of completeness of the application package was fully and finally decided, preventing a challenge based on any other statute, including but not limited to RCW 58.17.215.

amend multiple plats to remove the open space designation pursuant to RCW 58.17.215. The Superior Court also determined that the plats contained nothing that conflicted with a modification of the Golf Course's open space designation. Save NE Tacoma is precluded from relitigating whether any aspect of the plats requires modification to change the open space designation.

“*Res judicata*, or claim preclusion, bars the re-litigation of claims and issues that were litigated, or might have been litigated, in a prior action.” *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn. App. 304, 327, 237 P.3d 316 (2010) (emphasis added); *Marino Property v. Port Comm'rs of Seattle*, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982) (The doctrine of *res judicata* rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again.) (emphasis added).

“For *res judicata* to apply, a prior judgment must have the same (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made (identity of interest).” *Yakima County*, 157 Wn. App. at 327-28. “Causes of action are identical for *res judicata* if (1) prosecution of the later action would impair the rights established in the earlier action, (2) the evidence in both actions is substantially the same, (3) infringement of the same right is alleged in both actions, and (4) the actions arise out of the same nucleus of facts.” *Id.* at 328 (internal citations omitted).

All four elements of claim preclusion are present: (1) the same subject matter—the applicability and effect of the Open Space Taxation Agreement (“OSTA”) and Concomitant Zoning Agreement (“CZA”) on Petitioners’ rights to redevelop the Golf Course vis-à-vis the surrounding property owners’ rights; (2) the very same persons and parties; (3) an identity of interest (*i.e.*, property rights and interests) in determining whether consent is required, and (4) the same “cause of action” because (a) prosecution of Save NE Tacoma’s current claim that its members’ “consent” is necessary to plat amendment applications required by law and/or that the plats prohibit modification of the open space designation such that their amendment is necessary, would impair the rights established in the Declaratory Judgment Action, (b) the evidence in both actions is substantially the same, (c) infringement of the same right (consent requirement or content of plats) is alleged in both actions, and (d) the actions arise out of the same nucleus of facts, namely the 1981 land use documents and the present effort to change the Golf Course’s open space designation. *See id.* at 328 (internal citations omitted).

Here, Save NE Tacoma did not expressly raise RCW 58.17.215 in the Declaratory Judgment Action, but it needed to do so in order to preserve the claim that the neighbors’ consent was required. The doctrine of claim preclusion applies where Save NE Tacoma had the *opportunity* to raise the statute but failed to do so. *See Yakima County*, 157 Wn. App. at 327; *Marino Property*, 97 Wn.2d at 312. This Court should apply that doctrine to “put[] an end to strife, produce[] certainty as to individual

rights, and give[] dignity and respect to judicial proceedings.” *See Marino Property*, 97 Wn.2d at 312.

The members of Save NE Tacoma intervened in the Declaratory Judgment Action (*see* AR 415-506 (Ex. 25: Joint Status Report)) to establish their own rights under the 1981 land use documents, including their claim that *their consent* would be required to change the designation, as follows:

- “The City’s decision to rezone the Country Club Estates property to R-2 PRD **was conditioned** upon restriction of the Golf Course to golf course and open space uses in perpetuity.” (AR 446 (Complaint of Intervenor Plaintiffs ¶ 3.5)) (emphasis added));
- “The Hearing Examiner needs to know whether the OSTA and CZA apply to the Golf Course in order to make the necessary land use decisions pertaining to [Petitioners’] application” (AR 448 (Complaint ¶ 3.9));
- “Johnnie E. Lovelace, Lois S. Cooper, and James V. Lyons and Renee D. Lyons’ [rights] to limit future use of the Golf Course to open space and golf course use pursuant to the OSTA constitute an interest in the real property that is the subject of this complaint.” (AR 464 (Complaint ¶ 10.2));
- “Johnnie E. Lovelace, Lois S. Cooper, and James V. Lyons and Renee D. Lyons’ interests in the Golf Course property, as intended third-party beneficiaries of the OSTA and CZA, are interests in real property and [they] are entitled to quiet title in those interests.” (AR 465 (Complaint ¶ 10.4)); and
- Johnnie E. Lovelace, Lois S. Cooper, and James V. Lyons and Renee D. Lyons’ area entitled to have the OSTA and CZA reflected in the title to the Golf Course as binding restrictive covenants on the Golf Course property, which may only be removed or changed with Johnnie E. Lovelace, Lois S. Cooper, and James V. Lyons and Renee D. Lyons’ consent. (AR 465

(Complaint ¶ 10.5.) (emphasis added)).

Save NE Tacoma clearly raised in its pleadings the issue whether its members' consent was necessary to change the open space designation.

Before the Superior Court, Save NE Tacoma argued that whether their consent was necessary to change the open space designation was not decided because the word "consent" is not mentioned in the Superior Court's order. *See* CP 2250, lines 3-8. This makes no difference where they raised the issue in their pleadings. The subject matter of the order, moreover, undeniably concerns whether the members of Save NE Tacoma had any enforceable right to prevent modification of the open space designation, including any right to insist on their consent.

The Superior Court rejected all these claims. The Declaratory Judgment was broad and conclusive. The Superior Court declared that the land use designation in the 1981 documents did not create "any" right "enforceable by Save NE Tacoma," whether a property interest "or otherwise", as follows:

8. The land use designation set forth in the OSTA and CZA does not constitute, create or result in a common plan of development, or any other right or restriction, enforceable by Intervenor-Plaintiffs or any other private third-parties as an equitable servitude, restrictive covenant, property interest or otherwise.

See AR 415-506 (Ex. 25, Ex. E at p. 4 (emphasis added)); *see also* CP 2734-35 (Decision at Findings 29-31). Save NE Tacoma's present argument conflicts with this declaration. It also conflicts with the Superior

Court's finding that the plats do not contain any dedication of open space or "other use restriction" that affect the Golf Course property, stating,

9. **None of the plats which were approved with the Country Club Estates PRD contains any dedication of open space or other use restrictions that affect the Golf Course property owned by North Shore Golf Associates, Inc. that is the subject of this action.**

See AR 415-506 (Ex. 25, Ex. E at p. 4 (emphasis added)); *see also* CP 2734-35 (Decision at Findings 29-31).

These findings preclude Save NE Tacoma from asserting now that its members *do* have an enforceable right, namely the right under RCW 58.17.215 to require their signatures as applicants to amend plats in order to change the designation, and from asserting that the plats *do* contain recitals relevant to the open space designation that would require their amendment in order to change the open space designations. The Superior Court held that "none" of the plats contain *anything* that permits plat residents to prevent modification of the open space designation. Again, where Save NE Tacoma failed to expressly raise RCW 58.17.215, they are precluded from raising it now under the doctrine of claim preclusion.

Alternatively, this Court should apply issue preclusion (collateral estoppel) to prevent relitigation of these issues. Authority on issue preclusion is set forth above at V.B.2.a. This Court should determine that the issues raised here are identical to the issues already decided. The Superior Court's ruling already rejects that consent of the neighbors is required to modify the designation and that the plats contain anything that

affects the open space designation such that amendment of the plats would be necessary. To prevail, Save NE Tacoma would have to establish the contrary conclusions, which is prohibited based on issue preclusion.

Northshore raised these preclusion arguments to the Examiner. *See* AR 6558-84.05 (Ex. 208: Petitioner's October 11, 2009 Legal Memorandum to Hearing Examiner, at 6). The Examiner declined to address Save NE Tacoma's argument under RCW 58.17.215. *See* CP 2747 (Decision, Conclusion 6). Save NE Tacoma does not meet its burden to establish that this was error. This Court should reject the present challenge based on claim or issue preclusion.

c. Contrary to Save NE Tacoma's argument, RCW 58.17.215 does not apply.

If this Court does not apply LUPA's time bar or issue or claim preclusion to reject the challenge of Save NE Tacoma based on RCW 58.17.215, it still should deny the appeal. As a matter of law, RCW 58.17.215 does not apply.

As noted, the Superior Court determined that the 1981 documents do not create any restrictive covenants. For purposes of its appeal, Save NE Tacoma does not argue that the portion of the statute related to restrictive covenants applies. *See Save NE Tacoma's Opening Br.*, at 27. This is proper based on the Superior Court's determination, which is the law of the case. Save NE Tacoma argues instead that RCW 58.17.215 applies even if no such rights exist. *See Save NE Tacoma's Opening Br.*, at 27 (presenting its argument "even if the [open space] restriction is not a

covenant.”). Contrary to this argument, even the more general portion of RCW 58.17.215 does not apply.

The Golf Course is not part of any of the adjacent “subdivisions”, a key term under RCW 58.17.215. The statute addresses “alteration” of a “subdivision.” It unequivocally refers to the “alteration” of “subdivisions” and requires that any “alteration” thereof requires the written consent of a majority of persons with “an ownership interest” in the “subdivision” or a portion of the plat “to be altered.” *Id.* These terms have no applicability here. Northshore does not seek to alter a *subdivision* within the meaning of the statute. “‘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, except as provided in subsection (6) of this section.” *See* RCW 58.17.020(1). “‘Plat’ is a map or representation of a subdivision, showing thereon the division of a tract or parcel of land into lots, blocks, streets and alleys, or other divisions and dedications.” *See* RCW 58.17.020(2) (emphasis added). The Golf Course is not part of any division or redivision of land into five or more lots. The Golf Course is not part of a subdivision. Additionally, the surrounding plats (subdivisions) do not contain the Golf Course. The Golf Course was a *boundary* of the site plan and preliminary plat applications submitted in 1981, not included *within* the adjacent plats. *See* AR 5124-35 (Ex. 105); AR 35-48 (Ex. 8 at 1); *see also* CP 2747 (Decision, Conclusions 5-7). The Golf Course itself is not platted. The statute does not apply.

The Court should reject Save NE Tacoma's appeal because the requirement that the Golf Course serve as open space is tied solely to the PRD rezone. There are no restrictive covenants benefitting the adjacent plats and burdening the Golf Course, and the Superior Court ruled that the adjacent plats do not contain "any dedication of open space or other use restrictions that affect the Golf Course." *See* AR 415-506 (Ex. 25). It is illogical to assert that the boundary of a plat such as the Golf Course is within the plat. As a matter of law, the City did not err in concluding that applications to amend the surrounding plats were not required.

Save NE Tacoma cites no authority that applies RCW 58.17.215 in a way that would support its argument. None of the few cases referencing RCW 58.17.215 addresses the issue presented here whether redevelopment of an un-platted portion of a PRD requires the consent of the adjacent property owners where these owners lack any ownership interest in the subject property and where there is no dedication of open space or other use restrictions. *Cf. Fawn Lake Maint. Comm'n v. Abers*, 149 Wn. App. 318, 202 P.3d 1019 (2009) (discussing RCW 58.17.215 in context of easement); *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 145 P.3d 411 (2006) (same). Nothing shows the City has erred, so Save NE Tacoma's appeal on this ground should be denied.

This Court also should conclude that, even if the statute sections of RCW 58.17.215 that apply to subdivisions applied to the Golf Course property (which it does not), there is nothing in the surrounding plats that would require amendment if the open space designation were to change.

This fact is underscored by Save NE Tacoma's failure to identify *what* in the plats would require amendment. *See Save NE Tacoma's Opening Br.*, at 24-30. This fact is fatal to its appeal, and Save NE Tacoma's incomplete argument also makes response difficult.

Save NE Tacoma did not argue before the Superior Court that any language or content of the plats themselves needed to be amended, but instead argued that there existed "a plat-based open space condition" based on the Examiner's approval conditions that required the OSTA and CZA to be put in place. *See, e.g.*, CP 2247-49; 2251. Assuming Save NE Tacoma raises this argument in reply, its theory does not demonstrate that anything *in the plats* requires amendment under RCW 58.17.215.

Moreover, the Superior Court held in the Declaratory Judgment that nothing in the 1981 documents, including the plats, prevented modification of the designation. Despite these facts, Save NE Tacoma continues to insist, now through its argument under RCW 58.17.215, that based on the 1981 events, "each and every plat is expressly conditioned upon the perpetual existence of the golf course/open space." *See* CP 2248, lines 17-18 (Save NE Tacoma's argument below supporting assignment of error regarding RCW 58.17.215). There is no such "express condition" in the plats. Any argument that there is a perpetual open space restriction on the Golf Course is contrary to this Court's holding in *Olympia v. Palzer* that such restrictions are an invalid exercise of police power. 42 Wn. App. 751, 754-55, 713 P.2d 1125 (1986), *aff'd on other grounds*, 107 Wn.2d

225, 728 P.2d 135 (1986) (en banc). No amendment of the plats is required.

At most, Save NE Tacoma's brief might be read to suggest that Note 17 of the plat of Division 2A requires amendment. *See Save NE Tacoma's Opening Br.*, "Statement of Facts," pp. 7-8 (discussing Note 17), citing CP 1488-1606 and AR 6650-6651 (Ex. 217: 1985 Revised Plat Condition Div 2; Ex. 218: 1994 Final Plat Div. 2). The Court should reject the suggestion. Note 17 simply refers to the CZA and the OSTA, which the Superior Court has already held do not prohibit a modification of the designation. *Accord Palzer*, 42 Wn. App. at 754-55. Note 17 itself has no greater effect than the CZA or the OSTA that it references, which have been adjudged not to create any rights that are enforceable by Save NE Tacoma or that prevent the modification. It is circular to argue otherwise.

The Court should hold that RCW 58.17.215 does not apply to require applications initiated by members of Save NE Tacoma and other residents to amend certain plats to proceed with the project. The Court should deny Save NE Tacoma's appeal.

VI. CONCLUSION

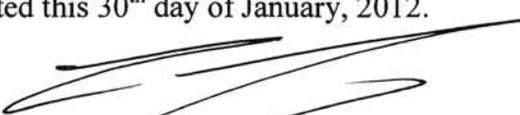
This Court should reject the attempt by the City and Save NE Tacoma to prevent LUPA review of the City's decisions through obfuscation of the date of the City's issuance of its decision. This Court should hold that TMC 1.70.030 requires the decision be in writing or, alternately, the fact that the decision was in writing makes it a "written decision" under RCW 36.70C.040(4)(a) for purposes of "issuance" under

LUPA. Accordingly, the “Notice of Appeal Results” that the City mailed to the parties on April 15, 2010 constitutes the decision being appealed. Under RCW 36.70C.040(4)(a), that decision is deemed to have issued three days after it was mailed, on April 18, 2010. The uncontested service on the parties within 21 days on May 6, 2010 was timely.

This Court also should reject Save NE Tacoma’s appeal of two aspects of the City’s decision and its effort to establish alternate grounds to affirm the City’s denial of Northshore’s applications. Save NE Tacoma’s fails to meet its burden under LUPA. The City’s construction of “usable, landscaped recreation areas” enforces the plain meaning of the provision and is consistent with its Code. RCW 58.17.215 does not apply where its application would be inconsistent with declarations of the Superior Court in the Declaratory Judgment. The Court should not reach the issue, moreover, where prior proceedings and LUPA demonstrate that the issue is no longer reviewable. Save NE Tacoma should not be permitted to raise issues it already raised or should have raised.

This Court should deny the appeals of the City and Save NE Tacoma.

Respectfully submitted this 30th day of January, 2012.



Aaron M. Laing, WSBA #34453
Averil B. Rothrock, WSBA #24248
SCHWABE, WILLIAMSON & WYATT, P.C.
1420 Fifth Ave., Suite 3010, Seattle, WA 98101
*Attorneys for Plaintiff / Appellant / Cross-
Respondent Northshore Investors, LLC*

APPENDIX - 1

1 stated in *RCW 36.70B.070(2)*, is whether the application is "sufficient for continued processing
 2 even though additional information may be required." The application in the present case more
 3 than met that threshold.
 4

5 23. The cross appellant made arguments for incompleteness in addition to the grounds
 6 stated by the City. They strongly urged that incompleteness be found because the written
 7 consent of every owner in the PRD was not provided. The applicants applied for a major
 8 modification to the 1981 PRD. *TMC 13.05.080.C(1)* requires that a major amendment of an
 9 existing permit "shall follow the same procedure required for the original application." The
 10 original application for a PRD is subject to *TMC 13.06.140.B* which states:
 11

12 Application for a reclassification to a PRD District shall be made
 13 in accordance with the provisions of Chapter 13.05 and Section
 14 13.06.650. Only applications bearing written consent of every
 15 property owner within the proposed PRD District shall be
 16 considered.

17 The City's interpretation is that the signature requirement applies only when a
 18 reclassification of an area to a PRD District occurs. In the instant case, the area is already a
 19 PRD District. The Hearing Examiner Pro Tempore finds this interpretation reasonable and
 20 defers to the City's construction of its Code in this instance.

21 24. The cross-appellant also argued that signatures of surrounding landowners agreeing
 22 to termination of the "open space condition" are needed in this case under the provisions of
 23 *RCW 58.17.215*. That section requires signatures of everyone within a subdivision when a
 24 proposed alteration thereof would result in the violation of a restrictive covenant applicable to
 25

26 **FINDINGS OF FACT,
 CONCLUSIONS OF LAW, AND
 DECISION**

-18-

City of Tacoma
 Office of the Hearing Examiner
 Tacoma Municipal Building
 747 Market Street, Room 720
 Tacoma, WA 98402-3768
 (253)591-5195 FAX (253)591-2003

1 the subdivision. Even if the "open space condition" is alive and well, the problem with this
 2 argument is that the applicants are the sole owners of the only subdivision that is being
 3 proposed. There is no application to alter any pre-existing subdivision where the surrounding
 4 landowners reside.
 5

6 25. The appellants raised issues of equitable estoppel, discriminatory enforcement, and
 7 constitutional vagueness. They also asserted that the decision was subverted by political
 8 considerations. The Hearing Examiner Pro Tempore does not reach any of these issues.
 9

10 26. It should be emphasized that this decision is only about a preliminary procedural
 11 ruling affecting the application. This decision is not intended to suggest anything about the
 12 merits of the application or anything about the validity, effectiveness or reach of the open space
 13 condition. These matters await adjudication on the merits during the permit review process.
 14

15 27. Any finding herein which may be deemed a conclusion is hereby adopted as such.

16 **DECISION:**

17 The Notice of Incompleteness is reversed. The City shall issue a Notice of
 18 Completeness as to January 29, 2007.

19 **DONE** this 12th day of July, 2007.

20 
 21 _____
 22 WICK DUFFORD, Hearing Examiner Pro Tempore

23
 24
 25
 26 **FINDINGS OF FACT,
 CONCLUSIONS OF LAW, AND
 DECISION**

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September 13, 2007

VIA FIRST CLASS MAIL AND EMAIL: JWARD@CITYOFTACOMA.ORG

Building and Land Use Services Division
Attn: Jennifer Ward
Public Works Department
Tacoma Municipal Building
747 Market Street, Room 345
Tacoma, WA 98402-3769

Re: INT2007-40000100150 – Comments on Request for Code Interpretation of
“Usable Open Space” Definition in PRD Regulation TMC 13.06.140.F.6

Dear Ms. Ward:

We write on behalf of Northshore Investors, LLC to comment on Mr. Huff’s request for an official code interpretation of the PRD “Usable Open Space” definition found in the former version of TMC 13.06.140.F.6 in effect prior to August 1, 2007. We request that the City respond by reiterating the definition that it provided under oath before the Hearing Examiner in May as graphically depicted in the attachment hereto. We also ask that the City follow well-established law and refrain from varying from its stated definition. To do otherwise would place the City in the compromised position of contradicting sworn testimony, violating our client’s vested development rights and due process rights, and violating state law.

The issue raised by Mr. Huff has been asked and answered by the City under oath before the Hearing Examiner during the May 2007 appeal hearing of the Pointe at Northshore notice of incompleteness. The City provided a graphic depiction of the definition, which was admitted as Exhibit 94 in the proceeding. Mr. Huff, as counsel for Save NE Tacoma, attended the hearing and is well-familiar with the City’s interpretation of this provision. He has a copy of the attached document. It is curious that he should invite the City to contradict its sworn testimony and statements by the City’s legal counsel.

Moreover, during the pre-application meetings in the fall of 2006, the City defined “Useable Open Space” consistent with the definition it provided under oath during the hearing. The City met with our client after the hearing to discuss open space issues and reiterated its

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Seattle, WA 206-622-1711 | Vancouver, WA 360-694-7551 | Washington, DC 202-488-4302

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006250

position that the definition is the same as set forth in the attachment hereto. Northshore Investors has relied upon and continues to rely upon the City's definition in preparing, submitting and modifying its application to re-develop the North Shore Golf Course.

The open space definition is a development regulation and must therefore comply with substantive due process requirements. Given that our client's project has vested to the definition in the attachment and as explained by the City, the City would be violating our client's constitutionally-protected development rights by varying from the established definition.

Finally, to the extent that the City's established open space definition is perceived to conflict with the Comprehensive Plan, the law is clear that any inconsistency between a Comprehensive Plan and a more definite (here, zoning) regulation is to be resolved in favor of the more definite regulation. The Washington Supreme Court has repeatedly held:

[C]omprehensive plans generally are not used to make specific land use decisions. Instead, . . . a comprehensive plan is a "guide" or "blueprint" to be used when making land use decisions. . . . Since a comprehensive plan is a guide and not a document designed for making specific land use decisions, conflicts surrounding the appropriate use are resolved in favor of the more specific regulations, usually zoning regulations. A specific zoning ordinance will prevail over an inconsistent comprehensive plan. If a comprehensive plan prohibits a particular use but the zoning code permits it, the use would be permitted. These rules require that conflicts between a general comprehensive plan and a specific zoning code be resolved in the zoning code's favor.

Citizens for Mount Vernon v. City of Mount Vernon, 133 Wn.2d 861, 873-74, 947 P.2d 1208 (1997) (citing and discussing *Barrie v. Kitsap County*, 93 Wn.2d 843, 613 P.2d 1148 (1980), *Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742, 757, 765 P.2d 264 (1988) and *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 43, 873 P.2d 498 (1994)) (citations omitted) (emphasis added); see *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 126 118 P.3d 322 (2005) (same).

The law is unequivocal. Even if the PRD regulations' open space definition is inconsistent with the City's current Comprehensive Plan, the definition in former TMC 13.06.140.F.6 prevails. The City has already interpreted the definition, and the City cannot rely upon its Comprehensive Plan to vary from that definition.

The City's interests are best served by affirming the definition it repeatedly provided to our client and reiterated under oath before the Examiner.

006251



Building and Land Use Services Division
September 13, 2007
Page 3

Thank you for your thoughtful consideration of our comments on this matter.

Very truly yours,

SCHWABE, WILLIAMSON & WYATT, PC



Aaron M. Laing

AAAL:res

cc: Client

Jay Derr

Gary Huff

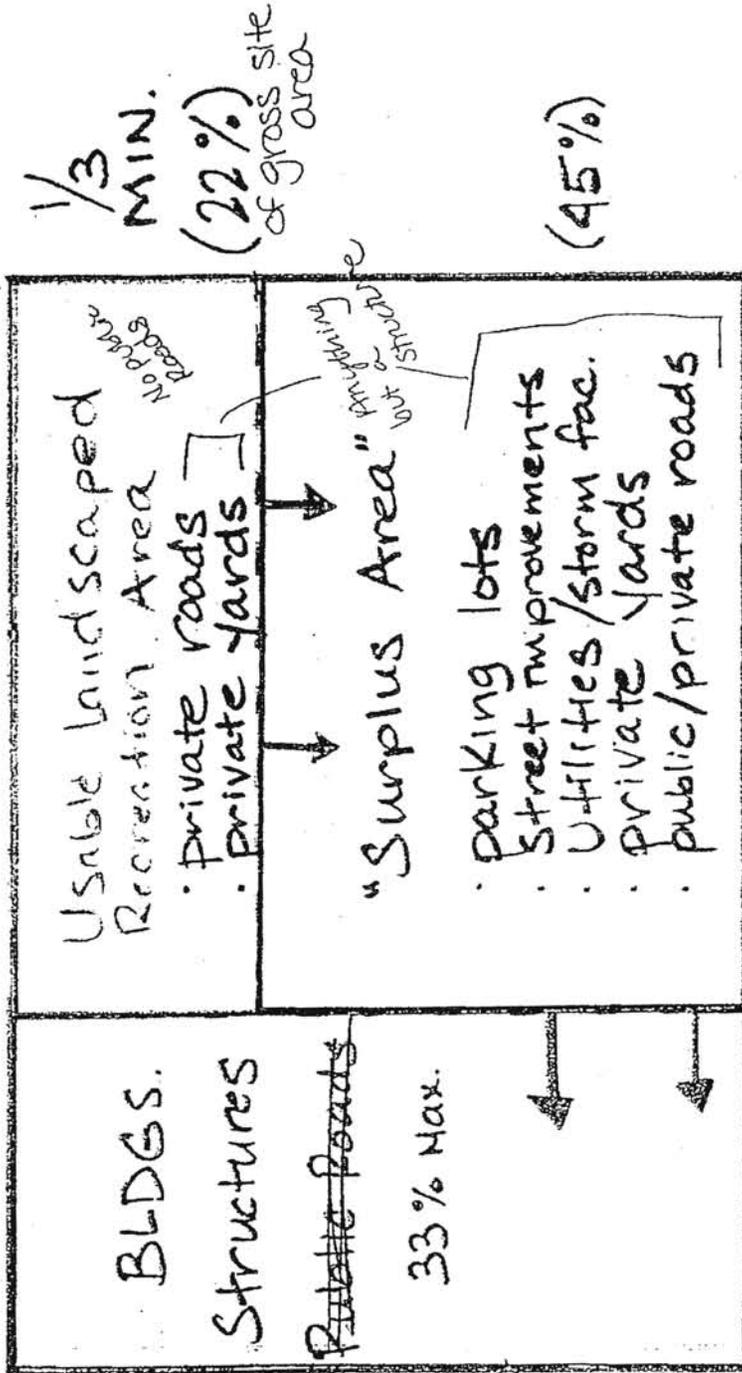
Attachment (Exhibit 94 to HEX appeal)

006252



EXISTING PRD CODE

AEX 94



1/3 Max. 2/3 Remainder
 - GROSS SITE AREA -

Public roads
 Rental +
 2 or more
 percent of
 site (included
 in gross site
 area)

006253

TITLE 1

Administration and Personnel

TITLE 1

ADMINISTRATION AND PERSONNEL

Chapters:

- 1.02 City Limits and Annexations
- 1.04 Seal
- 1.06 Administration
- 1.07 Historically Underutilized Businesses
- 1.08 Bonds
- 1.10 Emergency Management
- 1.12 Compensation Plan
- 1.16 Library
- 1.18 Mayor
- 1.19 Salary of Council Members
- 1.20 Obligations of City – Payment
- 1.22 Police Judge
- 1.23 Hearing Examiner
- 1.24 Personnel Rules
- 1.25 Pre-Employment Drug Screening
- 1.26 *Repealed*
- 1.27 Investment Committee
- 1.28 *Repealed*
- 1.28A Tacoma Arts Commission
- 1.28B Municipal Art Program
- 1.29 Human Rights Commission
- 1.30 Retirement and Pensions
- 1.32 Vehicles – Use
- 1.34 Working Fund Advances
- 1.35 Performance Audits
- 1.36 Bad Check and Other Charges
- 1.38 *Repealed*
- 1.40 *Repealed*
- 1.42 Landmarks Preservation Commission
- 1.43 *Repealed*
- 1.44 City Council Election Districts
- 1.45 Neighborhood Councils
- 1.46 Code of Ethics
- 1.47 Neighborhood Business District Program
- 1.48 *Repealed*
- 1.49 Donations, Devises, or Bequests
- 1.50 Minority and Women’s Business Enterprises
- 1.60 Public Corporations
- 1.70 Appeals to the City Council
- 1.80 Youth Building Tacoma Training and Employment Program
- 1.90 Local Employment and Apprenticeship Training Program

1.23.040 Hearing Examiner – Conflict of interest, appearance of fairness and freedom from improper influence.

Participants in adjudicative proceeding or hearing have the right, insofar as practicable, to have the Examiner free from bias, prejudice, or interest. Accordingly, an Examiner is subject to disqualification for bias, prejudice or interest or any other cause for which a judge is disqualified.

Any party to an adjudicative proceeding may petition for the disqualification of an Examiner promptly after receipt of notice indicating that the individual will preside or, if later, promptly upon discovery establishing grounds for disqualification. The Examiner for whom the disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination. (Ord. 25848 § 1; passed Feb. 27, 1996)

1.23.050 Areas of jurisdiction.

A. The Examiner shall receive and examine relevant information, conduct public hearings, maintain a record thereof, and enter findings of fact, conclusions of law, and recommendations to the City Council or other order, as appropriate, in the following matters:

1. Applications for rezoning of property (Chapter 13.05);
2. Formation of Local Improvement Districts (Chapter 10.04);
3. Approval of Local Improvement District assessments (Chapter 10.04);
4. Dangerous sidewalks proceedings (Chapter 10.18);
5. Petitions for street and alley vacations (Chapter 9.22);
6. Appeals of administrative determinations of the City Council (Section 1.06.820);
7. Appeals from the decision of the Landmarks Preservation Commission regarding certificates of approval (Section 42.080); and
8. Appeals of a decision of the City Council to remove a member of a City board, commission, committee, task force, or other multi-member body from office (Chapter 1.46).

B. In regard to the matters set forth below, the Examiner shall conduct adjudicative proceedings, maintain a record thereof, and enter findings of fact, conclusions of law, and a final decision or other order, as appropriate:

1. Applications for preliminary plat approval for subdivisions exceeding nine lots (Chapter 13.04);
2. Appeals from decisions of the Land Use Administrator (Chapter 13.05);
3. Appeals from decisions of the City Engineer regarding removal of or pruning trees on City-owned property (Chapter 9.20);
4. Appeals from the decisions or order of the Health Officer regarding violations of the Infectious Waste Management Code (Section 5.04.170);
5. Appeals from the Health Officer's denial of a permit to operate a swimming pool under Chapter 5.50 (Section 5.50.030);
6. Appeals from denial or revocation of a permit for sidewalk vending (Section 6.81.120);
7. Appeals regarding determinations of unlawful discriminatory practice under the Human Rights Commission chapter (Chapter 1.29);
8. Appeals from determinations of the Chief of Police, or his or her designee, regarding Potentially Dangerous Dogs and Dangerous Dogs (Chapter 17.04);
9. Appeals arising out of the Tax and License Code (Title 6);
10. Appeals arising out of the City Environmental Code, Chapter 13.12 (Section 13.12.680);
11. Appeals arising under the City's commute trip reduction ordinance (Chapter 13.15);
12. Actions brought under the City's Whistle Blower Policy;
13. Appeals from the film production coordinator's decisions regarding productions of motion pictures within the City (Section 11.10.140);
14. Appeals from denial of special permits regarding solid waste recycling (Section 12.09.070);
15. Matters referred for adjudication by the Civil Service Board under its rules of procedure (Charter Section 6.11(c));

16. Appeals arising under the City's concurrency management ordinance (Chapter 13.16);
17. Hearing of violations of the City's Ethics Code (Chapter 1.46);
18. Appeals from the Public Works Director's determination of civil penalties or any other charge, order, requirement, decision, or determination issued by the Director or his or her staff pursuant to the sewage disposal and drainage regulations ordinance (Chapter 12.08);
19. Appeals from the Public Works Director's determination of civil penalties for violations of the solid waste ordinance and appeals arising out of the imposition by the Director, or his or her staff, of solid waste utility charges; provided, that the Hearing Examiner shall not adjudicate claims with respect to any rate set by the City Council in a rate ordinance nor hear any challenge to the rate-making process (Chapter 12.09);
20. Appeals from the decision of the Community and Economic Development Department Director denying or canceling a final Certificate of Tax Exemption under Tacoma's Mixed-Use Center Development ordinance (Chapter 13.17);
21. Appeals arising from the imposition of charges for service issued by the Department of Public Utilities, as well as those arising from disputes concerning utility service, use of watershed or other Department property, and termination of any use; provided, that the Hearing Examiner shall not adjudicate claims with respect to any rate set by the City Council in a rate ordinance nor hear any challenge to the rate-making process (Chapters 12.06 and 12.10);
22. Appeals arising out of the City's Minimum Building and Structures Code for Substandard or Derelict properties (Chapter 2.01);
23. Appeals from sign enforcement (Section 13.05.105);
24. Applications for projects that require land use permits from the City of Tacoma as well as from a neighboring jurisdiction transferred to the jurisdiction of the Hearing Examiner in accordance with Section 13.05.040.F;
25. Appeals from Chronic Nuisance Code enforcement (Section 8.30A.080);
26. Appeals arising from a decision to deny a special street use permit, pursuant to Subtitle 16B;
27. Appeals arising from a decision to deny a telecommunications system franchise, pursuant to Subtitle 16B;
28. Appeals arising from a decision to deny a telecommunications system license, pursuant to Subtitle 16B;
29. Appeals arising from the establishment of a reimbursement assessment area and levying of a reimbursement assessment upon benefited property owners, pursuant to Chapter 35.72 RCW and applicable City ordinances;
30. Appeals from the decision of the Landmarks Preservation Commission regarding certificates of approval and decisions on demolition applications (Section 13.07.160);
31. Applications for wetland and stream development permits, wetland and stream assessments, and wetland delineation verifications in conjunction with a preliminary plat approval or reclassification.
32. Appeals regarding overpayment of wages (Section 1.12.071); and
33. Administrative hearings related to the breach or termination of cable television franchises granted, pursuant to Subtitle 16A.

(Ord. 27936 Ex. A; passed Oct. 19, 2010; Ord. 27913 Ex. A; passed Aug. 10, 2010; Ord. 27911 Ex. A; passed Aug. 3, 2010; Ord. 27844 Ex. A; passed Nov. 10, 2009; Ord. 27637 Ex. B; passed Aug. 28, 2007; Ord. 27504 § 7; passed Jun. 27, 2006; Ord. 27466 § 14; passed Jan. 17, 2006; Ord. 27447 § 1; passed Dec. 13, 2005; Ord. 27431 § 1; passed Nov. 15, 2005; Ord. 27429 § 1; passed Nov. 15, 2005; Ord. 27153 § 2; passed Oct. 21, 2003; Ord. 27129 § 8; passed Aug. 5, 2003; Ord. 27044 § 2; passed Feb. 25, 2003; Ord. 27002 § 1; passed Nov. 12, 2002; Ord. 26949 § 1; passed Jul. 16, 2002; Ord. 26955 § 1; passed Jun. 4, 2002; Ord. 26585 § 1; passed Mar. 14, 2000; Ord. 26485 § 1; passed Aug. 3, 1999; Ord. 26435 § 1; passed Jun. 8, 1999; Ord. 26386 § 5; passed Mar. 23, 1999; Ord. 26381 § 1; passed Mar. 16, 1999; Ord. 26247 § 1; passed Jun. 2, 1998; Ord. 26129 § 2; passed Sept. 16, 1997; Ord. 25848 § 1; passed Feb. 27, 1996)

1.23.060 Scope and standard of review.

Hearings upon original jurisdiction application set forth in subsection A of Section 1.23.050 shall be quasi-judicial in nature, except for subsection A.3, the formation of Local Improvement Districts, which shall be quasi-legislative in nature. The matters set forth in subsections B.1 through B.27 of the referred-to code section shall be quasi-judicial in nature and shall be conducted de novo unless otherwise required by law. (Ord. 27936 Ex. A; passed Oct. 19, 2010; Ord. 27129 § 9; passed Aug. 5, 2003; Ord. 27044 § 3; passed Feb. 25, 2003; Ord. 25848 § 1; passed Feb. 27, 1996)

the Examiner shall find that the problem to be remedied by the condition arises in whole or significant part from the development under consideration, the condition is reasonable, and is for a legitimate public purpose. (Ord. 27079 § 2; passed Apr. 29, 2003; Ord. 25848 § 1; passed Feb. 27, 1996)

1.23.140 Reconsideration of Hearing Examiner decisions and recommendation.

Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise provided by law, may file a motion with the office of the Hearing Examiner requesting reconsideration of a decision or recommendation entered by the Examiner. A motion for reconsideration must be in writing and must set forth the alleged errors of procedure, fact, or law and must be filed in the Office of the Hearing Examiner within 14 calendar days of the issuance of the Examiner's decision/recommendation, not counting the day of issuance of the decision/recommendation. If the last day for filing the motion for reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next working day. The requirements set forth herein regarding the time limits for filing of motions for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set forth the alleged errors shall be dismissed by the Examiner. It shall be within the sole discretion of the Examiner to determine whether an opportunity shall be given to other parties for response to a motion for reconsideration. The Examiner, after a review of the matter, shall take such further action as he/she deems appropriate, which may include the issuance of a revised decision/recommendation. (Ord. 26645 § 2, passed Jun. 27, 2000; Ord. 25848 § 1; passed Feb. 27, 1996)

1.23.150 Appeal of Examiner recommendations.

Appeal of those matters in which the Hearing Examiner enters a recommendation to the City Council, as set forth in subsection A of Section 1.23.050, shall be made to the City Council within 14 calendar days of the entering of the Hearing Examiner's recommendation and in the manner set forth at Chapter 1.70 of the Tacoma Municipal Code. Only those persons or entities having standing under the ordinance governing the application, or as otherwise provided by law, may appeal the Hearing Examiner's recommendation to the City Council. (Ord. 25848 § 1; passed Feb. 27, 1996)

1.23.160 Appeal of Hearing Examiner decisions.

A. Appeal of those matters in which the Hearing Examiner enters a final decision as set forth in subsection B of Section 1.23.050, except in regard to applications from preliminary plat approval, may be brought by any party to the adjudicative proceeding which led to the decision entered. In regard to applications for preliminary plat approval, any aggrieved person having standing under the ordinance governing such application, or as otherwise provided by law, may appeal the Examiner's decision as provided herein.

B. Appeals from decisions of the Hearing Examiner in regard to those matters set forth in subsection B of Section 1.23.050 shall be appealable to the Superior Court for the State of Washington; provided, however, that those determinations regarding civil penalties, as set forth in subsections B.20 and B.21 shall be appealable to the Tacoma Municipal Court. Any court action to set aside, enjoin, review or otherwise challenge the decision of the Examiner shall be commenced within 21 days of the entering of the decision by the Examiner, unless otherwise provided by statute. However, decisions of the Examiner in regard to shoreline permit applications under RCW 90.58 shall be appealable to the State Shorelines Hearings Board in accordance with the applicable provisions of the referred-to statute. (Ord. 26291 § 1; passed Sept. 15, 1998, Ord. 25848 § 1; passed Feb. 27, 1996)

1.23.170 Jurisdiction.

The Hearing Examiner shall retain jurisdiction for cases filed prior to adoption of the ordinance codified in this chapter, unless waived by the applicant. (Ord. 25848 § 1; passed Feb. 27, 1996)

Chapter 13.04

PLATTING AND SUBDIVISIONS

Sections:

13.04.010	Title.
13.04.020	Intent and authority.
13.04.030	Policy.
13.04.040	Definitions.
13.04.050	Jurisdiction.
13.04.055	Platting on shorelines.
13.04.060	Exclusions.
13.04.085	Boundary line adjustment.
13.04.088	Binding site plan approval.
13.04.090	Short subdivisions and short plats.
13.04.095	Appeals.
13.04.100	Plat procedures.
13.04.110	General requirements and minimum standards.
13.04.120	Conformity to the Comprehensive Plan and the Major Street Plan.
13.04.130	Relation to adjoining street system.
13.04.140	Access.
13.04.150	Conformity to topography.
13.04.160	Street widths.
13.04.165	Streetlights.
13.04.170	Roadways.
13.04.180	Street design.
13.04.190	Dead-end streets.
13.04.200	Alleys.
13.04.210	Easements.
13.04.220	Blocks.
13.04.230	Lots.
13.04.240	Plats within Planned Residential Development Districts (PRD Districts).
13.04.250	Duplication of names.
13.04.260	Public open space.
13.04.270	Checking by the City Engineer – Charges.
13.04.280	Development of illegally divided land – Innocent purchaser for value.
13.04.290	Development of illegally divided land – Public interest determination.
13.04.300	Model home.
13.04.305	Temporary rental or sales offices, contractors' offices, and signs.
13.04.310	Subdivisions.
31.04.315	<i>Repealed.</i>

13.04.010 Title.

These regulations shall hereafter be known, cited and referred to as the plat and subdivision regulations of the City of Tacoma. (Ord. 25532 § 1; passed Jun. 28, 1994)

13.04.020 Intent and authority.

These regulations are being adopted in accordance with the goals and authority of the Washington State Growth Management Act of 1990, as amended, and Chapter 58.17 of the Revised Code of Washington, concerning plats and subdivisions. It is intended that these regulations provide an efficient, effective, fair and timely method for the submission, review and approval of plats, short plats, boundary line adjustments and binding site plan approvals. (Ord. 25532 § 1; passed Jun. 28, 1994)

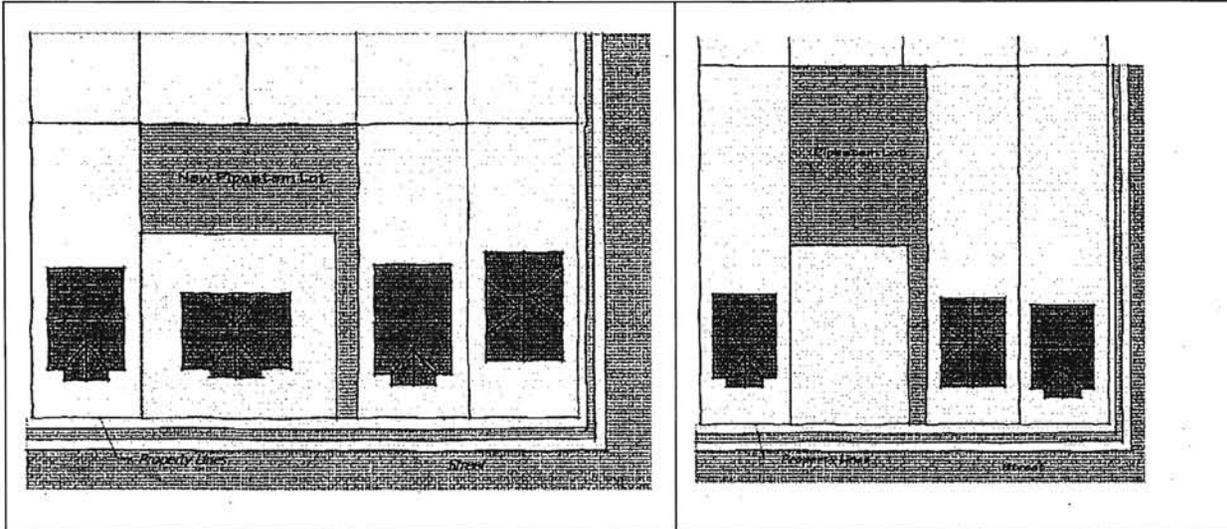
13.04.030 Policy.

A. It is hereby declared to be the policy of the City of Tacoma to consider the subdivision of land and the subsequent development of the subdivision as subject to the control of the City of Tacoma pursuant to the City's land use codes for the orderly, planned, efficient, and economical development of the community.

B. Land to be subdivided shall be of such character that it can be used safely for building purposes without danger to health or peril from fire, flood, or other menace, and land shall not be subdivided until adequate public facilities and improvements

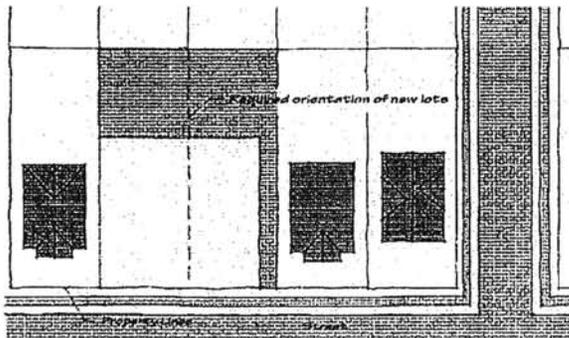
Examples of allowed pipestem layouts

In the first example, even though there is an established pattern on the block, the existing home prevents a property division consistent with that pattern. In the second example, the width and size of the property lends itself to a pipestem lot being created.



Example of a prohibited pipestem layout

In this example there is an established pattern on the block and a division consistent with that layout can be provided without significantly reducing the number of possible lots. Instead of creating a pipestem lot, the property should be divided consistent with the existing pattern.



(Ord. 27995 Ex. B; passed Jun. 14, 2011; Ord. 27563 Ex. A; passed Dec. 12, 2006; Ord. 25532 § 1; passed Jun. 28, 1994)

13.04.240 Plats within Planned Residential Development Districts (PRD Districts).

A. Intent. The PRD District is intended to: provide for greater flexibility in large-scale residential developments; promote a more desirable living environment than would be possible through the strict regulations of conventional zoning districts and of the subdivision ordinance of the City of Tacoma; encourage developers to use a more creative approach in land development; provide a means for reducing the improvements required in development through better design and land planning; conserve natural features and ecological systems of the physical environment; and facilitate more desirable, aesthetic and efficient use of open space.

In order to facilitate development within PRD Districts, these regulations may, if necessary, be modified as they apply to residential access streets, blocks, lots and building lines when the plan for such PRD District provides: adequate access to arterial streets and adequate circulation, recreation areas, and area per family as required by the zoning ordinances; light and

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air for the needs of the tract when fully developed and populated; and such legal restrictions or other legal status as will assure the carrying out of the plan.

B. Procedures.

1. All preliminary plats within PRD Districts shall be considered by the Hearing Examiner, except for minor preliminary plats considered by the Land Use Administrator subsequent to approval of a reclassification to a PRD District. The final plat shall be considered by the Land Use Administrator. The preliminary plat for a planned residential development may be submitted with the application for reclassification to a PRD District, and will then be processed concurrently with the reclassification application.

2. The final plat for a PRD District may be considered as a final site plan for that portion of the PRD District to which it pertains.

3. When the preliminary plat of a proposed subdivision in a PRD District is processed as the preliminary plan for the reclassification request, and/or the final plat is processed as the final site plan, the processing procedures for plats contained in this chapter shall be followed.

C. General Requirements.

1. Lot Area. Lot sizes required for plats within PRD Districts shall be the same as for the residential district with which the PRD District is combined; provided, however, that the Hearing Examiner or Land Use Administrator may modify said lot sizes where the following factors have been considered:

a. Type of dwelling structures involved;

b. Amount of common and private open space to be provided and the location of such open space in relation to the dwelling structures involved;

c. The street pattern and street design within the PRD District; and

d. The landscaping plan concept to be utilized around such dwellings. All modifications shall be made strictly within the spirit, intent, and purposes of this section and the PRD District section of the zoning ordinances.

2. Transfer of ownership of lots within PRD Districts shall be made in such a manner as to not increase the total number of lots in the PRD District, and in no event shall any ownership be less than the dimensions of the minimum size lot within the PRD District.

3. Streets and Roadways Within PRD Districts.

a. Standards of design and construction for roadways, both public and private, within PRDs may be modified as is deemed appropriate by the Hearing Examiner.

b. Right-of-way widths and street roadway widths may be reduced where it is found that the plan for the PRD District provides for the separation of vehicular and pedestrian circulation patterns, accommodates bicycle circulation, and provides for adequate off-street parking facilities.

4. All land within the Planned Residential Development District shall be subject to contractual agreements with the City of Tacoma and to recorded covenants approved by the City of Tacoma providing for compliance with the regulations and provisions of the district and the site plan or plat as approved. (Ord. 25893 § 7; passed Jun. 4, 1996; Ord. 25851 § 6; passed Feb. 27, 1996; Ord. 25532 § 1; passed Jun. 28, 1994)

13.04.250 Duplication of names.

The name of the proposed subdivision shall not duplicate the name of any other area within the City. A street name shall not duplicate the name of any other street or way within the City. (Ord. 25532 § 1; passed Jun. 28, 1994)

13.04.260 Public open space.

Due consideration shall be given by the subdivider to the allocation of suitable areas for schools, parks and playgrounds to be dedicated, by covenants in the deeds, for public use or reserved for the common use of all owners of property within the subdivision. Public open spaces shall conform to the Comprehensive Plan of the City. In lieu of dedication for open space, the City may require payment of a fee of \$25.00 per lot contained in the subdivision. The fee shall be used for the acquisition and/or development of parks or open space land which will benefit the residents of the subject subdivision and the citizens of the City of Tacoma. The above-referenced fee shall be applicable to all plats. (Ord. 27079 § 12; passed Apr. 29, 2003; Ord. 25532 § 1; passed Jun. 28, 1994)

TITLE 13

Land Use Regulatory Code

Tacoma Municipal Code

Chapter 13.05

LAND USE PERMIT PROCEDURES

Sections:

- 13.05.005 Definitions.
- 13.05.010 Application requirements for land use permits.
- 13.05.020 Notice process.
- 13.05.030 Land Use Administrator – Creation and purpose – Appointment – Authority.
- 13.05.040 Decision of the Land Use Administrator.
- 13.05.045 Historic Preservation Land Use Decisions.
- 13.05.046 Compatibility of historic standards with zoning development standards.
- 13.05.047 Certificates of approval, historic.
- 13.05.048 Demolition of City Landmarks.
- 13.05.049 Minimum buildings standards, historic.
- 13.05.050 Appeals of administrative decisions.
- 13.05.060 Applications considered by the Hearing Examiner.
- 13.05.070 Expiration of permits.
- 13.05.080 Modification/revision to permits.
- 13.05.090 Land Use Administrator approval authority.
- 13.05.095 Development Regulation Agreements.
- 13.05.100 Enforcement.
- 13.05.105 *Repealed.*
- 13.05.110 *Repealed.*

13.05.005 Definitions.

As used in this chapter, the following terms are defined as:

13.05.005.A

Abate: To repair, replace, remove, destroy, or otherwise remedy a condition which constitutes a violation of this title by such means and in such a manner and to such an extent as the Land Use Administrator determines is necessary in the interest of the public health, safety, and welfare of the community.

Administrative Approval, Historic: An approval that may be granted by the City Historic Preservation Officer for an alteration to a City landmark, without Landmarks Preservation Commission review, based on authority that may be granted by the Commission pursuant to TMC 1.42.

Aggrieved Person: In an appeal, an “aggrieved person” shall be defined as a person who is suffering from an infringement or denial of legal rights or claims.

Alteration of a City Landmark: Any act or process which changes materially, visually, or physically one or more of the exterior architectural features or significant interior features of a property listed on the Tacoma Register of Historic Places individually or as a part of a district, including, but not limited to, the development, reconstruction, or removal of any structure.

Appeal, for Standing: An aggrieved person or entity has “standing” when such person or entity is entitled to notice under the applicable provision of the Tacoma Municipal Code, or when such person or entity can demonstrate that such person or entity is within the zone of interest to be protected or regulated by the City law and will suffer direct and substantial impacts by the governmental action of which the complaint is made, different from that which would be experienced by the public in general.

Application, Complete: An application which meets the procedural requirements outlined in Section 13.05.010.C, or for development activities that require a Certificate of Approval, per 13.05.047.

13.05.005.C

Certificate of Approval, Historic: The written record of formal action by the Landmarks Preservation Commission indicating its approval of plans for alteration of a City landmark.

City landmark: A property that has been individually listed on the Tacoma Register of Historic Places, or that is a contributing property within a Historic Special Review District or Conservation District as defined by this chapter.

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Conservation District means an area designated for the preservation and protection of historic resources and overall characteristics of traditional development patterns, and that meets the criteria for such designation as described in Section 13.07.040.C of this code.

Contributing property, Historic: Any property within a Historic Special Review District or Conservation District which helps to convey the historic significance and traditional character of the area and that meets the criteria for determining significance, as set forth in Chapter 13.07.040.C of this code. This status may be documented in the district's nomination or in other findings adopted by the Landmarks Preservation Commission. Note that within this designation, the City may assign subordinate categories of significance.

13.05.005.D

Demolition of a City Landmark: Any act or process which destroys, in part or in whole, a City landmark, including neglect or lack of maintenance that results in the destruction of a historic property, except where otherwise indicated by this chapter.

Department: As used in this chapter, "Department" refers to the Community and Economic Development Department.

Design guideline, Historic: A standard of appropriate activity which will preserve or enhance the historic and architectural character of a structure or area, and which is used by the Landmarks Preservation Commission and the City Historic Preservation Officer to determine the appropriateness of proposals involving property within Historic Special Review and Conservation Districts.

13.05.005.E

Exterior appearance of a City Landmark: The architectural character and general composition of the exterior of a property as experienced from the outside, including, but not limited to, the type, color, and texture of a building material and the type, design, and character of all windows, doors, fixtures, signs, and appurtenant elements.

13.05.005.H

Historic resource: Any property that has been determined to be eligible by the City Historic Preservation Officer or Washington State Department of Archaeology and Historic Preservation staff for listing in the Tacoma Register of Historic Places, the Washington State Heritage Register, or the National Register of Historic Places, or any property that appears to be eligible for such listing by virtue of its age, exterior condition, or known historical associations.

Historic Special Review District: An Overlay Zone with a concentration of historic resources that has been found to meet the criteria for designation as a Historic Special Review District under the provisions of TMC 13.07 and has been so designated by City Council.

13.05.005.L

Landmarks Preservation Commission: The volunteer citizen body appointed by City Council whose primary responsibility is the oversight of the City's historic resources, including the designation of historic resources and districts to the Tacoma Register of Historic Places, reviewing proposed developments and alterations affecting properties on the Register and authorizing Certificates of Approval; raising community awareness of the City's history and historic resources, and serving as the City's primary subject matter resource in the areas of history, historic planning, and preservation, as provided for in this chapter and TMC 1.42 and Chapter 13.07.

13.05.005.N

Noncontributing property, Historic: A property within a Historic Special Review District or Conservation District which is documented in the district's nomination as not contributing architecturally, historically, and/or culturally to the historic character of the district, or which has been so designated in a Historic Special Review District Inventory drafted and adopted by the Landmarks Preservation Commission, or which has been specifically found to be noncontributing by a vote of the Commission.

13.05.005.O

Open Record Hearing: A hearing, conducted by a single hearing body or officer authorized to conduct such hearings that create a record through testimony and submission of evidence and information.

Owner: Any person having any interest in the real estate in question as indicated in the records of the office of the Pierce County Assessor, or who establishes, under this chapter, his or her ownership interest therein.

13.05.005.P

Person in Control of Property: Any person, in actual or constructive possession of a property, including, but not limited to, an owner, occupant, agent, or property manager of a property under his or her control.

Premises and property: Used by this chapter interchangeably and means any building, lot, parcel, dwelling, rental unit, real estate, or land, or portion thereof.

Project Permit or Project Permit Application: Any land use or environmental permit or license required for a project action, including, but not limited to, subdivisions, binding site plans, planned developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by the critical area preservation ordinance, site-specific rezones authorized by a Comprehensive Plan or sub area plan, but excluding the adoption or amendment of a Comprehensive Plan, sub area plan, or development regulations, except as otherwise specifically included in this subsection. This chapter does not apply to Exempted Activities under Section 13.11.140.

Public Meeting: An informal meeting, hearing, workshop, or other public gathering of people to obtain comments from the public or other agencies on a proposed project permit prior to the decision. A public meeting does not constitute an open record hearing. The proceedings at a public meeting may be recorded and a report or recommendation shall be included in the project permit application file.

13.05.005.R

Repair of a City Landmark: To fix or mend features of a property without any change in character, new construction, removal, or alteration.

13.05.005.V

Violation: Any act which results in non-compliance with any of the standards outlined within this title or conditions imposed from land use permits granted by the City.

13.05.005.W

Work Plan: Any document containing information detailing all of the required approvals, processes, timelines, actions, reports, etc., that are necessary to remedy a violation of this title and that said approvals, processes, timelines, actions, reports, etc. will be undertaken in order to gain compliance with this title. (Ord. 27995 Ex C; passed Jun. 14, 2011; Ord. 27912 Ex A; passed Aug. 10, 2010; Ord. 27728 Ex A; passed Jul. 1, 2008; Ord. 27431 § 4; passed Nov. 15, 2005; Ord. 25852 § 1; passed Feb. 27, 1996)

13.05.010 Application requirements for land use permits.

A. Purpose. The purpose of this section is to outline land use permit and application requirements.

B. Applicability. The regulations identified in this section apply to land use permits for which the Land Use Administrator and/or Hearing Examiner have decision-making authority. The applicant for a land use permit requested under this title shall have the burden of proving that a proposal is consistent with the criteria for such application.

C. Application Requirements.

1. Predevelopment Conference. A predevelopment conference may be scheduled at the request of the Department or the applicant. The predevelopment conference is intended to define the project scope and identify regulatory requirements of Title 13, prior to preparing a land use proposal.

2. Pre-Application Meeting. The pre-application meeting is a meeting between Department staff and a potential applicant for a land use permit to discuss the application submittal requirements and pertinent fees. A pre-application meeting is required prior to submittal of an application for rezoning, platting, height variances, conditional use permit, shoreline management substantial development (including conditional use, variance, and revision), wetland/stream development permits, wetland/stream assessments, and wetland delineation verifications. This requirement may be waived by the Department. The pre-application meeting is optional for other permits.

3. Applications Form and Content. The Department shall prescribe the form and content for complete applications made pursuant to this title. The applicant is responsible for providing complete and accurate information on all forms as specified below.

Applications shall include the following:

- a. The correct number of completed Department application forms signed by the applicant;
- b. The correct number of documents, plans, or maps identified on the Department Submittal Requirements form which are appropriate for the proposed project;
- c. A demonstration by the applicant of consistency with the applicable policies, regulations, and criteria for approval of the permit requested;

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d. A completed State Environmental Policy Act checklist, if required; containing all information required to adequately determine the potential environmental impacts of the proposal;

e. Payment of all applicable fees as identified in Section 2.09.170 – Required Filing Fees for Land Use Applications; and

f. Additional application information which may be requested by the Department and may include, but is not limited to, the following: geotechnical studies, hydrologic studies, noise studies, air quality studies, visual analysis, and transportation impact studies.

D. Initiation of Review Process. The Department shall review a submitted application to determine its completeness, but will not begin permit processing of any application until the application is found to be complete. "Completeness" means the appropriate documents and reports have been submitted. Accuracy and adequacy of the application is not reviewed as a part of this phase.

E. Notice of Complete or Incomplete Application.

1. Within 28 days after receiving a development permit application, the Department shall provide in writing to the applicant either:

a. A notice of complete application; or

b. A notice of incomplete application and what information is necessary to make the application complete.

The 28-day time period shall be determined by calendar days from the date the application was filed to the postmarked date on the written notice from the Department.

2. An application shall be found complete if the Department does not, within 28 days, provide to the applicant a notice of incomplete application.

3. If the application is determined to be incomplete, and/or additional information is requested, within 14 days after an applicant has submitted the requested additional information, the Department shall notify the applicant whether the information submitted adequately responds to the notice of incomplete application, thereby making the application complete, or what additional information is still necessary.

4. An application is complete for purposes of this section when it meets the submission requirements of the Department as outlined in Section 13.05.010.C and TMC Section 13.11.250 for projects that may affect wetlands, streams, or their regulated buffers, even though additional information may be required or project modifications may be made later. The determination of a complete application shall not preclude the Department from requesting additional information or studies, either at the time of the notice of complete application or subsequently if new information is required or substantial changes in the proposed action occur, or should it be discovered that the applicant omitted, or failed to disclose, pertinent information.

F. Inactive Applications. If an applicant fails to submit information identified in the notice of incomplete application or a request for additional information within 120 days from the Department's mailing date, or does not communicate the need for additional time to submit information, the Department may consider the application inactive and, after notification to the applicant, may close out the file and refund a proportionate amount of the fees collected with the application.

G. Modification to Application. Proposed modifications to an application which the Department has previously found to be complete will be treated as follows:

1. Modifications proposed by the Department to an application shall not be considered a new application.

2. If the applicant proposes modifications to an application which would result in a substantial increase in a project's impacts, as determined by the Department, the application may be considered a new application. The new application shall conform to the requirements of this title which are in effect at the time the new application is submitted.

H. Limitations on Refiling of Application.

1. Applications for a land use permit pursuant to Title 13 on a specific site shall not be accepted if a similar permit has been denied on the site within the 12 months prior to the date of submittal of the application. The date of denial shall be considered the date the decision was made on an appeal, if an appeal was filed, or the date of the original decision if no appeal was filed.

2. The 12-month time period may be waived or modified if the Land Use Administrator finds that special circumstances warrant earlier reapplication. The Land Use Administrator shall consider the following in determining whether an application for permit is similar to, or substantially the same as, a previously denied application:

a. An application for a permit shall be deemed similar if the proposed use of the property is the same, or substantially the same, as that which was considered and disallowed in the earlier decision;

b. An application for a permit shall be deemed similar if the proposed application form and site plan (i.e., building layout, lot configuration, dimensions) are the same, or substantially the same, as that which was considered and disallowed in the earlier decision; and

c. An application for a variance or waiver shall be deemed similar if the special circumstances which the applicant alleges as a basis for the request are the same, or substantially the same, as those considered and rejected in the earlier decision.

In every instance, the burden of proving that an application is not similar shall be upon the applicant.

I. Filing Fees. The schedule of fees for land use permits is established in Chapter 2.09 of the Tacoma Municipal Code.

J. Time Periods for Decision on Application.

1. A decision on applications considered by the Land Use Administrator shall be made within 120 days of complete application. Applications within the jurisdiction of the Hearing Examiner shall be processed within the time limits set forth in Chapter 1.23. The notice of decision on a land use permit shall be issued (and postmarked) within the prescribed number of days after the Department notifies the applicant that the application is complete or is found complete as provided in Section 13.05.010.D.3. The following time periods shall be exempt from the time period requirement:

a. Any period during which the applicant has been requested by the Department to correct plans, perform required studies, or provide additional required information due to the applicant's misrepresentation or inaccurate or insufficient information.

b. Any period during which an environmental impact statement is being prepared; however, in no case shall the time period exceed one year, unless otherwise agreed to by the applicant and the City's responsible official for SEPA compliance.

c. Any period for administrative appeals of land use permits.

d. Any extension for any reasonable period of time mutually agreed upon in writing between the applicant and the Department.

2. The 120-day time period established in Section 13.05.010.J.1 for applications to the Land Use Administrator shall not apply in the following situations:

a. If the permit requires approval of a new fully contained community as provided in RCW 36.70A.350, master planned resort as provided in RCW 36.70A.360, or the siting of an essential public facility as provided in RCW 36.70A.200.

b. If, at the applicant's request, there are substantial revisions to the project proposal, in which case the time period shall start from the date on which the revised project application is determined to be complete, per Section 13.05.010.E.3.

3. Decision when effective. A decision is considered final at the termination of an appeal period if no appeal is filed, or when a final decision on appeal has been made pursuant to either Chapter 1.23 or Chapter 1.70. In the case of a zoning reclassification, the first reading of the reclassification ordinance by the City Council shall be considered the final decision. First reading shall be considered a tentative approval, and does not constitute final rezoning of the property. However, first reading of the ordinance shall assure the applicant that the reclassification will be approved, provided that the application complies with all requirements and conditions for reclassification as may have been imposed by the Hearing Examiner or the City Council.

4. If unable to issue a final decision within the 120-day time period, a written notice shall be made to the applicant, including findings for the reasons why the time limit has not been met and the specified amount of time needed for the issuance of the final decision.

5. Time Computation. In computing any time period set forth in this chapter, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday, nor a legal holiday. Legal holidays are described in RCW 1.16.050. (Ord. 27893 Ex. A; passed Jun. 15, 2010; Ord. 27771 Ex. B; passed Dec. 9, 2008; Ord. 27728 Ex. A; passed Jul. 1, 2008; Ord. 27431 § 5; passed Nov. 15, 2005; Ord. 27245 § 1; passed Jun. 22, 2004; Ord. 26843 § 2; passed Aug. 21, 2001; Ord. 26645 § 4; passed Jun. 27, 2000; Ord. 25852 § 1; passed Feb. 27, 1996)

13.05.020 Notice process.

A. Purpose. The purpose of this section is to provide notice requirements for land use applications.

B. Process I – Minor Land Use Decisions.

1. A notice of application shall be provided within 14 days following a notice of complete application being issued to the applicant as identified in Section 13.05.010.E. Examples of minor land use decisions are waivers and variances.

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2. Notice of application shall be mailed by first-class mail to the applicant; property owner (if different than the applicant); neighborhood councils in the vicinity where the proposal is located; qualified neighborhood or community organizations; the Tacoma Landmarks Commission (for proposals located within a historic district or affecting a designated landmark); the Puyallup Indian Tribe for "substantial action" as defined in the "Agreement Between the Puyallup Tribe of Indians, Local Governments in Pierce County, the State of Washington, the United States of America, and Certain Private Property Owners," dated August 27, 1988; and to owners of property and/or taxpayers of record, as indicated by the records of the Pierce County Assessor/Treasurer, within the distances identified in Section 13.05.020.G.

3. Parties receiving notice of application shall be given 14 days from the date of mailing (including the day of mailing) to provide any comments on the proposed project to the Department. The notice shall indicate that a copy of the decision taken upon such application will be provided to any person who submits written comments on the application within 14 days of the mailing of such notice, or who requests receipt of a copy of the decision.

4. Decisions of the Land Use Administrator shall be mailed to the applicant and the property owner, if different than the applicant, by first class mail. Decisions of the Administrator requiring environmental review pursuant to the State Environmental Policy Act, WAC 197-11, and the provisions of TMC Chapter 13.12, shall also include a Threshold Determination by the Responsible Official for the Department. A decision shall be mailed by first-class mail to: owners of property and/or taxpayers of record as indicated by the Pierce County Assessor/Treasurer's records within the distance identified in Section 13.05.020.G; neighborhood councils in the vicinity where the proposal is located; qualified neighborhood or community organizations; and the Puyallup Indian Tribe for "substantial action" as defined in the "Agreement Between the Puyallup Tribe of Indians, Local Governments in Pierce County, the State of Washington, the United States of America, and Certain Private Property Owners," dated August 27, 1988.

5. A neighborhood or community organization shall be qualified to receive notice under this section upon a finding that the organization:

(a) has filed a request for a notification with the City Clerk in the form prescribed by rule, specifying the names and addresses of its representatives for the receipt of notice and its officers and directors;

(b) includes within its boundaries land within the jurisdiction of the permit authority;

(c) allows full participating membership to allow property owners/residents within its boundaries;

6. More than one neighborhood or community organization may represent the same area.

7. It shall be the duty of the neighborhood group to advise the City Clerk's office in writing of changes in its boundaries, or changes in the names and addresses of the officers and representatives for receipt of notice.

8. A public information sign (or signs), provided by the Department for applications noted in Table G (Section 13.05.020.G), indicating that a land use permit application for a proposal has been submitted, shall be erected on the site by the applicant, in a location specified by the Department, within seven calendar days of the date on which a notice of complete application is issued to the applicant. The sign shall remain on the site until the date of final decision, at which time the sign shall be removed by the applicant. The sign shall contain, at a minimum, the following information: type of application, name of applicant, description and location of proposal, and where additional information can be obtained.

C. Process II – Administrative Decisions Requiring an Environmental Determination and Height Variances, Shoreline Permits, Conditional Use, Special Development Permits, Wetland/Stream/Fish & Wildlife Habitat Conservation Area (FWHCA) Development Permits, Wetland/Stream/FWHCA Assessments, and Wetland Delineation Verifications.

1. A notice of application shall be provided within 14 days following a notice of complete application being issued to the applicant as identified in Section 13.05.010.E.

2. Notice of application shall be mailed by first-class mail to the applicant; property owner (if different than the applicant); neighborhood councils in the vicinity where the proposal is located; qualified neighborhood or community organizations consistent with the requirements set forth for Process I land use permits; the Tacoma Landmarks Commission (for proposals located within a historic district or affecting a designated landmark); the Puyallup Indian Tribe for "substantial action" as defined in the "Agreement Between the Puyallup Tribe of Indians, Local Governments in Pierce County, the State of Washington, the United States of America, and Certain Private Property Owners," dated August 27, 1988; and to owners of property and/or taxpayers of record, as indicated by the records of the Pierce County Assessor/Treasurer, within the distances identified in Section 13.05.020.G. For major modifications to development approved in a PRD District rezone and/or site approval, the notice of application shall also be provided to all owners of property and/or taxpayers of record within the entire PRD District and owners of property and/or taxpayers of record, as indicated by the records of the Pierce County Assessor/Treasurer, within the distances identified in Section 13.05.020.G from the boundary of the PRD District.

3. Parties receiving notice of application shall be given 30 days, with the exception of five to nine lot preliminary plats which shall be given 20 days, and Wetland/Stream Assessments which shall be given 14 days from the date of mailing (including the day of mailing) to provide any comments on the proposed project to the Department, unless a Public Meeting is held, as provided by Section 13.05.020.F. The notice shall indicate that a copy of the decision taken upon such application will be provided to any person who submits written comments on the application within 30 days of the mailing of such notice, or who requests receipt of a copy of the decision.

4. A public information sign (or signs), provided by the Department for applications noted in Table G (Section 13.05.020.G), indicating that a land use permit application for a proposal has been submitted, shall be erected on the site by the applicant, in a location specified by the Department, within seven calendar days of the date on which a notice of complete application is issued to the applicant. The sign shall remain on the site until the date of final decision, at which time the sign shall be removed by the applicant. The sign shall contain, at a minimum, the following information: type of application, name of applicant, description and location of proposal, and where additional information can be obtained.

5. Notice shall be published in a newspaper of general circulation for applications identified in the table in subsection G of this section.

D. Process III – Decisions Requiring a Public Hearing.

1. A notice of application shall be provided within 14 days following a notice of complete application being issued to the applicant as identified in Section 13.05.010.C.

2. Notice of application, including the information identified in Section 13.05.020.E, shall be mailed by first-class mail to the applicant, property owner (if different than the applicant), neighborhood councils in the vicinity where the proposal is located; qualified neighborhood or community organizations; the Tacoma Landmarks Commission (for proposals located within a historic district or affecting a designated landmark); Puyallup Indian Tribe for “substantial action” as defined in the “Agreement Between the Puyallup Tribe of Indians, Local Governments in Pierce County, the State of Washington, the United States of America, and Certain Private Property Owners,” dated August 27, 1988; and to owners of property and/or taxpayers of record, as indicated by the records of the Pierce County Assessor/Treasurer, within the distances identified in Section 13.05.020.G. For major modifications to development approved in a PRD District rezone and/or site approval, the notice of application shall also be provided to all owners of property and/or taxpayers of record within the entire PRD District and owners of property and/or taxpayers of record, as indicated by the records of the Pierce County Assessor/Treasurer, within the distances identified in Section 13.05.020.G from the boundary of the PRD District.

3. The notified parties shall be allowed 21 days from the date of mailing to comment on the pre-threshold environmental determination under provisions of Chapter 13.12, after which time the responsible official for SEPA shall make a final determination. Those parties who comment on the environmental information shall receive notice of the environmental determination. If an appeal of the determination is filed, it will be considered by the Hearing Examiner at the public hearing on the proposal.

4. A public information sign (or signs), provided by the Department, indicating that a land use permit application for a proposal has been submitted, shall be erected on the site by the applicant, in a location specified by the Department, within seven calendar days of the date on which a notice of complete application is issued to the applicant. The sign shall remain on the site until the date of final decision, at which time the sign shall be removed by the applicant. The notice shall contain, at a minimum, the following information: type of application, name of applicant, location of proposal, and where additional information can be obtained.

5. Notice shall be published in a newspaper of general circulation for applications identified in the table in subsection G of this section.

E. Content of Public Notice of Application. Notice of application shall contain the following information, where applicable, in whatever sequence is most appropriate for the proposal:

1. Date of application;
2. Date of notice of completion for the application;
3. Date of the notice of application;
4. Description of the proposed project action;
5. List of permits included in the application;
6. List of studies requested;
7. Other permits which may be required;
8. A list of existing environmental documents used to evaluate the proposed project(s) and where they can be reviewed;

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- 9. Public comment period (not less than 14 nor more than 30 days), statement of right to comment on the application, receive notice of and participate in hearings, request a copy of the decision when made, and any appeal rights;
- 10. Date, time, place and type of hearing (notice must be provided at least 15 days prior to the open record hearing);
- 11. Statement of preliminary determination of development regulations that will be used for project mitigation and of consistency;
- 12. A provision which advises that a "public meeting" may be requested by any party entitled to notice;
- 13. Any other information determined appropriate, e.g., preliminary environmental determination, applicant's analysis of code/policy applicability to project.

F. Public Comment Provisions. Parties receiving notice of application shall be given the opportunity to comment in writing to the department. A "public meeting" to obtain information, as defined in Section 13.05.005, may be held on applications which require public notification under Process II when:

- 1. The Land Use Administrator determines that the proposed project is of broad public significance; or
- 2. The neighborhood council in the area of the proposed project requests a "public meeting"; or
- 3. The owners of five or more parcels entitled to notice for the application make a written request for a meeting; or
- 4. The applicant has requested a "public meeting."

Requests for a meeting must be made in writing and must be in the Building and Land Use Services office within the comment period identified in the notice. One public meeting shall be held for a permit request regardless of the number of public meeting requests received. If a public meeting is held, the public comment period shall be extended 7 days beyond and including the date of the public meeting. Notice of the "public meeting" shall be mailed at least 14 days prior to the meeting to all parties entitled to original notice, and shall specify the extended public comment period; however, if the Land Use Administrator has determined that the proposed project is of broad public significance, or if the applicant requests a meeting, notification of a public meeting may be made with the notice of application, and shall allow the standard 30-day public comment period.

The comment period for permit type is identified in Section 13.05.020.G. When a proposal requires an environmental determination under Chapter 13.12, the notice shall include the time within which comments will be accepted prior to making a threshold determination of environmental significance or non-significance.

G. Notice and Comment Period for Specified Permit Applications. Table G specifies how to notify, the distance required, the comment period allowed, expiration of permits, and who has authority for the decision to be made on the application.

Table G – Notice, Comment and Expiration for Land Use Permits

Permit Type	Preapplication Meeting	Notice: Distance	Notice: Newspaper	Notice: Post Site	Comment Period	Decision	Hearing Required	City Council	Expiration of Permit
Interpretation/determination of code	Recommended	100 feet for site specific	For general application	Yes	14 days	LUA	No	No	None
Uses not specifically classified	Recommended	400 feet	Yes	Yes	30 days	LUA	No	No	None
Boundary line adjustment	Required	No	No	No	No	LUA	No	No	5 years***
Binding site plan	Required	No	No	No	No	LUA	No	No	5 years***
Environmental SEPA DNS/EIS	Optional	Same as case type	Yes if no hearing required	Yes for EIS	Same as case type	Dept. Director	No	No	None
Variance, height of main structure	Required	400 feet	No	Yes	30 days	LUA	No*	No	5 years

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Open space classification	Required	400 feet	No	Yes	**	Hearing Examiner	Yes	Yes	None
Plats 10+ lots	Required	400 feet	Yes	Yes	21 days SEPA**	Hearing Examiner	Yes	Final Plat	5 years***
Plats 5-9 lots	Required	400 feet	Yes	Yes	20 days	LUA	No*	Final Plat	5 years***
Rezoning	Required	400 feet	No	Yes	21 days SEPA**	Hearing Examiner	Yes	Yes	None
Shoreline/CUP/ variance	Required	400 feet	No	Yes	30 days*** **	LUA	No*	No	2 years/ maximum 6
Short plat	Required	No	No	No	No	LUA	No	No	5 years***
Site approval	Optional	400 feet	No	Yes	30 days*** **	LUA	No*	No	5 years
Conditional use	Required	400 feet	No	Yes	30 days*** **	LUA	No*	No	5 years****
Variance	Optional	100 feet	No	Yes	14 days	LUA	No*	No	5 years
Waiver	Optional	100 feet	No	Yes	14 days	LUA	No*	No	Condition of permit
Wetland/Stream/ FWPCA development permits	Required	400 feet	No	Yes	30 days	LUA	No*	No	5 years
Wetland/stream/ FWPCA assessment	Required	400 feet	No	Yes	14 days	LUA	No	No	5 years
Wetland delineation verification	Required	400 feet	No	Yes	30 days	LUA	No	No	5 years

INFORMATION IN THIS TABLE IS FOR REFERENCE PURPOSE ONLY.

- * When an open record hearing is required, all other land use permit applications for a specific site or project shall be considered concurrently by the Hearing Examiner (refer to Section 13.05.040.E).
- ** Comment on land use permit proposal allowed from date of notice to hearing.
- *** Must be recorded with the Pierce County Auditor within five years.
- **** Special use permits for wireless communication facilities, including towers, are limited to two years from the effective date of the Land Use Administrator's decision.
- ***** If a public meeting is held, the public comment period shall be extended 7 days beyond and including the date of the public meeting.

(Ord. 27893 Ex. A; passed Jun. 15, 2010; Ord. 27813 Ex. C; passed Jun. 30, 2009; Ord. 27771 Ex. B; passed Dec. 9, 2008; Ord. 27728 Ex. A; passed Jul. 1, 2008; Ord. 27631 Ex. A; passed Jul. 10, 2007; Ord. 27431 § 6; passed Nov. 15, 2005; Ord. 27245 § 2; passed Jun. 22, 2004; Ord. 27158 § 1; passed Nov. 4, 2003; Ord. 26195 § 1; passed Jan. 27, 1998; Ord. 25852 § 1; passed Feb. 27, 1996)

13.05.030 Land Use Administrator – Creation and purpose – Appointment – Authority.

A. Creation and Purpose. The position of Land Use Administrator is hereby created. The Land Use Administrator shall act upon land use regulatory permits as specified in this chapter. In order to ensure that the Land Use Administrator is free from improper influence, no individual, City employee, and member of the City Council, or other City board, commission or committee shall interfere with the exercise of the Land Use Administrator's duties and responsibilities set forth herein.

B. Appointment. The Land Use Administrator shall be appointed by the Director of the Community and Economic Development Department, upon advice of the Director of Public Works and the City Attorney. The Director of the Community and Economic Development Department may also designate an Acting Land Use Administrator who shall, in the event of the absence or the inability of the Land Use Administrator to act, have all the duties and powers of the Land Use Administrator.

C. Authority. The Land Use Administrator shall have the authority to act upon the following matters:

1. Interpretation, enforcement, and administration of the City's land use regulatory codes as prescribed in this title;
2. Applications for conditional use permits;
3. Applications for site plan approvals;
4. Applications for variances;
5. Applications for waivers;
6. Applications for preliminary and final plats as outlined in Chapter 13.04, Platting;

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7. Applications for Wetland/Stream/FWHCA Development Permits, Wetland Delineation Verifications, Wetland/Stream/FWHCA Assessments as outlined in Chapter 13.11;
8. Applications for Shoreline Management Substantial Development Permits/conditional use/ variances as outlined in Chapter 13.10;
9. Modifications or revisions to any of the above approvals;
10. Approval of landscape plans;
11. Extension of time limitations;
12. Application for permitted use classification for those uses not specifically classified.
13. Boundary line adjustments, binding site plans, and short plats;
14. Approval of building or development permits requiring Land Use Code and Environmental Code compliance.

D. Interpretation and Application of Land Use Regulatory Code. In interpreting and applying the provisions of the Land Use Regulatory Code, the provisions shall be held to be the minimum requirements for the promotion of the public safety, health, morals or general welfare. It is not intended by this code to interfere with or abrogate or annul any easements, covenants or agreements between parties. Where this code imposes a greater restriction upon the use of buildings or premises or upon the heights of buildings or requires larger yards or setbacks and open spaces than are required in other ordinances, codes, regulations, easements, covenants or agreements, the provisions of this code shall govern. An interpretation shall be utilized where the factual basis to make a determination is unusually complex or there is some problem with the veracity of the facts; where the applicable code provision(s) is ambiguous or its application to the facts unclear; or in those instances where a person applying for a license or permit disagrees with a staff determination made on the application. Requests for interpretation of the provisions of the Land Use Regulatory Code shall be processed in accordance with the requirements of Section 13.05.040.

E. Permitted Uses – Uses Not Specifically Classified. In addition to the authorized permitted uses for the districts as set forth in this title, any other use not elsewhere specifically classified may be permitted upon a finding by the Land Use Administrator that such use will be in conformity with the authorized permitted uses of the district in which the use is requested. Notification of the decision shall be made by publication in a newspaper of general circulation.

F. Reasonable Accommodation. Any person claiming to have a handicap, or someone acting on his or her behalf, who wishes to be excused from an otherwise applicable requirement of this Land Use Code under the Fair Housing Amendments Act of 1988, 42 USC § 3604(f)(3)(b), or the Washington Law Against Discrimination, Chapter 49.60 RCW, must provide the Land Use Administrator with verifiable documentation of handicap eligibility and need for accommodation. The Administrator shall act promptly on the request for accommodation. If handicap eligibility and need for accommodation are demonstrated, the Administrator shall approve an accommodation, which may include granting an exception to the provisions of this Code. The City shall not charge any fee for responding to such a request. (Ord. 27893 Ex. A; passed Jun. 15, 2010; Ord. 27813 Ex. C; passed Jun. 30, 2009; Ord. 27728 Ex. A; passed Jul. 1, 2008; Ord. 27539 § 1; passed Oct. 31, 2006; Ord. 27466 § 35; passed Jan. 17, 2006; Ord. 27431 § 7; passed Nov. 15, 2005; Ord. 27245 § 3; passed Jun. 22, 2004; Ord. 27017 § 5; passed Dec. 3, 2002; Ord. 26195 § 2; passed Jan. 27, 1998; Ord. 25852 § 1; passed Feb. 27, 1996)

13.05.040 Decision of the Land Use Administrator.

A. Effect of Land Use Administrator Decision. The Land Use Administrator's decision shall be final; provided, that pursuant to subsection H of this section, an appeal may be taken to the Hearing Examiner. The Land Use Administrator's decision shall be based upon the criteria set forth for the granting of such permit, the policies of the Comprehensive Plan, and any other applicable program adopted by the City Council. The decision of the Land Use Administrator shall be set forth in a written summary supporting such decision and demonstrating that the decision is consistent with the applicable criteria and standards contained in this title and the policies of the Comprehensive Plan. The decision shall include the environmental determination of the responsible official.

B. Conditioning Land Use Approvals. When acting on any land use matter, the Land Use Administrator may attach any reasonable conditions found necessary to make the project compatible with its environment, to carry out the goals and policies of the City's Comprehensive Plan, including its Shoreline Master Program, or to provide compliance with applicable criteria or standards set forth in the City's Land Use Regulatory Codes. Such conditions may include, but are not limited to:

1. The exact location and nature of the development, including additional building and parking area setbacks, screening in the form of landscape berms, landscaping or fencing;

2. Mitigating measures, identified in applicable environmental documents, which are reasonably capable of being accomplished by the project's sponsor, and which are intended to eliminate or lessen the environmental impact of the development;
3. Provisions for low- and moderate-income housing as authorized by state statute;
4. Hours of use or operation, or type and intensity of activities;
5. Sequence in scheduling of development;
6. Maintenance of the development;
7. Duration of use and subsequent removal of structures;
8. Dedication of land or granting of easements for public utilities and other public purposes;
9. Construction of, or other provisions for, public facilities and utilities. In regard to the conditions requiring the dedication of land or granting of easements for public use and the actual construction of or other provisions for public facilities and utilities, the Land Use Administrator shall find that the problem to be remedied by the condition arises, in whole or significant part, from the development under consideration, the condition is reasonable, and is for a legitimate public purpose.
10. Wetland/stream development permits, wetland/stream assessments, and wetland delineation verifications shall be subject to TMC Chapter 13.11.

Refer to Section 13.05.100 and TMC Chapter 13.11 for procedures to enforce permit decisions and conditions.

C. Timing of Decision. After examining all pertinent information and making any inspections deemed necessary by the Land Use Administrator, the Land Use Administrator shall issue a decision within 120 days from the date of notice of a complete application, unless additional time has been agreed to by the applicant, or for other reasons as stated in Section 13.05.010.

In the event the Administrator cannot act upon a land use matter within the time limits set forth, the Administrator shall notify the applicant in writing, setting forth reasons the matter cannot be acted upon within the time limitations prescribed, and estimating additional time necessary for completing the recommendation or decision.

D. Mailing of Decision.

1. A copy of the decision shall be mailed to the applicant and the property owner, if different than the applicant, by first class mail. A copy of the decision shall be mailed to those who commented in writing or requested a copy of the decision within the time period specified in Section 13.05.020 and a summary of the decision shall also be mailed by first-class mail to owners of the property, as indicated by the records of the Pierce County Assessor/Treasurer, within the distances specified in Section 13.05.020.G; the Puyallup Indian Tribe for "substantial actions" as defined in the "Agreement Between the Puyallup Tribe of Indians, Local Governments in Pierce County, the State of Washington, the United States of America, and Certain Private Property Owners," dated August 27, 1988; neighborhood councils in the vicinity of the proposal; and qualified neighborhood or community organizations.

2. Notice to the State of Washington on Shoreline Permit Decisions/Recommendations. Copies of the original application and other pertinent materials used in the final decision in accordance with this section, State regulations, and, pursuant to RCW 90.58 or 43.21C, the permit and any other written evidence of the final order of the City relative to the application, shall be transmitted by the Land Use Administrator to the Attorney General of the State of Washington and the Department of Ecology in accordance with WAC 173-27-130 and RCW 90.58.140(6).

3. Notice shall be provided to property owners affected by the Administrator's decision that such owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation. Notice of the Land Use Administrator's decision shall also be provided to the Pierce County Assessor/Treasurer's Office.

E. Consolidated Review of Multiple Permit Applications and of Environmental Appeals with the Underlying Land Use Action. Applications which require an open-record hearing shall be considered by the Hearing Examiner. When an open-record hearing is required, all other land use permit applications for a specific site or project shall be considered concurrently. Therefore, in this situation, applications for which the Land Use Administrator has authority shall be transferred to the jurisdiction of the Hearing Examiner to allow consideration of all land use actions concurrently.

F. Consolidated Review of Land Use Permitting on Multi-Jurisdictional Projects. Applications for projects that require land use permits from the City of Tacoma as well as from a neighboring jurisdiction, and where such neighboring jurisdiction's land use permitting processes require a pre-decision public hearing, the application for the City of Tacoma's land use permit shall be transferred to the jurisdiction of the Hearing Examiner for the purpose of conducting a joint hearing with the other permitting jurisdiction. Should a joint hearing not be arranged by agreement of the permitting jurisdictions, the matter shall be returned to the jurisdiction of the Land Use Administrator.

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G. Reconsideration. A request for reconsideration may be made on any decision or ruling of the Land Use Administrator by any aggrieved person or entity having standing under this chapter. A request seeking reconsideration shall be in writing and shall set forth the alleged errors of procedure, fact, or law. The request for reconsideration shall be filed with Building and Land Use Services within 14 calendar days of the issuance of the Land Use Administrator's decision, not counting the day of issuance of the decision. If the last day for filing the request for reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next working day. It shall be within the discretion of the Land Use Administrator to determine whether the opposing party or parties will be afforded an opportunity to respond. After review of the matter, the Land Use Administrator shall take such further action deemed proper, which may include the issuance of a revised decision.

H. Appeal to the Hearing Examiner. Any aggrieved person having standing under this chapter shall have the right, within 14 calendar days of the issuance of the Land Use Administrator's decision, or within seven calendar days of the decision on a reconsideration, to appeal the Land Use Administrator's decision to the Hearing Examiner. Such appeal shall be in accordance with Section 13.05.050 of this chapter.

I. Compliance with Permit Conditions. Compliance with conditions established in a permit is required. Any departure from the conditions of approval or approved plans constitutes a violation of this title and shall be subject to enforcement actions and penalties. See Sections 13.05.100 and 13.05.110 for enforcement and penalties. (Ord. 27893 Ex. A; passed Jun. 15, 2010; Ord. 27728 Ex. A; passed Jul. 1, 2008; Ord. 27431 § 8; passed Nov. 15, 2005; Ord. 27245 § 4; passed Jun. 22, 2004; Ord. 27079 § 13; passed Apr. 29, 2003; Ord. 26585 § 2; passed Mar. 14, 2000; Ord. 26195 § 3; passed Jan. 27, 1998; Ord. 25852 § 1; passed Feb. 27, 1996)

13.05.045 Historic preservation land use decisions.

A. Purpose. The City finds that the protection, enhancement, perpetuation, and continued use of landmarks, districts, and elements of historic, cultural, architectural, archeological, engineering, or geographic significance located within the City are required in the interests of the prosperity, civic pride, and ecological and general welfare of its citizens. The City further finds that the economic, cultural, and aesthetic standing of the City cannot be maintained or enhanced by disregarding the heritage of the City or by allowing the destruction or defacement of historic and cultural assets. The purpose of this section is to support these goals and provide regulatory procedures for historic preservation decision making bodies.

B. Authority and Responsibilities.

1. Landmarks Preservation Commission. Pursuant to TMC 1.42, and for the purposes of this chapter, the Landmarks Preservation Commission shall have the authority to:

a. Approve or deny proposals to alter individual properties or contributing properties within historic and conservation districts that are listed on the Tacoma Register of Historic Places, as provided in TMC 13.07, and authorize the issuance of Certificates of Approval for the same, and adopt standards, design guidelines, and district rules to be used to guide this review.

b. Where appropriate, encourage the conservation of historic materials and make recommendations regarding mitigation measures for projects adversely affecting historic resources.

2. Historic Preservation Officer. Pursuant to TMC 1.42, and for the purposes of this chapter, the Historic Preservation Officer shall have the authority to:

a. Grant administrative Certificates of Approval, subject to such limitations and within such standards as the Commission may establish.

b. On behalf of the Landmarks Preservation Commission, draft and issue Certificates of Approval or other written decisions on matters on which the Commission has taken formal action.

c. Upon request by other City entities, review permit applications and other project actions for appropriateness and consistency with the purposes of this chapter, Chapter 13.07, and the Preservation Plan element of the Comprehensive Plan.

d. With respect to the goals and policies contained within this chapter, Chapter 13.07, and the Comprehensive Plan, represent the Historic Preservation Certified Local Government program for Tacoma and review, advise, and comment upon environmental analyses performed by other agencies and mitigation proposed, including NEPA and SEPA, Section 106, and other similar duties.

e. Advise property owners and the public of historic preservation code requirements.

f. Assist the Land Use Administrator, as needed, with requests for interpretations of codes relating to landmarks and to historic districts, as provided in those codes. (Ord. 27995 Ex. C; passed Jun. 14, 2011)

13.05.046 Compatibility of historic standards with zoning development standards.

A. All property designated as a City landmark or that is located within a Historic Special Review District or Conservation District, according to the procedures set forth in Chapter 13.07, shall be subject to all of the controls, standards, and procedures set forth in Title 13, including those contained herein and in Chapter 13.07, applicable to the area in which it is presently located, and the owners of the property shall comply with the mandates of this Title in addition to all other applicable Tacoma Municipal Code requirements for the area in which such property is located. In the event of a conflict between the application of this chapter and other codes and ordinances of the City, the more restrictive shall govern, except where otherwise indicated.

B. Coordination with Residential Zoning Code. In certain cases, application of the development standards in the residential zones, as defined in Section 13.06.100, including those for height, bulk, scale, and setbacks, may conflict with historic preservation standards or criteria and result in adverse effects to City Landmark properties. In such cases, properties subject to design review and approval by the Landmarks Preservation Commission shall be exempted from the standards that conflict with the Landmarks Commission's application of historic preservation standards adopted pursuant to Chapter 13.07, including the Secretary of the Interior's Standards for the Rehabilitation and Guidelines for Rehabilitation of Historic Buildings and applicable Historic Special Review District Design Guidelines. The issuance of a Certificate of Approval for final design by the Landmarks Preservation Commission shall include specific references to any conflicts between the historic standards and those in Chapter 13.06, and specifically request the appropriate exemptions.

C. Coordination with Downtown Zoning. In certain cases, the application of design standards in Downtown Tacoma zoning districts, as defined in Chapter 13.06A, may conflict with historic preservation standards or criteria and result in adverse effects to historic properties. In such cases, properties subject to design review and approval by the Landmarks Preservation Commission shall be exempted from the basic design standards of Chapter 13.06A that conflict with the Landmarks Commission's application of historic preservation standards adopted pursuant to this chapter, including the Secretary of the Interior's Standards for the Rehabilitation and Guidelines for Rehabilitation of Historic Buildings and applicable Historic Special Review District Design Guidelines. The issuance of a Certificate of Approval for final design by the Landmarks Preservation Commission shall serve as the Commission's findings as required in TMC 13.06A.070.B. (Ord. 27995 Ex. C; passed Jun. 14, 2011)

13.05.047 Certificates of approval, historic.

A. Certificate of Approval Required. Except where specifically exempted by this chapter, a Certificate of Approval is required before any of the following actions may be undertaken:

1. Alteration to the exterior appearance of any City landmark, or any building, site, structure or object proposed for designation as a City Landmark pursuant to TMC 13.07.050;
2. Alterations to the exterior appearance of any existing buildings, public rights-of-way, or other public spaces, or development or construction of any new structures, in any Historic Special Review District.
3. Except where otherwise specified, construction of new structures and additions to existing buildings within Conservation Districts. This authority is limited to the exterior appearance of new buildings and additions.
4. Removal or alteration of any existing sign, or installation or placement any new sign, on a City Landmark or property within a Historic Special Review or Conservation District.
5. Demolition of any structure or building listed on the Tacoma Register of Historic Places, or that is located within a Historic Special Review or Conservation District.
6. No City permits for the above activities shall be issued by the City until a Certificate of Approval has been issued by the Landmarks Preservation Commission or administrative approval has been granted by the Historic Preservation Officer.
7. When a development permit application is filed with Building and Land Use Services that requires a Certificate of Approval, the applicant shall be directed to complete an application for Certificate of Approval for review by the Landmarks Preservation Commission or Historic Preservation Officer.

B. Application Requirements. The following information must be provided in order for the application to be complete, unless the Historic Preservation Officer indicates in writing that specific information is not necessary for a particular application:

1. Property name and building address;
2. Applicant's name and address;
3. Property owner's name and address;
4. Applicant's telephone and e-mail address, if available;

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5. The building owner's signature on the application or, if the applicant is not the owner, a signed letter from the owners designating the applicant as the owner's representative;
6. Confirmation that the fee required by the General Services Fee Schedule has been paid;
7. Written confirmation that the proposed work has been reviewed by Building and Land Use Services, appears to meet applicable codes and regulations, and will not require a variance;
8. A detailed description of the proposed work, including:
 - a. Any changes that will be made to the building or the site;
 - b. Any effect that the work would have on the public right-of-way or public spaces;
 - c. Any new development or construction;
9. 5 sets of scale plans, or a single legible electronic copy in a format approved by CEDD staff, with all dimensions shown, of:
 10. A site plan of all existing conditions, showing adjacent streets and buildings, and, if the project includes any work in the public right-of-way, the existing street uses, such as street trees and sidewalk displays, and another site plan showing proposed changes to the existing conditions;
 11. A floor plan showing the existing features and a floor plan showing proposed new features;
 12. Elevations and sections of both the proposed new features and the existing features;
 13. Construction details, where appropriate;
 14. A landscape plan showing existing features and plantings and a landscape plan showing proposed site features and plantings;
 15. Photographs of any existing features that would be altered and photographs showing the context of those features, such as the building facade where they are located;
 16. If the proposal includes new finishes or paint, one sample of proposed colors and an elevation drawing or photograph showing the proposed location of proposed new finishes or paint;
 17. If the proposal includes new signs, canopies, awnings, or exterior lighting:
 - a. 5 sets of scale plans, or a single legible electronic copy of the proposed signs, awnings, canopies, or lighting showing the overall dimensions, materials, design graphics, typeface, letter size, and colors;
 - b. 5 copies or a single electronic copy of details showing the proposed methods of attachment for the new signs, canopies, awnings, or exterior lighting;
 - c. For lighting, detail of the fixture(s) with specifications, including wattage and illumination color(s);
 - d. One sample of the proposed colors and materials;
 18. If the proposal includes the removal or replacement of existing architectural elements, a survey of the existing conditions of the features that would be removed or replaced.

C. Applications for Preliminary Approval.

1. An applicant may make a written request to submit an application for a Certificate of Approval for a preliminary design of a project if the applicant waives, in writing, the deadline for a Commission decision on the subsequent design phase or phases of the project and agrees, in writing, that the decision of the Commission is immediately appealable by the applicant or any interested person(s).
 2. The Historic Preservation Officer may reject the request if it appears that the review of a preliminary design would not be an efficient use of staff or Commission time and resources, or would not further the goals and objectives of this chapter.
 3. The Historic Preservation Officer may waive portions of the above application requirements in writing that are determined to be unnecessary for the Commission to approve a preliminary design.
 4. A Certificate of Approval of a preliminary design shall be conditioned automatically upon the subsequent submittal of the final design and all of the information listed in Subsection B above, and upon Commission approval prior to the issuance of any permits for work affecting the property.
- D. Applications for a Certificate of Approval shall be filed with the Permit Center.

E. Process and standards for review.

1. When an application for Certificate of Approval is received, the Historic Preservation Officer shall:

a. Review the application and determine whether the application requires review by the Landmarks Preservation Commission, or, subject to the limitations imposed by the Landmarks Preservation Commission pursuant to Chapter 1.42, without prejudice to the right of the owner at any time to apply directly to the Commission for its consideration and action on such matters, whether the application is appropriate for administrative review.

b. If the application is determined appropriate for administrative review, the Historic Preservation Officer shall proceed according to the Administrative Bylaws of the Commission.

2. If the application requires review by the full Commission, the Historic Preservation Officer shall notify the applicant in writing within 28 days whether the application is complete or that the application is incomplete and what additional information is required before the application will be complete.

3. Within 14 days of receiving the additional information, the Historic Preservation Officer shall notify the applicant in writing whether the application is now complete or what additional information is necessary.

4. An application shall be deemed to be complete if the Historic Preservation Officer does not notify the applicant in writing, by the deadlines provided in this section, that the application is incomplete. A determination that the application is complete is not a determination that an application is vested.

5. The determination that an application is complete does not preclude the Historic Preservation Officer or the Landmarks Preservation Commission from requiring additional information during the review process if more information is needed to evaluate the application according to the criteria in Chapter 13.07 and any rules adopted by the Commission.

6. Within 30 days after an application for a Certificate of Approval has been determined complete or at its next regularly scheduled meeting, whichever is longer, the Commission shall review the application to consider the application and to receive comments.

7. Notice of the Commission's meeting shall be served to the applicant and distributed to an established mailing list no less than three days prior to the time of the meeting.

8. The absence of the owner or applicant shall not impair the Commission's authority to make a decision regarding the application.

9. Within 45 days after the application for a Certificate of Approval has been determined complete, the Landmarks Preservation Commission shall issue a written decision granting, granting with conditions, or denying a Certificate of Approval, or if the Commission elects to defer its decision, a written description of any additional information the Commission will need to arrive at a decision. A copy of the decision shall be provided to the applicant and to Building and Land Use Services.

10. A Certificate of Approval shall be valid for 18 months from the date of issuance of the Commission's decision granting it unless the Commission grants an extension; provided, however, that a Certificate of Approval for actions subject to a permit issued by Building and Land Use Services shall be valid for the life of the permit, including any extensions granted in writing by Building and Land Use Services.

F. Economic Hardship

1. After receiving written notification from the Commission of the denial of Certificate of Approval, an applicant may commence the hardship process. No building permit or demolition permit shall be issued unless the Commission makes a finding that hardship exists.

2. When a claim of economic hardship is made due to the effect of this ordinance, the owner must prove that:

a. The property is incapable of earning a reasonable return, regardless of whether that return represents the most profitable return possible;

b. The property cannot be adapted for any other use, whether by the current owner or by a purchaser, which would result in a reasonable return; and

c. Efforts to find a purchaser interested in acquiring the property and preserving it have failed.

3. The applicant shall consult in good faith with the Commission, local preservation groups, and interested parties in a diligent effort to seek an alternative that will result in preservation of the property. Such efforts must be shown to the Commission.

4. The Commission shall hold a public hearing on the application within sixty (60) days from the date the complete application is received by the Historic Preservation Officer. Following the hearing, the Commission has thirty (30) days in

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which to act on the application. Failure to act on the hardship application within the (30) day timeframe will waive the Certificate of Approval requirement for permitting.

5. All decisions of the Commission shall be in writing.

6. The Commission's decision shall state the reasons for granting or denying the hardship application.

7. Denial of a hardship application may be appealed by the applicant within (14) business days to the Hearing Examiner after receipt of notification of such action.

8. Economic Evidence. The following shall be required for an application for economic hardship to be considered complete:

a. For all property:

(1) The amount paid for the property;

(2) The date of purchase, the party from whom purchased, and a description of the business or family relationship, if any, between the owner and the person from whom the property was purchased;

(3) The cost of any improvements since purchase by the applicant and date incurred;

(4) The assessed value of the land, and improvements thereon, according to the most recent assessments;

(5) Real estate taxes for the previous two years;

(6) Annual debt service, if any, for the previous two years;

(7) All appraisals obtained within the previous five years by the owner or applicant in connection with his or her purchase, financing or ownership of the property;

(8) Any listing of the property for sale or rent, price asked, and offers received, if any;

(9) Any consideration by the owner for profitable and adaptive uses for the property, including renovation studies, plans, and bids, if any; and

b. For income-producing property:

(1) Annual gross income from the property for the previous four years;

(2) Itemized operating and maintenance expenses for the previous four years;

(3) Annual cash flow for the previous four years.

G. Appeals to the Hearing Examiner. The Landmarks Preservation Commission shall refer to the Hearing Examiner for public hearing all final decisions regarding applications for certificates of approval and applications for demolition where the property owners, any interested parties of record, or applicants file with the Landmarks Preservation Commission, within 10 days of the date on the decision, written notice of appeal of the decision or attached conditions.

1. Form of Appeal. An appeal of the Landmarks Preservation Commission shall take the form of a written statement of the alleged reason(s) the decision was in error, or specifying the grounds for appeal. The following information shall be submitted:

a. An indication of facts that establish the appellant's standing;

b. An identification of explicit exceptions and objections to the decision being appealed, or an identification of specific errors in fact or conclusion;

c. The requested relief from the decision being appealed;

d. Any other information reasonably necessary to make a decision on appeal. Failure to set forth specific errors or grounds for appeal shall result in a summary dismissal of the appeal.

2. The Hearing Examiner shall conduct a hearing in the same manner and subject to the same rules as set forth in TMC 1.23.

3. The Hearing Examiner's decision shall be final. Any petition for judicial review must be commenced within 21 days of issuance of the Hearing Examiner's Decision, as provided for by TMC 1.23.060 and RCW 36.70C.040.

4. The Hearing Examiner, in considering the appropriateness of any exterior alteration of any City landmark, shall give weight to the determination and testimony of the consensus of the Landmarks Preservation Commission and shall consider:

a. The purposes, guidelines, and standards for the treatment of historic properties contained in this Title, and the goals and policies contained in the Historic Preservation Element of the Comprehensive Plan;

- b. The purpose of the ordinance under which each Historic Special Review or Conservation District is created;
 - c. For individual City landmarks, the extent to which the proposal contained in the application for Certificate of Approval would adversely affect the specific features or characteristics specified in the nomination to the Tacoma Register of Historic Places;
 - d. The reasonableness, or lack thereof, of the proposal contained in the application in light of other alternatives available to achieve the objectives of the owner and the applicant; and
 - e. The extent to which the proposal contained in the application may be necessary to meet the requirements of any other law, statute, regulation, code, or ordinance.
5. When considering appeals of applications for demolition decisions, in addition to the above, the Hearing Examiner shall refer to the Findings of Fact made by the Landmarks Preservation Commission in addition to the demolition criteria for review and other pertinent statements of purpose and findings in this Title.
6. The Examiner may attach any reasonable conditions necessary to make the application compatible and consistent with the purposes and standards contained in this Title.

H. Ordinary Maintenance and Repairs. Nothing in this chapter or Chapter 13.07 shall be construed to prevent the ordinary maintenance or repair of any exterior architectural feature of any City landmark, which maintenance or repair does not involve a change in design, material, or the outward appearance thereof. (Ord. 27995 Ex. C; passed Jun. 14, 2011)

13.05.048 Demolition of City Landmarks.

A. Application requirements. In addition to the application requirements listed in Section 13.05.047, the following information must be provided in order for the application to be complete, unless the Historic Preservation Officer indicates in writing that specific information is not necessary for a particular application:

1. A detailed, professional architectural and physical description of the property in the form of a narrative report, to cover the following:
 - a. Physical description of all significant architectural elements of the building;
 - b. A historical overview;
 - c. Elevation drawings of all sides;
 - d. Site plan of all existing conditions showing adjacent streets and buildings and, if the project includes any work in the public right-of-way, the existing street uses, such as street trees and sidewalk displays;
 - e. Photographs of all significant architectural elements of the building; and
 - f. Context photographs, including surrounding streetscape and major sightlines.
2. A narrative statement addressing the criteria in this subsection for Applications for Historic Building Demolitions, to include the following areas, as applicable:
 - a. Architectural/historical/cultural significance of the building;
 - b. Physical condition of the building;
 - c. Narrative describing future development plans for the site, including a description of immediate plans for the site following demolition.
3. For replacement construction/redevelopment of the site, the following information is required:
 - a. A complete construction timeline for the replacement structure to be completed within two years, or a written explanation of why this is not possible.
 - b. Conceptual drawings, sketches, renderings, and plans.
 - c. Written proof, acceptable to the Landmarks Preservation Commission, of valid and binding financial commitments for the replacement structure is required before the permit can be issued, and should be submitted with the demolition request. This may include project budgets, funding sources, and written letters of credit.
4. If a new structure is not planned for the site, the application shall contain a narrative describing the rationale for demolition and a written request for waiver of the automatic conditions contained in Subsections C.1, C.2 and C.4, below.
5. If a new structure is not planned for the site, the application requirements in this section and Section 13.05.047 relating to new construction are not required in order for an application to be complete.

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6. Reports by professionally qualified experts in the fields of engineering, architecture, and architectural history or real estate finance, as applicable, addressing the arguments made by the applicant.

B. Permitting Timelines.

1. Any City landmark for which a demolition permit application has been received is excluded from City permit timelines imposed by Section 13.05.010.J.

2. An application for a Certificate of Approval for Demolition of a City Landmark shall be filed with the Building and Land Use Services Permit Intake Center. When a demolition application is filed, the application shall be routed to the Historic Preservation Officer.

3. Determination of Complete Application. The Historic Preservation Officer shall determine whether an application for demolition is complete consistent with the timelines and procedures outlined in Section 13.05.047.E.1 through E.5.

4. Application Review.

a. Preliminary Meeting. Once the application for historic building demolition has been determined to be complete, excepting the demolition fee, the Historic Preservation Officer shall schedule a preliminary briefing at the next available regularly scheduled meeting of the Landmark Preservation Commission.

(1) The purpose of this meeting is for the applicant and the Commission to discuss the historic significance of the building, project background and possible alternative outcomes, and to schedule a hearing date, if necessary.

(2) To proceed with the application, the applicant shall request a public hearing, in writing, to consider the demolition application at the preliminary meeting.

(3) At this meeting, the Landmarks Preservation Commission may grant the request for public hearing, or may request an additional 30 days from this meeting to distribute the application for peer review, especially as the material pertains to the rationale contained in the application that involves professional expertise in, but not limited to, engineering, finance, law, architecture or architectural history, or, finding that the property in question is not contributing to the Historic District, may conditionally waive the procedural requirements of this section, provided that subsections 1 and 2 of Section 13.05.048.C, "Demolition of City Landmarks – Automatic Conditions," are met.

(4) If a 30-day peer review is requested, the request for public hearing shall again be considered at the next regular meeting following the conclusion of the peer review period.

b. Public Hearing. Upon receiving such direction from the Landmarks Preservation Commission, and once the application fee has been paid by the applicant, the Historic Preservation Officer shall schedule the application for a public hearing within 90 days.

(1) The Historic Preservation Officer shall give written notice, by first-class mail, of the time, date, place, and subject of the meeting to consider the application for historic building demolition not less than 30 days prior to the meeting to all owners of record of the subject property, as indicated by the records of the Pierce County Assessor-Treasurer, and taxpayers of record of properties within 400 feet of the subject property.

(2) The Commission shall consider the merits of the application, comments received during peer review, and any public comment received in writing or during public testimony.

(3) Following the public hearing, there shall be an automatic 60-day comment period during which the Commission may request additional information from the applicant in response to any commentary received.

(4) At its next meeting following the public comment period, the Landmarks Preservation Commission shall make findings of fact regarding the application based on the criteria for consideration contained in this subsection. The Landmarks Preservation Commission may approve, subject to automatic conditions imposed by this subsection, the application or may deny the application based upon its findings of fact. This decision will instruct the Historic Preservation Officer whether or not he or she may issue written approval for a historic building demolition.

C. Automatic Conditions. Following a demolition approval pursuant to this section, the following conditions are automatically imposed, except where exempted per Section 13.05.048.B or elsewhere in this chapter, and must be satisfied before the Historic Preservation Officer shall issue a written decision:

1. For properties within a Historic Special Review or Conservation District, the design for a replacement structure is presented to and approved by the Landmarks Preservation Commission pursuant to the regular design review process as defined in this chapter; or, if no replacement structure is proposed for a noncontributing structure, the Commission may, at its discretion, waive this condition and those contained in Subsections C.2 and C.4, below;

2. Acceptable proof of financing commitments and construction timeline is submitted to the Historic Preservation Officer;

3. Documentation of the building proposed for demolition that meets Historic American Building Survey ("HABS") standards or mitigation requirements of the Washington State Department of Archaeology and Historic Preservation ("DAHP"), as appropriate, is submitted to the Historic Preservation Office and the Northwest Room of the Tacoma Public Library;

4. Development permits for the replacement are ready for issue by Building and Land Use Services, and there are no variance or conditional use permit applications outstanding;

5. Any additional mitigation agreement, such as relocation, salvage of architectural features, interpretation, or deconstruction, proposed by the applicant is signed and binding by City representatives and the applicant, and approved, if necessary, by the City Council; and

6. Any conditions imposed on the demolition have been accepted in writing (such as salvage requirements or archaeological requirements).

D. Specific exemptions. The following are excluded from the requirements imposed by this chapter and Chapter 13.07 but are still subject to Landmarks Preservation Commission approval for exterior changes as outlined elsewhere in this chapter and Chapter 13.07.

1. Demolition of accessory buildings, including garages and other outbuildings, and noncontributing later additions to historic buildings, where the primary structure will not be affected materially or physically by the demolition and where the accessory building or addition is not specifically designated as a historic structure of its own merit;

2. Demolition work on the interior of a City landmark or object, site, or improvement within a Historic Special Review or Conservation District, where the proposed demolition will not affect the exterior of the building and where no character defining architectural elements specifically defined by the nomination will be removed or altered; and

3. Objects, sites, and improvements that have been identified by the Landmarks Preservation Commission specifically as noncontributing within their respective Historic Special Review or Conservation District buildings inventory at the preliminary meeting, provided that a timeline, financing, and design for a suitable replacement structure have been approved by the Landmarks Preservation Commission, or such requirements have been waived, pursuant to Section 13.05.048. (Ord. 27995 Ex. C; passed Jun. 14, 2011)

13.05.049 Minimum buildings standards, historic.

A. Prevention of Demolition by Neglect. The Landmarks Preservation Commission shall make a reasonable effort to notify the Building Official of historic properties that appear to meet the criteria for substandard buildings or property under TMC 2.01.060.

B. For buildings listed on the Tacoma Register of Historic Places which are found to be Substandard, Derelict, or Dangerous according to the Building Official, under the Minimum Building provisions of TMC 2.01, the following shall apply:

1. Because City landmarks are culturally, architecturally, and historically significant to the City and community, the historic status of a Substandard, Derelict, or Dangerous Building may constitute a "sufficient reason" for acceptance of alternate timelines and extensions upon agreed timelines; and,

2. Any timelines and plans for the remediation of a dangerous City landmark, including for repair or demolition, shall not be accepted by the Building Official until the applicable procedures as set forth in this chapter for review of design or demolition by the Landmarks Preservation Commission have been satisfied, pursuant to TMC 2.01.040.F.

3. The Building Official may consider the Landmarks Preservation Commission to be an interested party as defined in TMC 2.01, and shall make a reasonable effort to keep the Commission notified of enforcement complaints and proceedings involving City Landmarks.

4. Nothing in this chapter shall be construed to prevent the alteration of any feature which the Building Official shall certify represents an immediate and urgent threat to life safety. The Building Official shall make a reasonable effort to keep the Historic Preservation Officer informed of alterations required to remove an unsafe condition involving a City Landmark.

C. The Historic Preservation Officer shall have the authority to administratively approve changes without prior Landmarks Preservation Commission review per Section 13.05.048, if, upon consultation with the Building Official and appropriate City Engineering staff, it is determined such changes are necessary to mitigate an immediate and urgent threat of structural failure or significant damage to a City landmark. The circumstances and rationale for such an alteration shall be provided in a report to the Landmarks Preservation Commission at its next regular meeting. (Ord. 27995 Ex. C; passed Jun. 14, 2011)

13.05.050 Appeals of administrative decisions.

A. Purpose. The purpose of this section is to cross-reference the procedures for appealing administrative decisions on land use proposals.

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B. **Applicability.** The provisions of this section shall apply to any order, requirement, permit, decision, or determination on land use proposals made by the Land Use Administrator. These may include, but are not limited to, variances, shoreline, short plat, wetland/stream development, site approval, and conditional use permits, modifications to permits, interpretations of land use regulatory codes, and decisions for the imposition of fines. These provisions do not apply to decisions of the Land Use Administrator for revised shoreline permits (refer to Section 13.10.200). These provisions also do not apply to exemptions under TMC Chapter 13.11.

C. **Appeal to the Hearing Examiner.** The Examiner shall have the authority to hear and decide appeals from any written order, requirement, permit, decision, or determination on land use proposals, except for appeals of decisions identified in Chapter 13.04, made by the Land Use Administrator. The Examiner shall consider the appeal in accordance with procedures set forth in Chapter 1.23 and the Hearing Examiner's rules of procedure.

D. **Who May Appeal.** Any decision or ruling of the Land Use Administrator may be appealed by any aggrieved person or entity having standing under the ordinance of the Land Use Administrator's written order. In this context, an "aggrieved person" shall be defined as a person who is suffering from an infringement or denial of legal rights or claims. An aggrieved person has "standing" when it is determined that the person or entity can demonstrate that such person or entity is within the zone of interest to be protected or regulated by the City law and will suffer direct and substantial impacts by the governmental action of which the complaint is made, different from that which would be experienced by the public in general.

E. **Time Limit for Appealing.** Appeals from decisions or rulings of the Land Use Administrator shall be made within 14 calendar days of the date of the written order or within seven calendar days of the date of issuance of the decision on a request for reconsideration, not counting the day of issuance of the decision. If the last day for filing an appeal falls on a weekend day or a holiday, the last day for filing shall be the next working day.

F. **Form of Appeal.** An appeal of the Land Use Administrator shall take the form of a written statement of the alleged reason(s) the decision was in error, or specifying the grounds for appeal. The following information, accompanied by an appeal fee as specified in Section 2.09.500, of the Tacoma Municipal Code, shall be submitted:

1. An indication of facts that establish the appellant's right to appeal.
2. An identification of explicit exceptions and objections to the decision being appealed, or an identification of specific errors in fact or conclusion.
3. The requested relief from the decision being appealed.
4. Any other information reasonably necessary to make a decision on the appeal.

NOTE: Failure to set forth specific errors or grounds for appeal shall result in summary dismissal of the appeal.

G. **Where to Appeal.** The Office of the Hearing Examiner. (Ord. 27813 Ex. C; passed Jun. 30, 2009; Ord. 27728 Ex. A; passed Jul. 1, 2008; Ord. 27245 § 5; passed Jun. 22, 2004; Ord. 25852 § 1; passed Feb. 27, 1996)

13.05.060 Applications considered by the Hearing Examiner.

A. **Reclassifications.** A public hearing shall be held by the Hearing Examiner for parcel reclassification of property. The application shall be processed in accordance with provisions of Sections 13.05.010 and 13.05.020. Refer to Section 13.06.650 for criteria which apply to reclassification of property.

B. **Subdivision of Property.** A public hearing shall be conducted by the Hearing Examiner for preliminary plats with ten or more lots. The provisions of Chapter 13.04 for processing of the application shall apply.

C. **Consolidated Review of Multiple Permit Applications and of Environmental Appeals Considered Concurrently.** The Hearing Examiner shall consider concurrently all related land use permit applications for a specific site, and any accompanying environmental appeal. Applications for which the Land Use Administrator has authority shall be transferred to the jurisdiction of the Hearing Examiner to allow concurrent consideration of all land use actions, as prescribed in Section 13.05.040. (Ord. 26934 § 9; passed Mar. 5, 2002; Ord. 25852 § 1; passed Feb. 27, 1996)

13.05.070 Expiration of permits.

(Refer to Table G in Section 13.05.020).

A. **Expiration Schedule.** The following schedule indicates the expiration provisions for land use permits within the City of Tacoma.

	Type of Permit	Maximum Duration
1.	Conditional Use Permit	5 years
2.	Variance	5 years
3.	Site Approval	5 years
4.	Waiver	5 years
5.	Wetland/Stream/FWHCA Development Permits and Wetland/Stream/FWHCA Assessments	5 years
6.	Wetland Delineation Verifications	5 years
7.	Preliminary Plats, Binding Site Plans, Short Plats, Boundary Line Adjustments	5 years to record with Pierce County Auditor
8.	Shoreline Permits	2 years to commence construction; 5 years maximum, possible one-year extension

Conditional use permits for wireless communication facilities, including towers, are limited to two years from the effective date of the Land Use Administrator's decision.

The Hearing Examiner or Land Use Administrator may, when issuing a decision, require a shorter expiration period than that indicated in subsection A of this section. However, in limiting the term of a permit, the Hearing Examiner or Land Use Administrator shall find that the nature of the specific development is such that the normal expiration period is unreasonable or would adversely affect the health, safety, or general welfare of people working or residing in the area of the proposal. The Land Use Administrator may adopt appropriate time limits as a part of action on shoreline permits, in accordance with WAC 173-27-090.

B. Commencement of Permit Term. The term for a permit shall commence on the date of the Hearing Examiner's or Land Use Administrator's decision; provided, that in the event the decision is appealed, the effective date shall be the date of decision on appeal. The term for a shoreline permit shall commence on the effective date of the permit as defined in WAC 173-27-090.

C. When Permit Expired. A permit under this chapter shall expire if, on the date the permit expires, the project sponsor has not submitted a complete application for building permit or the building permit has expired.

D. Extension of Shoreline Permits. In accordance with WAC 173-27-090, the Land Use Administrator may authorize a single extension before the end of the time limit for up to one year if a request for extension has been filed before the expiration date and notice of the proposed extension is given to parties of record and the Department of Ecology. The extension must be based on reasonable factors. (Ord. 27813 Ex. C; passed Jun. 30, 2009; Ord. 27728 Ex. A; passed Jul. 1, 2008; Ord. 27431 § 9; passed Nov. 15, 2005; Ord. 27245 § 6; passed Jun. 22, 2004; Ord. 26195 § 4; passed Jan. 27, 1998; Ord. 25852 § 1; passed Feb. 27, 1996)

13.05.080 Modification/revision to permits.

A. Purpose. The purpose of this section is to define types of modifications to permits and to identify procedures for those actions.

B. Minor Modifications. No additional review for minor modifications to previously approved land use permits is required, provided the modification proposed is consistent with the standards set forth below:

1. The proposal results in a change of use that is permitted outright in the current zoning classification.
2. The proposal does not add to the site or approved structures more than a 10 percent increase in square footage.
3. If a modification in a special condition of approval imposed upon the original permit is requested, the proposed change does not modify the intent of the original condition.
4. The proposal does not increase the overall impervious surface on the site by more than 25 percent.
5. The proposal is unlikely to result in a notable increase in or any new significant adverse affects on adjacent properties or the environment.
6. Any additions or expansions approved through a series of minor modifications that cumulatively exceed the requirements of this section shall be reviewed as a major modification.

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C. Major Modifications. Any modification exceeding any of the standards for minor modifications outlined above shall be subject to the following standards.

1. Major modifications shall be processed in the same manner and be subject to the same decision criteria that are currently required for the type of permit being modified.
2. In addition to the standard decision criteria, the Land Use Administrator or Hearing Examiner shall, in their review and decision, address the applicability of any specific conditions of approval for the original permit.

D. Shoreline Permit Revision.

1. The applicant shall submit detailed plans and text describing the proposed changes in the permit, and how those changes are within the scope and intent of the original permit in accordance with WAC 173-27-100.

E. Conditional Use Permit Revision.

1. Conditional use permits issued for special needs housing facilities pursuant to Sections 13.06.535 and 13.06.640 shall, in addition to the above criteria, be subject to the following additional revision criteria:
 - a. Minor modifications shall include: changes in the number of residents up to 10 percent, minor modifications to the operational plan, and changes of the operating agency or provider to a parent organization or to an equivalent organization (e.g., from one supportive housing provider that is licensed by DSHS to another).
 - b. Major modifications shall include: changes in the mission of the organization, significant changes to the operational plan (changes that could potentially affect the impacts of the facility on the surrounding community), and substantial changes in staffing levels (e.g., increase in number of professional staff by more than 10 percent).

F. PRD District Modifications.

1. Proposed modifications to development approved in a PRD District rezone and/or site approval shall, in addition to the above criteria, be deemed minor only if all the following criteria are satisfied:
 - a. No new land use is proposed;
 - b. No increase in density, number of dwelling units, or lots is proposed; and
 - c. No reduction in the amount of approved open space is proposed, excluding reductions in private yards.

Examples of minor modifications could include, but are not limited to, lot line adjustments, minor relocations of buildings or landscaped areas, minor additions to existing buildings, the construction of accessory buildings, and minor changes in phasing and timing.

2. In addition to the standard criteria applicable to major modifications to a PRD District rezone and/or site approval, such major modifications to fully or partially developed PRD Districts shall only be approved if found to be consistent with the following additional decision criteria:
 - a. The proposed modification shall be designed to be compatible with the overall site design concept of the originally approved site plan. In determining compatibility, the decision maker may consider factors such as the design, configuration and layout of infrastructure and community amenities, the arrangement and orientation of lots, the layout of different uses, and the bulk and scale of buildings, if applicable, with a particular focus on transition areas between existing and proposed development.
 - b. The proposed modification shall be generally consistent with the findings and conclusions of the original PRD rezone decision.
 - c. If the existing PRD District is nonconforming to the current development standards for PRD District, the proposed modification does not increase the district's level of nonconformity to those standards.

G. Other permits. Any modification, whether considered minor or major, may still require approvals other than the type granted for the original development. For example, an existing, permitted conditional use seeking a modification that qualifies as a minor modification to their existing conditional use permit but that also necessitates a variance to a development standard, would not be required to obtain approval of a major modification to their existing conditional use permit or a new conditional use permit but would need to receive a variance permit for the project. (Ord. 27893 Ex. A; passed Jun. 15, 2010; Ord. 27631 Ex. A; passed Jul. 10, 2007; Ord. 27539 § 2; passed Oct. 31, 2006; Ord. 27431 § 10; passed Nov. 15, 2005; Ord. 27431 § 10, passed Nov. 15, 2005; Ord. 26195 § 5, passed Jan. 27, 1998; Ord. 25852 § 1; passed Feb. 27, 1996)

13.05.090 Land Use Administrator approval authority.

No building or development permit shall be issued without prior approval of the Land Use Administrator or his designee with regard to compliance with the Land Use Code or the Environmental Code. (Ord. 27017 § 6, passed Dec. 3, 2002)

13.05.095 Development Regulation Agreements.

A. Purpose. Pursuant to RCW 36.70B.170-210, the purpose of this section is to create an optional application procedure that could authorize certain major projects in key locations to be reviewed, rated, approved, and conditioned according to the extent to which they advance the Comprehensive Plan's goals and policies. In addition to demonstrating precisely how it significantly advances the goals and policies of the Comprehensive Plan by achieving the threshold set forth in subsection 13.05.095(D) TMC, a threshold established based on the Comprehensive Plan goals and policies, a project located within the areas described in B(1) or B(2) must document specific compliance with the policies and standards set forth in the Downtown Element of the Comprehensive Plan.

It is anticipated that there will be a degree of flexibility in the application of the City's development regulations so that any conditions are tailored to the specifics of the proposed project and community vision in such a manner as to ensure that significant public benefits are secured. Project approval is embodied in a contract designed to assure that anticipated public benefits are realized according to agreed upon terms and conditions that may include, but are not limited to, project vesting, timing, and funding of on- and off-site improvements.

The City is authorized, but not required, to accept, review, and/or approve the proposed Development Regulation Agreements. This process is voluntary on the part of both the applicant and the City.

B. Applicability. Development Regulation Agreements shall only be allowed for one of the following project types:

1. Proposed projects located within the International Financial Services Area (IFSA), as defined in the City's Amended Ordinance No. 27825, with a building footprint of at least 15,000 square feet and a proposed height of at least 75 feet;
2. Proposed projects located within the "Working Definition of Downtown," as set forth in Figure 1 in the Downtown Element of the City Comprehensive Plan, provided that the real property involved is subject to a significant measure of public ownership or control, and provided that the project includes a building footprint of at least 15,000 square feet and a proposed height of at least 75 feet;
3. Proposed projects located within the IFSA or the Working Definition of Downtown where the City Landmarks Commission formally certifies that the proposed project is either a historic structure or is directly associated with and supports the preservation of an adjacent historic structure;
4. Proposed projects located on a public facility site, as defined in subsection 13.06.700.P TMC, that are at least five acres in size and are not a public utility site.

C. Application process. An application for a Development Regulation Agreement may only be made by a person or entity having ownership or control of real property within one of the qualifying areas identified in subsection B above. Applications for a Development Regulation Agreement shall be made with the Community and Economic Development Department, solely and exclusively on the current form approved by said Department, together with the filing fee set forth in the current edition of the City's Fee Schedule, as adopted by resolution of the City Council. The City Council shall be notified once a complete application has been received. The City shall give notice under Sections 13.02.057 and 13.02.045.H TMC as if the application were for a land use intensity change.

D. Review criteria. The City Manager, and such designee or designees as may be appointed for the purpose, shall negotiate acceptable terms and conditions of the proposed Development Regulation Agreement based on the following criteria:

1. The Development Regulation Agreement conforms to the existing Comprehensive Plan. Except for projects on a public facility site of at least five acres in size, conformance must be demonstrated by the project, as described in the Development Regulation Agreement, scoring 800 points out of a possible 1000 points, according to the following scoring system (based on the Downtown Element of the City Comprehensive Plan):
 - a. Balanced healthy economy. In any project where more than 60 percent of the floorspace is Class A office space, one point shall be awarded for every 200 square feet of gross floorspace (excluding parking) up to a maximum of 290 points.
 - b. Achieving vitality downtown. Up to 40 points shall be awarded for each of the following categories: (i) CPTED design ("Crime Prevention Through Environmental Design"), (ii) sunlight access to priority public use areas, (iii) view maximization, (iv) connectivity, (v) quality materials and design, (vi) remarkable features, (vii) access to open space, and (viii) street edge activation and building ground orientation.
 - c. Sustainability. Up to 50 points shall be awarded for each of the following categories: (i) complete streets, (ii) transit connections, and (iii) energy conservation design to a L.E.E.D. (Leadership in Energy and Environmental Design)

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certification to a platinum level or certified under another well-recognized rating system to a level equivalent to certification to a platinum level.

d. Quality Urban Design. Up to 60 points shall be awarded for each of the following categories: (i) walk ability, (ii) public environment, (iii) neighborly outlook, and (iv) support for public art.

2. Appropriate project or proposal elements, such as permitted uses, residential densities, nonresidential densities and intensities, or structure sizes, are adequately provided to include evidence that the site is adequate in size and shape for the proposed project or use, conforms to the general character of the neighborhood, and would be compatible with adjacent land uses.

3. Appropriate provisions are made for the amount and payment of fees imposed or agreed to in accordance with any applicable provisions of state law, any reimbursement provisions, and other financial contributions by the property owner, inspection fees, or dedications.

4. Adequate mitigation measures including development conditions under chapter 43.21C RCW are provided.

5. Adequate and appropriate development standards such as maximum heights, setbacks, drainage and water quality requirements, landscaping, and other development features are provided.

6. If applicable, targets and requirements regarding affordable housing are addressed.

7. Provisions are sufficient to assure requirements of parks and open space preservation.

8. Best available science and best management practices shall be used to address critical areas within the property covered by a Development Regulation Agreement adopted pursuant to this section. Review of a development activity's critical area impacts that go beyond those exempted activities identified in Section 13.11.140 TMC shall occur during the Development Regulation Agreement review process, and a separate critical areas permit is not required. Any Development Regulation Agreement approval(s) shall, to the maximum extent feasible, avoid potential impacts to critical areas, and any unavoidable impacts to critical areas shall be fully mitigated, either on- or off-site.

9. Interim uses and phasing of development and construction is appropriately provided. In the case of an interim use of a property or portion of a property, deferrals or departures from development regulations may be allowed without providing a demonstrated benefit to the City; provided, that any departures or deferrals to the Code requested for a final use of the property shall comply with criterion No. 10 below. The agreement shall clearly state the conditions under which the interim use shall be converted to a permanent use within a stated time period and the penalties for noncompliance if the interim use is not converted to the permanent use in the stated period of time.

10. Where a phased Development Regulation Agreement is proposed, a site plan shall be provided and shall clearly show the proposed interim and final use subject to the agreement.

11. In the case of a Development Regulation Agreement where the proposed use would be the final use of the property, it shall be clearly documented that any departures from the standards of the Code, requested by the applicant, are in the judgment of the City, off-set by providing a benefit to the City of equal or greater value relative to the departure requested. In no case shall a departure from the Code be granted if no benefit to the City is proposed in turn by the applicant.

12. Conditions are set forth providing for review procedures and standards for implementing decisions, together with conditions explicitly addressing enforceability of Development Regulation Agreement terms and conditions and applicable remedies.

13. Thresholds and procedures for modifications to the provisions of the Development Regulation Agreement are provided.

14. A build-out or vesting period for applicable standards is provided.

15. Any other appropriate development requirements or procedures necessary to the specific project or proposal are adequately addressed.

16. If appropriate and if the applicant is to fund or provide public facilities, the Development Regulation Agreement shall contain appropriate provisions for reimbursement, over time, to the applicant.

17. Appropriate statutory authority exists for any involuntary obligation of the applicant to fund or provide services, infrastructure, impact fees, inspection fees, dedications, or other service or financial contributions.

18. Penalties for noncompliance with the terms of the Development Regulation Agreement are provided.

19. The building(s) shall be L.E.E.D. certified to a gold level or certified under another well-recognized rating system to be comparable to a building that is L.E.E.D. certified to a gold level.

E. Other standards and requirements.

1. Compliance with the provisions of subsection D above will ensure that the terms of the Development Regulation Agreement are consistent with the development regulations of the City then in effect, except that in the case of Shoreline Management Districts (Chapter 13.10 TMC) and Landmarks and Historic Special Review Districts (Chapter 13.07 TMC), specific compliance with the regulations and procedures of these codes is required.
2. The Development Regulation Agreement shall specify any and all development standards to which its terms and provisions apply. All other applicable standards and requirements of the City or other agencies shall remain in effect for the project.

F. Public hearing and approval process.

1. If the City Manager deems that an acceptable Development Regulation Agreement has been negotiated and recommends the same for consideration, the City Council shall hold a public hearing and then may take final action, by resolution, to authorize entry into the Development Regulation Agreement. In addition, the City Council may continue the hearing for the purpose of clarifying issues or obtaining additional information, facts, or documentary evidence; advice may be sought from the Planning Commission.
2. Because a Development Regulation Agreement is not necessary to any given project or use of real property under the existing Comprehensive Plan and development regulations in effect at the time of making application, approval of a Development Regulation Agreement is wholly discretionary, and any action taken by the City Council is legislative only and not quasi-judicial.
3. The decision of the City Council shall be final immediately upon adoption of a resolution authorizing or rejecting the Development Regulation Agreement.
4. Following approval of a Development Regulation Agreement by the City Council, and execution of the same, the Development Regulation Agreement shall be recorded with the Pierce County Auditor.

G. Modifications. Once a Development Regulation Agreement is approved, no variances or discretionary permits may be applied for. Changes to standards may only be secured by amendment to the Development Regulation Agreement pursuant to amendment thresholds and process set forth in the Development Regulation Agreement.

H. Enforcement. Unless amended pursuant to this section and the terms of the agreement, or terminated, a Development Regulation Agreement is enforceable during its term by a party to the Development Regulation Agreement. A Development Regulation Agreement and the development standards in the Development Regulation Agreement govern during the term of the agreement or for all or that part of the specified build-out period. The Agreement will not be subject to a new or amended zoning ordinance or development standard adopted after the effective date of the Agreement, unless otherwise provided in the Agreement or unless amended pursuant to this section. Any permit or approval issued by the City after the execution of the Agreement must be consistent with the Development Regulation Agreement. (Ord. 27877 Ex. A; passed Mar. 2, 2010)

13.05.100 Enforcement.

- A. Purpose. To ensure that the Land Use Regulatory Code, as well as conditions imposed on land use permits granted by the City, are administered, enforced, and upheld to protect the health, safety and welfare of the general public.
- B. Applicability. A person who undertakes a development or use without first obtaining all required land use permits or other required official authorizations or conducts a use or development in a manner that is inconsistent with the provisions of this title, or who fails to conform to the terms of an approved land use permit or other official land use determination or authorization of the Land Use Administrator, Hearing Examiner, City Council or other authorized official, or who fails to comply with a stop work order issued under these regulations shall be considered in violation of this title and be subject to enforcement actions by the City of Tacoma, as outlined herein.
 1. The Land Use Administrator, and/or their authorized representative, shall have the authority to enforce the land use regulations of the City of Tacoma.
 2. The Land Use Regulatory Code shall be enforced for the benefit of the health, safety and welfare of the general public, and not for the benefit of any particular person or class of persons.
 3. It is the intent of this Land Use Regulatory Code to place the obligation of complying with its requirements upon the owner, occupier, or other person responsible for the condition of the land and buildings within the scope of this title.
 4. No provision of, or term used in, this code is intended to impose upon the City, or any of its officers or employees, any duty which would subject them to damages in a civil action.
 5. Any violation of this title is a detriment to the health, safety, and welfare of the public, and is therefore declared to be a public nuisance.

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6. The enforcement provisions outlined in this chapter shall apply to all sections of Title 13 of the Tacoma Municipal Code. However, if a specific chapter or section contains its own set of enforcement provisions, then such provisions shall be used for enforcement of that chapter and are exempt from the enforcement provisions outlined herein.

C. Enforcement Process

1. Violation Review Criteria. Each violation requires a review of all relevant facts in order to determine the appropriate enforcement response. When enforcing the provisions of this Chapter, the Land Use Administrator and/or their authorized representative should, as practical, seek to resolve violations without resorting to formal enforcement measures. When formal enforcement measures are necessary, the Land Use Administrator and/or their authorized representative should seek to resolve violations administratively prior to imposing civil penalties or seeking other remedies. The Land Use Administrator and/or their authorized representative should generally seek to gain compliance via civil penalties prior to pursuing abatement or criminal penalties. The Land Use Administrator may consider a variety of factors when determining the appropriate enforcement response, including but not limited to:

- a. Severity, duration, and impact of the violation(s), including whether the violation has a probability of placing a person or persons in danger of death or bodily harm, causing significant environmental harm, or causing significant physical damage to the property of another;
- b. Compliance history, including any identical or similar violations or notice of violation at the same site or on a different site but caused by the same party;
- c. Economic benefit gained by the violation(s);
- d. Intent or negligence demonstrated by the person(s) responsible for the violation(s);
- e. Responsiveness in correcting the violation(s); and,
- f. Other circumstances, including any mitigating factors.

2. Stop Work Order

a. The Land Use Administrator and/or their authorized representative shall have the authority to issue a Stop Work Order whenever any use, activity, work or development is being done without a permit, review or authorization required by this title or is being done contrary to any permit, required review, or authorization which may result in violation of this title. The Stop Work Order shall be posted on the site of the violation and contain the following information:

- (1) The street address or a description of the building, structure, premises, or land where the violation has occurred, in terms reasonably sufficient to identify its location;
- (2) A description of the potential violation and a reference to the provisions of the Tacoma Municipal Code which may have been violated;
- (3) A description of the action required to remedy the potential violation, which may include corrections, repairs, demolition, removal, restoration, or any other appropriate action as determined by the Land Use Administrator and/or their authorized representative;
- (4) The appropriate department and/or division investigating the case and the contact person.

b. With the exception of emergency work determined by the Land Use Administrator and/or their authorized representative to be necessary to prevent immediate threats to the public health, safety and welfare or stabilize a site or prevent further property or environmental damage, it is unlawful for any work to be done after the posting or service of a Stop-Work Order until authorization to proceed is provided by the Land Use Administrator and/or their authorized representative

3. Voluntary Compliance. The Land Use Administrator and/or their authorized representative may pursue a reasonable attempt to secure voluntary compliance by contacting the owner or other person responsible for any violation of this title, explaining the violation and requesting compliance. This contact may be in person or in writing or both.

4. Investigation and Notice of Violation

a. The Land Use Administrator and/or their authorized representative, if he or she has a reasonable belief that a violation of this title exists and the voluntary compliance measures outlined above have already been sought and have been unsuccessful, or are determined to not be appropriate, may issue a Notice of Violation to the owner of the property where the violation has occurred, the person in control of the property, if different, or the person committing the violation, if different, containing the following:

- (1) The street address or a description of the building, structure, premises, or land where the violation has occurred, in terms reasonably sufficient to identify its location;

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- (2) A description of the violation and a reference to the provisions of the Tacoma Municipal Code which have been violated;
 - (3) A description of the action required to remedy the violation, which may include corrections, repairs, demolition, removal, restoration, submittal of a work plan or any other appropriate action as determined by the Land Use Administrator and/or their authorized representative;
 - (4) A statement that the required action must be taken or work plan submitted within 18 days of receipt of the Notice of Violation, after which the City may impose monetary civil penalties and/or abate the violation in accordance with the provisions of this chapter;
 - (5) The appropriate department and/or division investigating the case and the contact person.
 - (6) A statement that the person to whom a Notice of Violation is directed may appeal the Notice of Violation to the Hearing Examiner, or his or her designee, including the deadline for filing such an appeal.
 - (7) A statement that if the person to whom the Notice of Violation is issued fails to submit a Notice of Appeal within 10 calendar days of issuance or fails to voluntarily abate the violation within 18 calendar days of issuance, the City may assess monetary penalties, as outlined in the Civil Penalties section below, against the owner of the property, and/or the person in control of the property, if different, and/or the person committing the violation, if different and readily identifiable.
- b. The Notice of Violation shall be served by any one or any combination of the following methods:
- (1) By first-class mail to the last known address of the owner of the property and to the person in control of the property, if different, and/or to the person committing the violation, if different and readily identifiable; or
 - (2) By posting the Notice of Violation in a prominent location on the premises in a conspicuous manner which is reasonably likely to be discovered; or
 - (3) By personal service upon the owner of the property and/or the person in control of the property, if different, and/or the person committing the violation, if different and readily identifiable.
- c. The Land Use Administrator and/or their authorized representative may, with the consent of the owner or occupier of a building or premises, or pursuant to a lawfully issued inspection warrant, enter at reasonable times any building or premises subject to the consent or warrant to perform the duties imposed by the Land Use Regulatory Code.
- d. At the end of the specified timeframe, the site will be re-inspected to see if the condition has been corrected. If the condition has been corrected, the case will be closed. If the condition has not been corrected, Civil Penalties, Abatement, or Criminal Penalties may be imposed against the person and/or persons named in the Notice of Violation, to the discretion of the Land Use Administrator or his/her designee, in accordance with TMC 13.05.100.C.5 through 13.05.100.C.10, below.

5. Civil Penalty

- a. Any person who fails to remedy a violation or take the corrective action described by the Land Use Administrator and/or their authorized representative in a Notice of Violation within the time period specified in the Notice of Violation may be subject to monetary civil penalties. The Civil Penalty will be either:
- (1) Prepared and sent by first-class mail to the owner of the property and/or the person in control of the property, if different, and/or the person committing the violation, if different and readily identifiable; or
 - (2) Personally served upon the owner of the property, and/or the person in control of the property, if different, and/or the person committing the violation, if different and readily identifiable; or
 - (3) Posted on the property or premises in a prominent location and in a conspicuous manner which is reasonably likely to be discovered.
- b. The Civil Penalty shall contain the following:
- (1) A statement indicating that the action outlined by the City in the Notice of Violation must be taken, or further civil penalties may be imposed to the discretion of the Land Use Administrator or his/her designee;
 - (2) The address of the site and specific details of the violation which is to be corrected;
 - (3) The appropriate department and/or division investigating the case and the contact person;
 - (4) A statement that the person to whom the Civil Penalty is directed may appeal the Civil Penalty to the Hearing Examiner, or his/her designee, including the deadline for filing such an appeal. Such Notice of Appeal must be in writing and must be received by the City Clerk's Office, no later than ten days after the Civil Penalty has been issued.
 - (5) A statement that if the person to whom the Civil Penalty is issued fails to submit a Notice of Appeal within ten calendar days of issuance or fails to voluntarily abate the violation indicated in the Notice of Violation, the City may remedy the

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violation through abatement, as outlined below, and bill such costs against the person in control of the property, if different, and/or the person committing the violation, if different and readily identifiable.

c. The site will be re-inspected to see if the condition has been corrected. If the condition has been corrected, the case will be closed. If the condition has not been corrected, a second Civil Penalty may be sent or delivered in accordance with subsection 13.05.100.C.5 above. The monetary civil penalties for violations of this chapter shall be as follows:

(1) First, second, and subsequent civil penalties, \$250;

(2) Each day that a property or person is not in compliance with the provisions of this title may constitute a separate violation of this title and be subject to a separate civil penalty.

d. Civil penalties will continue to accumulate until the violation is corrected.

e. At such time that the assessed civil penalties associated with a violation exceeds \$1,000, a Certificate of Complaint may be filed with the Pierce County Auditor to be attached to the title of the property. A copy of the Certificate of Complaint shall be sent to the property owner and any other identified parties of interest, if different from the property owner.

f. Any person to whom a civil penalty is issued may appeal the civil penalty, as outlined in Section 13.05.100.C.7

6. Abatement

a. In the event that compliance is not achieved through the measures outlined in 13.05.100.C.1 through 13.05.100.C.5, above, or that said measures are not an appropriate means to remedy a violation, to the discretion of the Land Use Administrator or his/her designee, the City may, in addition to collecting monetary civil penalties, remove or correct the violation through a means of abatement.

b. Using any lawful means, the City may enter unsecured property and may remove or correct a violation which is subject to abatement. If the person in control of the premises does not consent to entry, the City may seek such judicial process in Pierce County Superior Court as it deems necessary to effect the removal or correction of such condition.

c. Abatement undertaken on properties regulated under Chapter 13.07 shall be reviewed and approved by the Tacoma Landmarks Preservation Commission, in accordance with the provisions contained in TMC 13.07, prior to abatement.

d. Recovery of Costs

(1) An invoice for abatement costs shall be mailed to the owner of the property over which a Notice of Violation has been directed and/or the party identified in the Notice of Violation, and shall become due and payable to the City of Tacoma within 30 calendar days from the date of said invoice. Provisions for appealing an invoice for abatement costs shall be included on said invoice, as specified in Section 13.05.100.C.8.

(2) Any debt shall be collectible in the same manner as any other civil debt owed to the City, and the City may pursue collection of the costs of any abatement proceedings under this Chapter by any other lawful means, including, but not limited to, referral to a collection agency.

7. Appeals of a Notice of Violation or Civil Penalty

a. A person to whom a Notice of Violation or Civil Penalty is issued may appeal the City's notice or order by filing a request with the City Clerk no later than 10 calendar days after said Notice of Violation or Civil Penalty is issued. Each request for appeal shall contain the address and telephone number of the person requesting the hearing and the name and address of any person who may represent him or her. Each request for appeal shall set out the basis for the appeal.

b. If an appeal is submitted, the Hearing Examiner, or his or her designee, will conduct a hearing, as required by this Chapter, no more than 18 calendar days after the Hearing Examiner or his or her designee issues a Notice of Hearing.

c. If an appeal is submitted, the Hearing Examiner or his or her designee shall mail a Hearing Notice giving the time, location, and date of the hearing, by first-class mail to person or persons to whom the Notice of Violation or Civil Penalty was directed and any other parties identified in the appeal request.

d. The Hearing Examiner, or his or her designee, shall conduct a hearing on the violation. The Land Use Administrator and/or their authorized representative, as well as the person to whom the Notice of Violation or Civil Penalty was directed, may participate as parties in the hearing and each party may call witnesses. The City shall have the burden of proof to establish, by a preponderance of the evidence, that a violation has occurred and that the required corrective action is reasonable, or that the Civil Penalty was appropriately assessed for noncompliance with this Title.

e. The Hearing Examiner shall determine whether the City has established, by a preponderance of the evidence, that a violation has occurred and that the required corrective action is reasonable, or that the Civil Penalty was appropriate and reasonable, and, based on that determination, shall issue a Final Order that affirms, modifies, or vacates the Land Use Administrator's decisions

regarding the alleged violation, the required corrective action, and/or Civil Penalty. The Hearing Examiner's Final Order shall contain the following information:

- (1) The decision regarding the alleged violation including findings of facts and conclusion based thereon;
- (2) The required corrective action, if any;
- (3) The date and time by which the correction must be completed;
- (4) Any additional conditions imposed by the Hearing Examiner regarding the violation and any corrective action;
- (5) The date and time after which the City may proceed with abatement, as outlined in TMC 13.05.100.C.6, if the required corrective action is not completed;
- (6) A statement that any associated civil penalties are affirmed, modified, or waived;
- (7) A statement of any appeal remedies;
- (8) A notice that if the City proceeds with abatement, the costs of said abatement may be assessed against the property owner, person in control of the property, or person committing the violation, if the costs of abatement are not paid in accordance with the provisions of this Chapter.

f. If the person to whom the Notice of Violation or Civil Penalty was directed fails to appear at the scheduled hearing, the Hearing Examiner will enter a Final Order finding that the violation has occurred, or the Civil Penalty Order was appropriate and reasonable, and that abatement may proceed.

g. The Final Order shall be served on the person by one of the methods stated in Section 13.05.100.C.4 of this Chapter.

h. A Final Order of the Hearing Examiner shall be considered the final administrative decision and may be appealed to a court of competent jurisdiction within 21 calendar days of its issuance.

8. Appeals of Abatement Invoice

- a. Any person sent an invoice regarding the costs due for the abatement of a violation may appeal the invoice and request a hearing to determine if the costs should be assessed, reduced, or waived.
- b. A request for appeal shall be made in writing and filed with the City Clerk no later than ten calendar days from the date of the invoice specifying the costs due for the abatement.
- c. Each request for hearing shall contain the address and telephone number of the person requesting the hearing and the name and/ address of any person who will be present to represent him or her.
- d. Each request for hearing shall set out the basis for the appeal.
- e. Failure to appeal an abatement invoice within ten days from the date of the invoice shall be a waiver of the right to contest the validity of the costs incurred in abatement of the violation. The costs will be deemed to be valid and the City may pursue collection of the costs by any lawful means, including, but not limited to, referral to a collection agency.

f. The hearing:

- (1) Shall be scheduled no more than 18 calendar days after the Hearing Examiner or his or her designee issues the Notice of Hearing. The Hearing Examiner or his/her designee shall mail a notice giving the time, location, and date of the hearing by first class mail to person or persons to whom the notice of the costs due for the abatement was directed.
- (2) Shall be held before the Hearing Examiner informally. The department and the person requesting the hearing may be represented by counsel, examine witnesses, and present evidence.
- (3) The Hearing Examiner may uphold the amount billed for the cost of abatement, reduce the amount billed, or waive the costs. Costs shall be collected by any lawful means, including, but not limited to, referral to a collection agency.

g. The determination of the Hearing Examiner is the final administrative decision and may be appealed to a court of competent jurisdiction within 21 calendar days of its issuance.

9. Emergency Abatement

In certain instances, such as an unanticipated and imminent threat to the health, safety, or general welfare of the public or the environment which requires immediate action within a time too short to allow full compliance with the standard procedures outlined in this chapter, the City may seek emergency abatement in order to gain compliance with this title, to the discretion of the Land Use Administrator or his/her designee. Using any lawful means, the City may enter unsecured property and may remove or correct a violation which is subject to abatement. If the person in control of the premises does not consent to entry,

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the City may seek such judicial process in Pierce County Superior Court as it deems necessary to effect the removal or correction of such condition.

10. Criminal Penalty

In certain instances, where the aforementioned enforcement and penalty provisions outlined in this Chapter do not result in compliance or are not an appropriate means for achieving compliance, the Land Use Administrator and/or their authorized representative may refer the matter to the City Attorney for criminal prosecution. Upon conviction, the owner of the property upon which the violation has occurred, and/or the person in control of the property where the violation has occurred, if different, and/or the person committing the violation, if different, may be subject to a fine of up to \$1,000, or imprisonment for not more than 90 days in jail, or by both such fine and imprisonment. Upon conviction and pursuant to a prosecution motion, the court shall also order immediate action by the property owner or person in control of the property to correct the condition constituting the violation and to maintain the corrected condition in compliance with this Title. The mandatory minimum fines shall include statutory costs and assessments.

11. Additional Relief

Nothing in this chapter shall preclude the City from seeking any other relief, as authorized in other provisions of the Tacoma Municipal Code. Enforcement of this Chapter is supplemental to all other laws adopted by the City.

12. Revocation of Permits

Any person, firm, corporation, or other legal entity found to have violated the terms and conditions of a discretionary land use permit within the purview of the Land Use Administrator, Hearing Examiner, City Council, or other authorized official, pursuant to this Title, shall be subject to revocation of that permit upon failure to correct the violation. Permits found to have been authorized based on a misrepresentation of the facts that the permit authorization was based upon shall also be subject to revocation. Should a discretionary land use permit be revoked, the use rights attached to the site and/or structure in question shall revert to uses permitted outright in the underlying zoning district, subject to all development standards contained therein. Revocation of a permit does not preclude the assessment of penalties outlined in Section 13.05.100.C, above. Appeals of the revocation order shall be in accordance with Section 13.05.050. (Ord. 27912 Ex. A; passed Aug. 10, 2010: Ord. 27017 § 7; passed Dec. 3, 2002: Ord. 25852 § 1; passed Feb. 27, 1996)

13.05.105 Sign enforcement. *Repealed by Ord. 27912.*

(Ord. 27912 Ex. A; passed Aug. 10, 2010: Ord. 27893 Ex. A; passed Jun. 15, 2010: Ord. 27245 § 7; passed Jun. 22, 2004: Ord. 27017 § 8; passed Dec. 3, 2002: Ord. 26435 § 2; passed Jun. 8, 1999)

13.05.110 Violations – Penalties. *Repealed by Ord. 27912.*

(Ord. 27912 Ex. A; passed Aug. 10, 2010: Ord. 27539 § 3; passed Oct. 31, 2006: Ord. 25852 § 1; passed Feb. 27, 1996)

RCW 58.17.215

Alteration of subdivision — Procedure.

When any person is interested in the alteration of any subdivision or the altering of any portion thereof, except as provided in RCW 58.17.040(6), 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. 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. If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof.

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. 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. 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.

After approval of the alteration, the legislative body shall order the applicant to produce a revised drawing of the approved alteration of the final plat or short plat, which after signature of the legislative authority, shall be filed with the county auditor to become the lawful plat of the property.

This section shall not be construed as applying to the alteration or replatting of any plat of state-granted tide or shore lands.

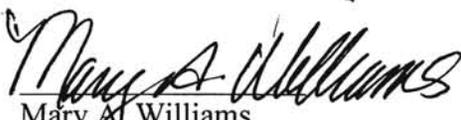
[1987 c 354 § 4.]

FILED
JAN 31 2012
CLERK OF SUPERIOR COURT
TACOMA, WASHINGTON

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2012, I caused to be served via Legal Messenger the foregoing **NORTHSHORE INVESTORS, LLC'S RESPONSE BRIEF TO OPENING BRIEFS OF CITY OF TACOMA AND SAVE NE TACOMA** on the following parties at the following addresses:

<p>Gary D. Huff Steven D. Robinson Karr Tuttle Campbell 1201 Third Avenue, Suite 2900 Seattle, WA 98101 Telephone: (206) 223-1313 Facsimile: (206) 682-7100 Email: ghuff@karrtuttle.com Email: sdrobinson@karrtuttle.com <i>Attorneys for Petitioner Save NE Tacoma</i></p>	<p>Jay P. Derr Dale N. Johnson Duncan M. Greene GordonDerr LLP 2025 First Avenue, Suite 500 Seattle, WA 98121-3140 Telephone: (206) 382-9540 Facsimile: (206) 626-0675 Email: jderr@gordonderr.com Email: djohnson@gordonderr.com <i>Attorneys for Respondent City of Tacoma</i></p>
<p>Paul W. Moomaw Christopher Brain Tousley Brain Stephens PLLC 1700 7th Avenue, Suite 2200 Seattle, WA 98101 Telephone: (206) 682-5600 Facsimile: (206) 682-2992 Email: pmoomaw@tousley.com <i>Attorney for Petitioner North Shore Golf Associates, Inc.</i></p>	


Mary A. Williams