

No. 42490-8-II

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

NORTHSHORE INVESTORS, LLC, a Washington limited liability company; and NORTH SHORE GOLF ASSOCIATES, INC., a Washington corporation; and SAVE NE TACOMA, a Washington non-profit corporation, et al.

Appellants / Cross-Respondents,

v.

CITY OF TACOMA, a Washington municipal corporation,

Respondent / Cross-Appellant.

FILED
STATE OF WASHINGTON
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**OPENING BRIEF
OF CROSS-APPELLANT
CITY OF TACOMA**

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I. INTRODUCTION

This matter involves a LUPA¹ appeal filed by Petitioners Northshore Investors, LLC (“Developer”) and North Shore Golf Associates, Inc. (“NSGA” or “Owners”) (collectively referred to as “Petitioners”) challenging certain land use decisions by the City of Tacoma (“Tacoma” or the “City”). The City’s decisions denied the Petitioners’ request to change the land use designation of the Owners’ property (the “Golf Course Property”), which is currently designated as open space, and their related requests seeking approvals for the proposed development of 860 homes on the Golf Course Property.

The principal land use decision at issue in this appeal was the product of both a written recommendation by the Tacoma Hearing Examiner and an oral vote by the Tacoma City Council to adopt the Examiner’s recommendation. In 2009, the Hearing Examiner issued a written decision that included findings of fact, conclusions of law, and a recommendation that the City Council deny Petitioners’ request to eliminate the Golf Course Property’s open space designation. In 2010, the Tacoma City Council concurred in the Hearing Examiner’s recommendation by voice vote. That oral decision was entered into the public record in several different ways on the night of the Council’s vote

¹ Land Use Petition Act, Chapter 36.70C RCW.

and on the following day. Counsel for the Developer was present at the time of the voice vote.

Petitioners appealed the City Council's decision to the Pierce County Superior Court, which rejected the merits of Petitioners' LUPA appeal and affirmed the City Council's decision. Petitioners now appeal the trial court's decision on the merits of their LUPA appeal to this Court.

In this cross-appeal, Tacoma assigns error to the trial court's prior decision denying the City's motion to dismiss Petitioners' LUPA petition for lack of jurisdiction due to untimely service. LUPA requires filing and service of a petition within 21 days of the issuance of the land use decision. RCW 36.70C.040(3). As discussed below, the City issued its final decision denying Petitioners' request on April 13, 2010. Petitioners admit that they did not serve the LUPA petition on the City until May 6, 2010 – 23 days after the City issued its final decision. Thus, Petitioners' LUPA petition was not timely served and should have been dismissed.

The City respectfully requests that this Court reverse the trial court's order denying its motion to dismiss Petitioners' LUPA petition.

II. ASSIGNMENT OF ERROR AND ISSUES

Assignment of Error to Superior Court's Order

The Superior Court erred in denying the City's motion to dismiss Petitioners' LUPA petition for failure to timely serve the City. Clerk's

Papers (“CP”) 1390-1392 (Order Denying Petitioners SAVE NE Tacoma’s and Respondent City of Tacoma’s Motions to Dismiss LUPA Petition, pp. 1-3) (the “Order”), attached hereto as Appendix A.² *See also* Verbatim Report of Proceedings (“VRP”), Friday, June 18, 2010, attached hereto as Appendix B.³

Issue Pertaining to Assignment of Error

Did the Superior Court err in denying the City’s motion to dismiss Petitioners’ LUPA petition for failure to timely serve the City when (i) the Tacoma City Council adopted the Hearing Examiner’s recommendation by voice vote on April 13, 2010; (ii) that oral decision was entered into the public record on April 13, 2010, and again on April 14, 2010; and (iii) Petitioners admit that they did not serve the City until May 6, 2010, more than 21 days after entry of the Council’s decision into the public record?

III. STATEMENT OF THE CASE

A. Petitioners’ Redevelopment Applications.

On January 29, 2007, the Petitioners submitted applications to Tacoma for permits and approvals to redevelop the Golf Course Property with 860 residential units.⁴ In order to proceed with their redevelopment proposal, Petitioners requested the City’s approval of a “Rezone

² Citations to numbered pages within the Clerk’s Papers are to “CP __,” followed by a parenthetical identifying the document title and page numbers within each document.

³ Citations to the Verbatim Report of Proceedings are to “VRP __.”

⁴ CP 124.

Modification” (processed as a rezone request) that would remove the Golf Course Property’s open space designation.⁵ That designation was established as a voluntary condition of a prior rezone secured by the Owners in 1981 to develop land around the Golf Course Property.⁶ In exchange for the rezone, the Owners agreed to a condition requiring that the Golf Course Property remain in open space use in perpetuity.⁷ Petitioners also requested approval of related applications for a Preliminary Plat and a Site Plan, as well as certain variances/reductions to development standards, wetland/stream assessments, and wetland/stream exemptions.⁸

Under the Tacoma Municipal Code (“TMC”), the City’s Hearing Examiner was responsible for making a recommendation to the City Council regarding the Petitioners’ Rezone Modification request and making a final decision regarding their remaining requests.⁹ The City Council was responsible for making a final decision regarding only the Rezone Modification request.¹⁰

B. Hearing Examiner’s Recommendation and Decision.

The City of Tacoma Hearing Examiner conducted a four-day

⁵ CP 122-24, 130-31.

⁶ CP 124-27.

⁷ CP 124-27.

⁸ CP 122-24.

⁹ CP 166, 186. *See also* TMC 1.23.050(B), 13.04.100(E), 13.04.095.

¹⁰ TMC 1.23.050(A).

hearing from October 12 to 16, 2009, to consider Petitioners' redevelopment applications.¹¹ On January 7, 2010, the Hearing Examiner issued a written decision recommending that the City Council deny the Rezone Modification request and denying the applications for Preliminary Plat and Site Plan approval (the "Examiner's Recommendation and Decision," attached hereto as Appendix C).¹² As a result of this decision, the Examiner did not reach the requests for variances/reductions, wetland/stream assessments, and wetland/stream exemptions.¹³ The Hearing Examiner's decision denying Petitioners' request for Preliminary Plat and Site Plan approval constituted the City's final decision on these matters.¹⁴

Under the TMC, Petitioners were required to appeal the Hearing Examiner's recommendation regarding the Rezone Modification to the City Council prior to seeking judicial review of that issue.¹⁵ Petitioners filed an appeal of the Examiner's recommendation to the Council on January 21, 2010.¹⁶ On January 22, 2010, as required by the TMC, the City mailed a "Notice of Filing of an Appeal" to all parties to the Hearing

¹¹ CP 129-30.

¹² CP 122-42.

¹³ CP 123.

¹⁴ CP 123, 142. *See also* TMC 1.23.050(B).

¹⁵ CP 553-54 (TMC Chapter 1.70, "Appeals to City Council").

¹⁶ CP 537 (Declaration of Aaron Laing ("Laing Decl."), ¶ 5).

Examiner proceeding.¹⁷ Attached to this notice was a copy of TMC Chapter 1.70, which provides as follows at TMC 1.70.050:

Any court action to set aside, enjoin, review, or otherwise challenge the decision of the City Council concerning an appeal shall be commenced in Superior Court within 21 days of the final decision of the City Council. Pursuant to RCW Chapter 36.70C, the final date of the decision of the City Council on the appeal shall be deemed to be the date the motion concerning the appeal is adopted by the City Council and shall be considered to have been entered into the public record on that date.¹⁸

On February 24, 2010, as also required by the TMC, the City mailed a “Notice of Appeal Date” to all parties to the appeal.¹⁹ A copy of TMC Chapter 1.70 is attached hereto as Appendix D.

C. Original LUPA Petition and Stipulation.

On January 28, 2010, Petitioners timely filed and served a LUPA Petition challenging the Hearing Examiner’s decision to deny the applications for Preliminary Plat and Site Plan approval, as well as his decision declining to address Petitioners’ related applications for variances/reductions, wetland/stream assessments, and wetland/stream exemptions (the “Original LUPA Petition”).²⁰

On February 25, 2010, the Petitioners, the City, and Save NE

¹⁷ CP 537-38 (Laing Decl., ¶ 6); CP 549-54 (“Notice of Filing of an Appeal”).

¹⁸ CP 554 (TMC 1.70.050, “Review of Council decision.”).

¹⁹ CP 570-71.

²⁰ CP 144-87.

Tacoma²¹ entered into a stipulation that allowed the Petitioners to amend the Original LUPA Petition, if necessary, to address the City Council's decision regarding the Rezone Modification request (the "Stipulation").²² The parties stipulated that "[o]nce the City Council issues a final decision on the pending appeal, there will be a 21-day LUPA appeal deadline. If the City Council issues a final decision on April 13, 2010, the related appeal deadline would be on or about May 4, 2010."²³ Accordingly, the Stipulation provides:

Within twenty-one (21) days of the issuance of the City Council's final decision on the pending related appeal, Applicants' LUPA petition and / or Save NE Tacoma's LUPA petition may be amended to address the City Council's decision by filing an amended LUPA petition consistent with the requirements of RCW 36.70C.040 and RCW 36.70C.070. The Parties' counsel of record shall accept service of the same, without waiver of any defense other than improper service, via electronic mail and the Court's e-filing system, which service shall be deemed effective as of the date of electronic transmittal. The Parties' agreement to accept service of amended LUPA petitions via electronic mail and the Court's e-filing system shall not waive the defense of improper service relating to the Parties' original LUPA petitions.²⁴

D. City Council's Oral Decision.

On April 8, 2010, the City's legal counsel transmitted to the parties

²¹ On January 28, 2010, four neighboring property owners, Johnnie E. Lovelace, Lois S. Cooper, James V. Lyons and Renee D. Lyons, along with a Washington non-profit corporation Save NE Tacoma (hereinafter collectively "Save NE Tacoma") also filed and served a LUPA appeal challenging various aspects of the City's Decision. *See* CP 388-89.

²² CP 188-202.

²³ CP 189.

²⁴ CP 190.

a copy of a memorandum informing the City Council of the framework for their deliberations and decision (the “Appeal Procedures Memo”).²⁵ The Appeal Procedures Memo presented the Council with four options for action:

1. Remand to the Hearing Examiner to take additional evidence if the Council decides additional information is necessary to make a decision on the rezone.
2. Affirm or concur in the Hearing Examiner decision (which means deny the rezone request), based on the findings and conclusions prepared by the Hearing Examiner.
3. Affirm or concur in the Hearing Examiner decision (deny the rezone request), but with additional findings that the Council might make.
4. Reverse the Hearing Examiner decision (approve the rezone request), in which case the Council will need to prepare findings and conclusions based on its review of the record.²⁶

On April 13, 2010, the City Council heard the Petitioners’ appeal of the Hearing Examiner’s recommendation to deny Petitioners’ Rezone Modification request.²⁷ At the conclusion of the hearing, Mayor Marilyn Strickland moved to concur in the Hearing Examiner’s recommendation and to deny Petitioners’ appeal.²⁸ A roll call vote was taken, the motion was declared adopted and the appeal was declared denied.²⁹ Because the

²⁵ CP 540-41 (Laing Decl., ¶ 6); CP 573-76 (cover email and copy of Appeal Procedures Memo).

²⁶ CP 576.

²⁷ CP 224-91 (Transcript of City Council Appeal Hearing and Voice Vote).

²⁸ CP 283-84.

²⁹ CP 291 (Transcript); CP 211 (Voting Record); CP 294 (Minutes).

Council chose the second option for action described in the Appeal Procedures Memo – to “[a]ffirm or concur in the Hearing Examiner decision (which means deny the rezone request), based on the findings and conclusions prepared by the Hearing Examiner” – the Council’s decision was implemented by voice vote and no written decision was prepared.³⁰ Counsel for the Developer attended the appeal hearing and was present for the Council’s voice vote.³¹

The City Council’s oral decision denying Petitioners’ appeal was immediately entered into the public record on April 13, 2010, by several means, including live webcast on the City’s official web site, live cable television, and a video recording posted on the City’s web site at 8:41 p.m.³² On April 14, 2010, the City again entered the decision into the public record by other means, including posting to the City’s web site a transcript of the closed-captioning provided for the live television broadcast of the appeal hearing, posting to the City’s web site the Voting Record from the hearing, and making available at the Tacoma Public Library a DVD video recording of the hearing.³³ A copy of the transcript posted to the City’s web site on April 14 is attached hereto as Appendix E.

³⁰ CP 576 (Appeal Procedures Memo, p. 3) (emphasis added).

³¹ CP 377.

³² CP 300 (Declaration of Sidney Lee (“Lee Decl.”), ¶¶ 1-4).

³³ CP 300 (Lee Decl., ¶¶ 5-6); CP 204 (Declaration of Wendy Fowler (“Fowler Decl.”), ¶¶ 3-4).

On April 15, 2010, the City mailed a “Notice of Appeal Results” to the parties to the appeal.³⁴ Unlike the prior notices regarding Petitioners’ appeal (the “Notice of Filing of An Appeal” and the “Notice of Appeal Date”) the “Notice of Appeal Results” was not required by the TMC.³⁵ Rather, the “Notice of Appeal Results” was provided as a courtesy to advise the parties of the results of the appeal.³⁶ The “Notice of Appeal Results” stated as follows: “At that time [on April 13, 2010] the City Council moved to concur with the Findings, Conclusions and Recommendation of the Hearing Examiner and denied the appeal.”³⁷ A copy of the “Notice of Appeal Results” is attached hereto as Appendix F.

E. Amended LUPA Petition.

On May 3, 2010, Petitioners filed an amended LUPA petition challenging the City Council’s decision to deny their Rezone Modification request (the “Amended LUPA Petition”).³⁸ The Certificate of Service attached to the Amended LUPA Petition incorrectly states that it was served on the City on April 28, 2010.³⁹ Tacoma’s representatives were available to accept service at all times but did not receive service of the

³⁴ CP 578 (Notice of Appeal Results).

³⁵ CP 633 (Declaration of Doris Sorum, (“Sorum Decl.”), ¶3); CP 553 (TMC 1.70.020, requiring a “Notice of filing of an appeal” and notice of “the date and time of the hearing”).

³⁶ CP 633 (Sorum Decl., ¶3).

³⁷ CP 578.

³⁸ CP 302-349.

³⁹ CP 349.

Amended LUPA Petition by any means until May 6, 2010.⁴⁰ Petitioners admit that they did not serve the Amended LUPA Petition on the City until May 6, 2010.⁴¹

A Corrected Certificate of Service accompanied the Amended LUPA Petition that was served on the City.⁴² This Certificate, signed by counsel for the Developer, states that he caused the Amended LUPA Petition to be served upon counsel for the City of Tacoma via first Class U.S. Mail and e-mail on May 6, 2010.⁴³ The Corrected Certificate of Service also states that “[m]y legal assistant erroneously believed that the pleadings was [sic] being served via ECF e-service at the time the document was e-filed with the Court.”⁴⁴

F. Motion to Dismiss.

On May 14, 2010, the City and Save NE Tacoma filed motions to dismiss the Amended LUPA Petition for failure to timely serve the City within 21 days after entry of the City Council’s oral decision into the public record.⁴⁵ In their response brief and in oral argument, Petitioners incorrectly argued that the TMC required the City to issue a written decision; that the TMC required the City to provide a “Notice of Appeal

⁴⁰ CP 119-20; CP 373-74; CP 351.

⁴¹ CP 519 (Petitioners’ Opposition to Motions to Dismiss, p. 6) (stating that “on May 6, 2010, Petitioners served the Amended LUPA Petition by email on counsel for the City”).

⁴² CP 353-54.

⁴³ CP 354.

⁴⁴ CP 354.

⁴⁵ CP 104-377; CP 378-87.

Results,” which constituted the City’s final, written land use decision; that the City’s land use decision was “issued” pursuant to RCW 36.70C.040(4)(a) three days after the City mailed the “Notice of Appeal Results”; and that the Amended LUPA Petition was therefore timely served on the City within 21 days after the issuance of the decision.⁴⁶

On June 1, 2010, after hearing the parties’ oral argument, the trial court issued the following oral ruling denying the motions to dismiss:

THE COURT: All right. Counsel, I think I've heard enough on this one. I'm going to allow the amended LUPA petition to stand. I think that the written decision is a written codification [of an] oral decision. Given how frequently the City and County Council backtrack on some of their oral decisions, obviously, sending -- reducing it to writing and sending it out, particularly when the Clerk, the City Clerk, is charged with doing that, indicates that the final decision is the written one. Once it's mailed out, there's three days' time for mailing; and then you have 21 days to file a LUPA after that. It was timely filed.⁴⁷

On June 18, 2010, the trial court entered a written order denying the motions to dismiss (the “Order”).⁴⁸

G. Superior Court Order Denying Petitioners’ LUPA Petitions.

The parties then proceeded to brief the merits of Petitioners’ LUPA appeal.⁴⁹ After reviewing the pleadings and hearing the parties’ oral

⁴⁶ CP 514-35; VRP, pp. 10-18.

⁴⁷ VRP, p. 20.

⁴⁸ CP 1390-1392.

⁴⁹ CP 1393-1458; CP 2190-2237; CP 1622-2189; CP 2292-2311.

argument, the trial court denied the Petitioners' LUPA appeal and affirmed the City's decisions in all respects.⁵⁰

Petitioners' appeal of the trial court's decision on the merits, and the City's and Save NE Tacoma's cross-appeals of the trial court's Order denying the motions to dismiss, followed.⁵¹ These appeals are now ripe for review by this Court.

IV. ARGUMENT

A. Standard of Review.

"A superior court hearing a LUPA petition acts in an appellate capacity and with only the jurisdiction conferred by law." *Knight v. City of Yelm*, No. 84831-9 (Wash., December 15, 2011), slip op. at 11 (citing *Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005)). "[B]efore a superior court may exercise its appellate jurisdiction, statutory procedural requirements must be satisfied. A court lacking jurisdiction must enter an order of dismissal." *Id.*

The legislature enacted LUPA in 1995 to serve as the "exclusive means of judicial review of land use decisions." RCW 36.70C.030(1). "LUPA's stated purpose is 'timely judicial review.'" *Habitat Watch v.*

⁵⁰ CP 2315-19. The trial court also denied the LUPA Petition filed by Save NE Tacoma. *Id.* Save NE Tacoma agrees with the result of the trial court's decision but has filed a cross-appeal with this Court addressing certain issues that could provide alternative grounds for affirming her decision.

⁵¹ CP 2320-27; 2338-42; 2343-59.

Skagit County, 155 Wn.2d 397, 406, 120 P.3d 56 (2005) (quoting RCW 36.70C.010). The key jurisdictional requirement under LUPA is timely filing and service: “A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served.” RCW 36.70C.040(2) (emphasis added).

Under LUPA, a party’s failure to timely file and serve the petition on the necessary parties deprives the superior court of jurisdiction. *See* RCW 36.70C.040(2); *Conom*, 155 Wn.2d at 158; *Witt v. Port of Olympia*, 126 Wn. App. 752, 756, 109 P.3d 489 (2005). Washington courts require “strict compliance with LUPA’s procedure,” emphasizing that a “land use petition is barred, and the court may not grant review, if timely service is not completed in accordance with LUPA’s procedures.” *Witt*, 126 Wn. App. at 756 (quoting *Overhulse Neighborhood Ass’n v. Thurston County*, 94 Wn. App. 593, 598, 972 P.2d 470 (1999)).

Because timely filing and service are jurisdictional requirements, the doctrine of substantial compliance does not apply to LUPA’s strict deadline for filing and service. *Overhulse*, 94 Wn. App. at 593. Similarly, the LUPA deadline “cannot be equitably tolled.” *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 381–82, 223 P.3d 1172 (2009).

This Court reviews the trial court’s legal conclusions *de novo*. *See Habitat Watch*, 155 Wn. 2d at 405-6.

B. LUPA Required Dismissal of the Amended LUPA Petition.

The key issue raised by Tacoma’s cross-appeal is whether the “issuance” of the Tacoma City Council’s decision is governed by the provisions of RCW 36.70C.040(4)(a) for written decisions, or by RCW 36.70C.040(4)(c) for decisions rendered by other means and entered into the public record. Because RCW 36.70C.040(4)(c) applies to the City Council’s voice vote, Petitioners’ Amended LUPA Petition was untimely and should have been dismissed.

LUPA’s statute of limitations begins to run on the date a land use decision is “issued.” RCW 36.70C.040(3). RCW 36.70C.040 “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.” *Habitat Watch*, 155 Wn.2d at 406, (citing RCW 36.70C.040(4)(a)-(c)). RCW 36.70C.040(4) provides that the date on which a land use decision is issued is:

- (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;
- (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.

RCW 36.70C.040(4).

The parties agree that the City's Council's decision was not made by ordinance or resolution under RCW 36.70C.040(4)(b).⁵² Thus, the central question at issue in this cross-appeal is whether the City issued a "written decision" under RCW 36.70C.040(4)(a) or issued a decision "in some other fashion" under RCW 36.70C.040(4)(c), such as an oral decision. *See Habitat Watch*, 155 Wn.2d at 406.

The trial court ruled that the City issued a written decision under RCW 36.70C.040(4)(a). This ruling was based on erroneous interpretations of the TMC, LUPA, and relevant case law. Contrary to Petitioners' arguments and the trial court's Order, the City was not required to issue a written decision in this case, and in fact did not issue a written decision. The City Council made its decision when it adopted by voice vote a motion to concur in the Hearing Examiner's findings, conclusions, and recommendation. This oral decision was "issued" under RCW 36.70C.040(4)(c) when it was immediately entered into the public record on April 13, 2010 (and again on April 14). As a result, Petitioners' service on the City was untimely, and the trial court erred in denying the

⁵² CP 517; CP 518; CP 541; VRP, p. 18.

motions to dismiss.

1. The City Council Issued an Oral Decision, Not a Written Decision.

In an effort to overcome their failure to timely serve the Amended LUPA Petition, the Petitioners have asserted that the City Council's decision was a "written decision" under RCW 36.70C.040(4)(a). However, the record in this appeal and the case law interpreting LUPA confirm that the City Council issued an oral decision, not a written decision.

As a factual matter, the record shows that the City made its decision to deny the appeal orally, not in writing. Petitioners admit that the Council "orally voted to deny the appeal."⁵³ The Council's voice vote to adopt the motion to concur in the Hearing Examiner's findings, conclusions, and recommendation and to deny the appeal is documented in the transcript of the April 13, 2010, hearing.⁵⁴

The nature of the Council's oral decision did not change when the City mailed the "Notice of Appeal Results" to the parties. It is clear from the title and plain language of this notice that it does not constitute the

⁵³ CP 518; CP 541 (Laing Decl., ¶ 16).

⁵⁴ CP 224-91. The Council's oral decision was consistent with TMC 1.70.050, which provides that "the final date of the decision of the City Council on the appeal shall be deemed to be the date the motion concerning the appeal is adopted by the City Council ..." CP 554.

City's decision.⁵⁵ Rather, the Notice of Appeal Results merely advised the parties of the Council's oral decision, consistent with the City's historic practice of providing such courtesy notice.⁵⁶ The notice speaks in descriptive, past-tense terms (such as "heard," "moved," and "denied") rather than active, present tense terms ("is," "shall," or "hereby").⁵⁷ Because the City Council made its final decision by voice vote before the "Notice of Appeal Results" was generated and mailed, that notice cannot constitute a "written decision . . . mailed by the local jurisdiction" under RCW 36.70C.040(4)(a).⁵⁸

On the contrary, RCW 36.70C.040(4)(c) specifically applies to "decisions made orally at a city council meeting." *Habitat Watch*, 155 Wn.2d at 408 n. 5. In *Habitat Watch*, the court discussed "two possible interpretations of the language in RCW 36.70C.040(4)(c)" and described the "more likely interpretation" as follows:

[I]f a decision is neither written (as provided for in subsection (a)) nor made by ordinance or resolution

⁵⁵ CP 587.

⁵⁶ CP 633 (Sorum Decl., ¶3).

⁵⁷ CP 587.

⁵⁸ Nor was the "Notice of Appeal Results" a "notice that a written decision is publicly available" under RCW 36.70C.040(4)(a). The "Notice of Appeal Results" did not mention the existence of any written decision or indicate that a written decision would be publicly available at any particular location. CP 587. This is because no such written decision existed. Simply put, to provide notice of the results of a decision is not the same as providing notice that a copy of a written decision is publicly available. Thus, neither prong of RCW 36.70C.040(4)(a) (a "written decision" that is "mailed by the local jurisdiction" or a "notice that a written decision is publicly available") is applicable in this case.

(subsection (b)), then it is issued on the date it is entered into the public record. Subsection (c), then, does not include decisions covered under subsections (a) and (b), but would include other types, such as decisions made orally at a city council meeting. These decisions would be issued when the minutes from the meeting are made open to the public or the decision is otherwise memorialized such that it is publicly accessible.

Id. (emphasis added). Thus, the court in *Habitat Watch* clearly indicated that RCW 36.70C.040(4)(c) should be interpreted to encompass “decisions made orally at a city council meeting,” such as the decision made by the Tacoma City Council on April 13, 2010. *Id.* Such decisions are issued when the decision is “memorialized such that it is publicly accessible,” as was done by the City on both April 13, 2010, and April 14, 2010. *Id.*

Washington courts have repeatedly held that orally-announced land use decisions are “issued” when they are entered into the public record, unless one of the following circumstances applies: (1) the materials entered in the public record are not sufficient to identify the scope and terms of the decision; (2) some further action is required to make the decision “final”; or (3) the decision maker later executes a formal decision document that was prepared in advance and speaks in present-tense terms (such as “shall”). *Habitat Watch*, 155 Wn.2d at 408 n. 5 (holding that an oral land use decision is issued when it is “publicly accessible”); *Vogel v. City of Richland*, 161 Wn. App. 770, 255 P.3d 805

(2011) (holding that an oral land use decision is issued when “its scope and terms have been memorialized in some tangible, accessible way”); *King’s Way Foursquare Church v. Clallam County*, 128 Wn. App. 687, 690-692, n. 6, 116 P.3d 1060 (2005) (holding that “an oral vote will not be final if further action is deemed necessary to complete it – for example, when a vote to approve a variance is followed by a written order setting forth detailed conditions”); *Hale v. Island County*, 88 Wn. App. 764, 769, 946 P.2d (1997) (holding that a document signed after an oral vote was a “written decision” because the document was written before the vote was taken and “used the present tense”).

None of these limited circumstances applies in this case. First, the materials entered into the public record by Tacoma were more than sufficient to identify the scope and terms of the City Council’s oral decision. In *Vogel*, the court held that certain documents were insufficient to identify the scope and terms of the land use decision because, for example, they “gave no indication of what classification of road would later be constructed, or that a road would be constructed at all.” 161 Wn. App. at 779. Here, by contrast, the records reflecting the Council’s oral decision clearly identified the scope and terms of that decision by providing video and a text transcript of the entire Council appeal hearing and by referencing the Examiner’s Recommendation and Decision (which

had previously been made publicly available). The Council's decision was unambiguous and required no further explanation.

On April 13, the City made a live video broadcast of the entire appeal hearing available on its web site and cable television and subsequently posted a video recording on the web site.⁵⁹ On April 14, the City made publicly available additional records reflecting the decision, including a transcript of the appeal hearing, the Council's Voting Record, and a DVD video recording of the hearing.⁶⁰ Unlike the records at issue in *Vogel*, these records fully disclosed the scope and terms of the Council's oral decision.

Second, no further action was required to make the Tacoma City Council's decision in this case "final." The court in *Hale* suggested that an oral land use decision may not be final, for example, "when a vote to approve a variance is followed by a written order setting forth detailed conditions." *Hale*, 88 Wn. App. at 769. Here, because the Council adopted the Hearing Examiner's previously-issued findings, conclusions, and recommendation without change, there was no need for a written order to follow the Council's oral decision.

Finally, the Tacoma City Council did not subsequently execute a formal decision document. In *Hale*, the Board of Island County

⁵⁹ CP 300 (Lee Decl., ¶¶ 1-4).

⁶⁰ CP 300 (Lee Decl., ¶¶ 5-6); CP 204 (Fowler Decl., ¶¶ 3-4).

Commissioners (“BICC”) initially acted orally by taking a vote at a public hearing, but unlike the Tacoma City Council, the BICC later signed and had attested a decision document that had been “prepared in advance” of the public hearing. *Hale*, 88 Wn. App. at 769. The *Hale* court went out of its way to emphasize that “[t]he document was not written after the decision was made.” *Id.* Moreover, the document signed by the BICC “used the present tense” in describing the action taken by the BICC: “the ‘use described in this permit shall be undertaken.” *Id.* (emphasis added). Based on the language of the document, the *Hale* court determined that the decision was a written decision and, therefore, RCW 36.70C.040(4)(a) applied.

In this case, by contrast, no such decision document was prepared in advance and formally executed. The “Notice of Appeal Results” was, in fact, “written after the decision was made.” *See id.*⁶¹ Furthermore, unlike the document signed by the BICC in *Hale*, the “Notice of Appeal Results” spoke in the past tense in describing the action taken by the Tacoma City Council.⁶² Thus, the material facts emphasized by the *Hale* court in finding that the BICC’s decision was made in writing are not

⁶¹ *See also* CP 578.

⁶² *See* CP 578 (Notice of Appeal Results, stating that the Council “heard” the appeal and “moved” to concur with the Hearing Examiner’s Findings, Conclusions and Recommendation, and “denied” the appeal); *compare* *Hale*, 88 Wn. App. at 769.

present in this case.⁶³ Rather, this case presents a decision that was undertaken by voice vote, which required no further explanation or action by the City. The decision was made and issued at the time the voice vote was taken and nearly simultaneously entered into the public record.

In short, the LUPA case law addressing the issuance of oral and written decisions confirms that the Tacoma City Council made an oral decision in this case, and did not issue a written decision.

2. The City Council Was Not Required to Issue a Written Decision.

Contrary to Petitioners' assertions before the trial court, the City was not required to issue a written decision in this case.⁶⁴ Nothing in LUPA or the TMC required the City to issue a written decision when the City Council chose to simply affirm the Hearing Examiner's recommendation based on the findings and conclusions that had already been prepared by the Examiner. In fact, both LUPA and the TMC contemplate that some land use decisions will be made orally rather than in writing.

a. LUPA does not require a written decision.

Before the trial court, Petitioners suggested that LUPA always

⁶³ Moreover, after *Hale* was decided by Division I, the Supreme Court altered the legal landscape regarding when a land use decision is "issued" through the facts and reasoning in *Habitat Watch*, 155 Wn.2d 397.

⁶⁴ See CP 518-19; CP524; CP 543; VRP, pp. 10-20.

requires a written decision that must be attached to a LUPA petition under RCW 36.70C.070(4).⁶⁵ However, LUPA does not require local governments to issue written decisions in all cases. In fact, the statute specifically anticipates that some land use decisions will be made orally. Petitioners' reading of the statute ignores the plain language of LUPA and the Supreme Court's decision in *Habitat Watch*.

Although LUPA includes numerous references to the possibility of a "written decision,"⁶⁶ RCW 36.70.C.040(4) confirms that a decision may be "made by ordinance or resolution," may be a "written decision" other than an ordinance or resolution, or may be made in some other way. Moreover, RCW 36.70C.070(4) specifically recognizes that a decision might not be written. This provision requires LUPA petitions to set forth "[i]dentification of the decision-making body or officer, together with a duplicate copy of the decision, or, if not a written decision, a summary or brief description of it." RCW 36.70.C.70(4) (emphasis added). Thus, contrary to Petitioners' suggestion, LUPA does not require a written decision.

Finally, case law confirms that local governments may orally issue land use decisions under LUPA. *Habitat Watch*, 155 Wn.2d at 405, n.5 (decisions may be "made orally at a city council meeting" under RCW

⁶⁵ See CP 543 (Laing Decl., ¶ 22).

⁶⁶ See RCW 36.70.C.040(2)(b)(i)-(ii), (2)(c), .040(2)(d), .040(4)(a), .040(5)(a), .070(4).

36.70C.040(4)(c)). *See also Vogel*, 161 Wn. App. at 780; *King's Way Foursquare Church*, 128 Wn. App. at 690-692, n. 6; *Hale*, 88 Wn. App. at 769.

b. The TMC does not require a written decision.

Nor was a written decision required by TMC 1.70.030, which provides as follows:

The City Council shall accept, modify, or reject any findings or conclusions, or remand the recommendation of the Hearing Examiner for further hearing. Any decision of the City Council shall be based on the original record of the hearing conducted by the Hearing Examiner; however, the Council, at its discretion, may publicly request additional information of the parties to an appeal, or from the Hearing Examiner. 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.⁶⁷

Under the plain language of TMC 1.70.030, a written decision specifying the Council's findings and conclusions is only required "whenever such findings and conclusions are different from those of the appealed recommendation," such as when the Council chooses to modify or reject the Hearing Examiner's findings and conclusions. When the Council chooses to accept and concur in the Hearing Examiner's findings and conclusions, as it did in this case, the Council may simply adopt the Examiner's findings and conclusions by voice vote. Under these

⁶⁷ CP 553 (emphasis added).

circumstances, no written decision is required by the TMC or needed as a practical matter.

This reading of TMC 1.70.030 is consistent with rules of statutory construction applied by courts when interpreting municipal ordinances. *See Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 41, 156 P.3d 185 (2007) (municipal ordinances are construed according to the rules of statutory construction). Courts construe legislative acts as a whole and, whenever possible, harmonize the provisions of an act to insure its proper construction. *Alpine Lakes Protection Soc. v. Washington State Dept of Ecology*, 135 Wn. App. 376, 390, 144 P.3d 385 (2006)). Constructions that would render a portion of a statute “meaningless or superfluous” should be avoided. *Ford Motor Co.*, 160 Wn.2d at 41.

By recognizing that some City Council decisions will be made orally, the City’s interpretation of TMC 1.70.030 harmonizes the provisions of TMC 1.70.030, TMC 1.70.040 and TMC 1.70.050. TMC 1.70.040 provides that “[t]he City Council may adopt all or portions of the Hearing Examiner’s findings and conclusions supporting the recommendation.”⁶⁸ TMC 1.70.050 provides that “[p]ursuant to RCW Chapter 36.70C, the final date of the decision of the City Council on the appeal shall be deemed to be the date the motion concerning the appeal is

⁶⁸ CP 554.

adopted by the City Council . . .”⁶⁹

When read together, these provisions allow the City Council to issue a final land use decision by simply passing a voice vote motion, rather than preparing a new written decision, in cases where the Council agrees with all of the Hearing Examiner’s findings and conclusions. In cases where the Council disagrees with some or all of the Examiner’s findings and conclusions, the Council must prepare a written decision specifying any “findings and conclusions [that] are different from those of the appealed recommendation” and adopt those findings and conclusions by motion at a later date.⁷⁰ Thus, consistent with LUPA’s purpose to expedite land use decision making, the City’s interpretation allows the Council to immediately issue an oral decision concurring with all of the Examiner’s findings and conclusions, or, if necessary, to prepare any new written findings and conclusions and orally adopt that document at a later date.

Petitioners’ argued interpretation, by contrast, misconstrues TMC 1.70.030 to require a written decision in all cases. This interpretation fails to harmonize the provisions of the TMC. If the Council’s oral decisions were always issued by the mailing of a subsequently-prepared “written decision” under RCW 36.70C.040(4)(a), there would be no need for the

⁶⁹ CP 554.

⁷⁰ CP 553-54.

language in TMC 1.70.050 providing that the Council’s final decision occurs on the date of the Council’s adoption of “the motion concerning the appeal.”⁷¹ Petitioners’ interpretation renders that language superfluous. The Court should reject Petitioners’ strained argument that the TMC requires a written decision in all cases.

c. The TMC does not require the City to provide a “Notice of Appeal Results.”

Petitioners incorrectly argued, and the trial court erroneously ruled, that the TMC required the City to provide a “Notice of Appeal Results.”⁷² One of the stated bases for the trial court’s ruling was that “the City Clerk is charged with doing that [providing a ‘Notice of Appeal Results’].”⁷³ However, as noted above, unrebutted evidence in the record confirms that the TMC does not require a “Notice of Appeal Results.”⁷⁴ The TMC only requires a “Notice of Filing of an Appeal” and a “Notice of Appeal Date,” not a “Notice of Appeal Results.”⁷⁵

Moreover, the TMC provision cited by Petitioners before the trial court does not support their argument. Petitioners cited TMC 1.06.100 for the proposition that the City Clerk was required to provide a “Notice of

⁷¹ CP 554.

⁷² CP 518; VRP, pp. 13, 20.

⁷³ VRP, p. 20.

⁷⁴ CP 633 (Sorum Decl., ¶3).

⁷⁵ CP 553 (TMC 1.70.020, requiring “notice of filing of an appeal” and notice of “the date and time of the hearing of the appeal”).

Appeal Results.”⁷⁶ TMC 1.06.100 sets forth no such requirement. It is simply a general provision requiring the City Clerk to “[p]ublish all legal notices.”⁷⁷

Petitioners also quoted a statement from the City’s web site that the City Clerk’s office “sends a variety of notices to appellants and/or applicants, publishes notices of appeal hearings, and maintains files on appeals.”⁷⁸ This statement does not reference a “Notice of Appeal Results” (as opposed to “notices of appeal hearings”). In any event, the quoted language is not included in the TMC and is not binding on the City.

3. The City Council’s Oral Decision Was Issued When it Was Entered into the Public Record on April 13.

Oral land use decisions are “issued” on the “date of the first public record finalizing the change.” *Vogel*, 161 Wn. App. at 780. In his concurrence and dissent in *Habitat Watch*, Justice Sanders observed that land use decisions issued under RCW 36.70C.040(4)(c) are “entered into the public record” when they are “filed in a public office open to public inspection.” 155 Wn.2d at 423 (J. Sanders, partially concurring and partially dissenting).

Here, the first records finalizing the Council’s oral decision were

⁷⁶ CP 517-18; CP 527; CP 542; VRP, pp. 13-15.

⁷⁷ CP 583.

⁷⁸ CP 517; CP 542; CP 580-82.

made open to public inspection on April 13.⁷⁹ Additional records reflecting the Council's decision were made open to public inspection on April 14.⁸⁰ There can be no doubt that these records became part of the "public record" under RCW 36.70C.040(4)(c) when they were made available to the public on April 13 and April 14.

Notwithstanding Petitioners' feigned surprise that the City would make records available by "posting things on the City's web site,"⁸¹ the posting of public records to an agency's web site is an increasingly common way to make them available. Because this approach saves public resources, it was recently endorsed by the Legislature when it amended the Public Records Act, RCW 42.56 ("PRA"), to allow agencies to make public records available in response to requests by "providing an internet address and link on the agency's web site to the specific records requested." See SSB 6367 (2010) (amending RCW 42.56.520) ("Agencies are encouraged to make commonly requested records available on agency web sites.").⁸²

Thus, the Council's oral decision was "issued" on April 13, when

⁷⁹ CP 300 (Lee Decl., ¶¶ 1-4).

⁸⁰ CP 300 (Lee Decl., ¶¶ 5-6); CP 204 (Fowler Decl., ¶¶ 3-4).

⁸¹ CP 526.

⁸² In his concurrence and dissent in *Habitat Watch*, Justice Sanders indicated that it is appropriate to look to the PRA when interpreting LUPA, and that if a record is "discoverable" under the PRA, it meets the definition of "issued" under RCW 36.70C.040(4)(c)." *Habitat Watch*, 155 Wn.2d at 423. The records reflecting the Council's voice vote were undeniably discoverable under the PRA's broad definition of public records. See RCW 42.56.010(2).

the City made video of the hearing available on its web site and cable television.⁸³ At the latest, the decision was issued on April 14, when the City entered into the public record additional documents reflecting the Council's decision.⁸⁴ In either event, Petitioners did not serve their Amended LUPA Petition on the City within 21 days of the issuance of the Council's oral decision.

4. Petitioners Did Not Serve the City Within 21 Days of the Issuance of the City Council's Oral Decision.

Petitioners admit that they did not serve the Amended LUPA Petition on the City until May 6, 2010.⁸⁵ May 6 is 23 days after April 13 and 22 days after April 14.

5. Petitioners Had Ample Notice that the LUPA Deadline Was May 4.

In briefing before the trial court, the Petitioners argued that, under the City's position, "no petitioner or interested party could ever hope to know when a land use decision is 'issued,'" and the City could "trap unsuspecting appellants" into missing the LUPA deadline.⁸⁶ However, the record confirms that the Petitioners had ample notice that the Council's decision was issued on April 13 and that the LUPA deadline was therefore

⁸³ CP 300 (Lee Decl., ¶¶ 1-4).

⁸⁴ CP 300 (Lee Decl., ¶¶ 5-6); CP 204 (Fowler Decl., ¶¶ 3-4).

⁸⁵ CP 519 (Petitioners' Opposition to Motions to Dismiss, p. 6) (stating that "on May 6, 2010, Petitioners served the Amended LUPA Petition by email on counsel for the City").

⁸⁶ CP 527.

May 4.

Before the Council appeal hearing, the City provided Petitioners with a copy of TMC 1.70.050, which provides that “[p]ursuant to RCW Chapter 36.70C, the final date of the decision of the City Council on the appeal shall be deemed to be the date the motion concerning the appeal is adopted by the City Council and shall be considered to have been entered into the public record on that date.”⁸⁷ This statement is consistent with the City’s historic practice and its actions taken on April 13 to enter the Council’s oral vote into the public record. TMC 1.70.050 put Petitioners on notice that the decision would be entered into the public record and issued on the same date that the Council’s motion was adopted.⁸⁸ Similarly, the Stipulation put Petitioners on notice that, “[i]f the City Council issues a final decision on April 13, 2010, the related appeal deadline would be on or about May 4, 2010.”⁸⁹ Finally, it was clear from the language of the “Notice of Appeal Results” that the City’s decision was made on April 13, 2010. Accordingly, Petitioners had ample notice

⁸⁷ CP 554.

⁸⁸ The City does not argue that the language of TMC 1.70.050 itself resulted in the entry of the Council’s oral decision into the public record. Instead, the City’s position is that TMC 1.70.050 is consistent with its practice of taking action to enter that decision into the public record. Nor does the City suggest, contrary to Petitioners’ arguments before the trial court, that the City is entitled to unilaterally determine when a land use decision is “issued.” *See* CP 526-27. Rather, the facts of this case, in light of the provisions of LUPA and related case law, dictate that the Council’s oral land use decision was “issued” when it was entered into the public record.

⁸⁹ CP 189.

of the decision in advance of the LUPA deadline. They were well aware of the deadline based on the City's decision on April 13. Indeed, counsel for the Developer was present at the voice vote on April 13. Petitioners nevertheless failed to timely serve the City.

Petitioners' suggestion that they were somehow misled or surprised by the May 4 deadline is disingenuous. Indeed, Petitioners have admitted that their delayed service of the City on May 6 was the result of a clerical error, not a misunderstanding or miscalculation of the appeal deadline.⁹⁰ As noted above, equitable tolling is not available under LUPA, but even if it were, Petitioners have not shown that they were actually misled by the City's process. *See Millay v. Cam*, 135 Wash.2d 193, 206, 955 P.2d 791 (1998) ("The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.").

For these reasons, the trial court should have dismissed Petitioners' Amended LUPA Petition.

C. The Original LUPA Petition Should Also Have Been Dismissed.

Dismissal of the Petitioners' Amended LUPA Petition, which sought review of the City's denial of their Rezone Modification request,

⁹⁰ CP 354 ("My legal assistant erroneously believed that the pleadings was [sic] being served via ECF e-service at the time the document was e-filed with the Court.").

also required dismissal of Petitioners' Original LUPA Petition, which sought review of the City's denial of their related applications for Preliminary Plat and Site Plan approval.⁹¹ It is impossible to provide the relief Petitioners seek in the Original LUPA Petition in the absence of the Rezone Modification. If the Amended LUPA Petition is dismissed, the Golf Course Property's open space designation will necessarily remain in place. It is not possible to approve a Preliminary Plat and Site Plan for a residential development on land designated as open space. As the Hearing Examiner noted, "The inability to approve the Rezone Modification, makes approval of the Site Plan impossible."⁹²

RCW 58.17.195 specifically provides that "[n]o plat or short plat may be approved unless the City . . . makes a formal written finding of fact that the proposed subdivision or proposed short subdivision is in conformity with any applicable zoning ordinance or other land use control that may exist." Accordingly, preliminary plat approval cannot conflict with applicable land use controls. *Loveless v. Yantis*, 82 Wn.2d 754, 762, 513 P.2d 1023 (1973). In *Loveless*, a developer submitted a preliminary plat design that included buildings as tall as 110 feet. *Loveless*, 82 Wn.2d at 760. The suburban-agriculture use district, where the land was located, only allowed buildings up to 35 feet high. *Id.* The court concluded that

⁹¹ Petitioners have never contested this fact in any proceedings below.

⁹² CP 142.

“the plat cannot be granted preliminary approval since on its face it violates the controlling zoning ordinances.” *Id.* at 762.

Similarly, in the instant case Petitioners seek Preliminary Plat and Site Plan approval that conflicts with the condition requiring the Golf Course to remain as open space.⁹³ Because any subdivision and residential development of the Golf Course will necessarily conflict with the applicable land use designation, the trial court could not have granted the relief Petitioners sought: Preliminary Plat and Site Plan approval. Accordingly, the Original LUPA Petition should also have been dismissed.

V. CONCLUSION

The undisputed facts in the record confirm that the City Council’s decision was made orally on April 13, 2011, and was entered into the public record on both April 13, 2011, and April 14, 2011. Petitioners admit that they did not serve the City until May 6. Under these facts, the Amended LUPA Petition was not timely served on the City. As a result, the Superior Court lacked jurisdiction and should have dismissed the Amended LUPA Petition. Dismissal of the Amended LUPA Petition also required dismissal of the Original LUPA Petition.

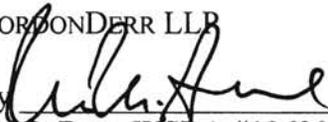
Thus, for the reasons stated herein, the City respectfully requests

⁹³ CP 125.

that the Court reverse the Superior Court's Order denying the motions to dismiss for lack of jurisdiction and remand with instructions to dismiss both the Amended LUPA Petition and the Original LUPA Petition.

RESPECTFULLY SUBMITTED this 30th day of December, 2011.

GORDON DERR LLP

By 

Jay P. Derr, WSBA #12620

Dale N. Johnson, WSBA #26629

Duncan M. Greene, WSBA #36718

Attorneys for Respondent

City of Tacoma

CERTIFICATE OF SERVICE

I, Jessica Roper, under penalty of perjury under the laws of the State of Washington, declare as follows:

On the date and in the manner indicated below, I caused a true and correct copy of Cross-Appellant City of Tacoma's Opening Brief and Appendices A through F to be served on the following:

COURT OF APPEALS DIVISION II
c/o Court of Appeals Division I
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Seattle, WA 98101-1176

By United States Mail
 By Legal Messenger
 By Facsimile

NORTHSHORE INVESTORS LLC
Aaron M. Laing
Schwabe Williamson & Wyatt
1420 Fifth Avenue, Suite 3400
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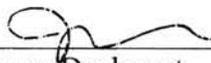
NORTH SHORE GOLF ASSOCIATES
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 By Legal Messenger
 By Facsimile

DATED this 30th day of December, 2011.



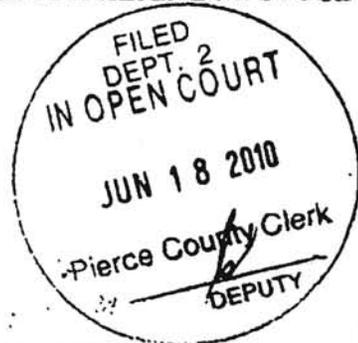
Jessica Roper, Declarant

STATE OF WASHINGTON
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APPENDIX A



THE HONORABLE KATHERINE M. STOLZ



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

NORTHSHORE INVESTORS, LLC, a
Washington limited liability company, and
NORTH SHORE GOLF ASSOCIATES,
INC., a Washington corporation; and
SAVE NE TACOMA, a Washington non-
profit corporation,

Petitioners,

vs.

CITY OF TACOMA, a Washington municipal
corporation,

Respondent.

No. 10-2-05930-5

ORDER DENYING PETITIONERS
SAVE NE TACOMA'S AND
RESPONDENT CITY OF TACOMA'S
MOTIONS TO DISMISS LUPA
PETITION

~~PROPOSED~~

THIS MATTER has come before the Honorable Judge Katherine M. Stolz upon
Petitioners Save NE Tacoma's and Respondent City of Tacoma's Motions to Dismiss LUPA
Petition.

The Court considered the following documents:

1. Land Use Petition Pursuant to RCW 36.70C *et seq.*, filed January 28, 2010.
2. Amended Land Use Petition Pursuant to RCW 36.70C *et seq.*, filed May 3,
2010.
3. Respondent City of Tacoma's Motion to Dismiss LUPA Petition, filed
May 14, 2010.

ORDER DENYING PETITIONER'S AND RESPONDENT'S
MOTIONS TO DISMISS LUPA PETITION ~~PROPOSED~~ - 1

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Telephone 206 522.1711 Fax 206.292.0460

- 1 4. Declaration of Dale N. Johnson, Exhibit A to #3, above.
- 2 5. Declaration of Wendy Fowler, Attachment 4 to #3, above.
- 3 6. Declaration of Sidney Lee, Attachment 6 to #3, above.
- 4 7. Declaration of Doris Sorum, Attachment 11 to #3, above.
- 5 8. Declaration of Amanda Kleiss-Acres, Exhibit B to #3, above.
- 6 9. Declaration of Jay P. Derr, Exhibit C to #3, above.
- 7 10. Petitioners Save NE Tacoma, Lovelace, Cooper and Lyons's Motion to
- 8 Dismiss LUPA Petition and Joinder in Respondent City of Tacoma's Motion to Dismiss
- 9 LUPA Petition, filed May 14, 2010.
- 10 11. Declaration of Steven D. Robinson, filed May 14, 2010.
- 11 12. Declaration of Gary D. Huff, filed May 14, 2010.
- 12 13. Petitioners' Opposition to Respondent City of Tacoma's and Petitioner Save
- 13 NE Tacoma's Motions to Dismiss Amended LUPA Petition, filed June 1, 2010.
- 14 14. Declaration of Paul W. Moomaw, filed June 1, 2010.
- 15 15. Declaration of Aaron M. Laing, filed June 1, 2010.
- 16 16. Respondent City of Tacoma's Reply to Defendant's *[sic]* Response to
- 17 Tacoma's Motion to Dismiss LUPA Petition, filed June 7, 2010.
- 18 17. Declaration of Duncan M. Green, Appendix A to #16, above.
- 19 18. Declaration of Doris Sorum, Attachment 1 to #16, above.
- 20 19. Petitioners Save NE Tacoma, Lovelace, Cooper and Lyons' Reply
- 21 Memorandum in Support of Motion to Dismiss LUPA Petition, filed June 7, 2010.
- 22 20. The records and pleadings on file in this action.
- 23 The Court, having heard oral arguments from counsel on June 18, 2010, HEREBY ORDERS
- 24 ADJUDGES AND DECREES that:
- 25 1. Respondent City of Tacoma's Motion to Dismiss LUPA Petition is DENIED;
- 26 2. Petitioners Save NE Tacoma, Lovelace, Cooper and Lyons's Motion to

ORDER DENYING PETITIONER'S AND RESPONDENT'S
MOTIONS TO DISMISS LUPA PETITION [~~PROPOSED~~] - 2

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1 Dismiss LUPA Petition is DENIED;

2 3. Pursuant to CR 11, Petitioners Northshore Investors, LLC's and North Shore
3 Golf Associates, Inc.'s are awarded ~~their reasonable~~ attorney fees and costs incurred in
4 connection with defending the motions to dismiss. Petitioners shall file an affidavit in
5 support of attorney fees no later than 14 days from the date of this Order.

6 DONE IN OPEN COURT this 18th day of JUNE, 2010.

7 **Presented by:**

8 SCHWABE, WILLIAMSON & WYATT, P.C.

[Handwritten signature: Katherine M. Stolz]
KATHERINE M. STOLZ

9 By:

10 *[Handwritten signature: Aaron M. Laing]*
11 Aaron M. Laing, WSBA #34453
12 Attorneys for Petitioner Northshore Investors, LLC

FILED
DEPT. 2
IN OPEN COURT

JUN 18 2010
Pierce County Clerk
By *[Handwritten signature]*
DEPUTY

13 **Approved as to form:**

14 GORDONDERR LLP

15 By: *[Handwritten signature: Dale N. Johnson]* 18 JUN 18
16 Jay P. Derr, WSBA #12620
17 Dale N. Johnson, WSBA #26629
18 Attorneys for City of Tacoma

19 TOUSLEY BRAIN STEPHENS, PLLC

20 By: *[Handwritten signature: Paul W. Moomaw]*
21 Paul W. Moomaw, WSBA #32728
22 Attorneys for Petitioner North Shore Golf Associates, Inc.

23 KARR TUTTLE CAMPBELL

24 By: *[Handwritten signature: Gary D. Huff]*
25 Gary D. Huff, WSBA #6185
26 Steven D. Robinson, WSBA #12999
Attorneys for Save NE Tacoma

ORDER DENYING PETITIONER'S AND RESPONDENT'S
MOTIONS TO DISMISS LUPA PETITION [~~PROPOSED~~] - 3

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APPENDIX B

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

NORTHSHORE INVESTORS, LLC, a)	
Washington limited liability)	
company; and NORTH SHORE GOLF)	
ASSOCIATES, INC., a Washington)	
corporation; and SAVE NE)	Superior Court
TACOMA, a Washington non-profit)	No. 10-2-05930-5
corporation, et al.,)	
)	Court of Appeals
Petitioners,)	No. 42490-8-II
)	
vs.)	
)	
CITY OF TACOMA, a Washington)	
municipal corporation,)	
)	
Respondent.)	

VERBATIM REPORT OF PROCEEDINGS

Friday, June 18, 2010
Before The Honorable Katherine M. Stolz
Tacoma, Washington

<<<<<< >>>>>>

A P P E A R A N C E S

For Petitioner Northshore Investors, LLC: AARON M. LAING
Attorney at Law

For Petitioner North Shore Golf Associates: PAUL W. MOOMAW
Attorney at Law

For Respondent City of Tacoma: DALE N. JOHNSON
Attorney at Law

For Save NE Tacoma, et al: STEVEN D. ROBINSON
Attorney at Law

Reported by: Kimberly A. O'Neill, CCR
License No. 1954

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TABLE OF CONTENTS

Proceedings of June 18, 2010

Page:

Petitioners' Motion to Dismiss LUPA Petition.....3

1 BE IT REMEMBERED that on Friday, the 18th day of
2 June, 2010, the above-captioned cause came on duly for
3 hearing before THE HONORABLE KATHERINE M. STOLZ, Judge of
4 the Superior Court in and for the county of Pierce, state of
5 Washington; the following proceedings were had, to wit:

6
7 <<<<<< >>>>>>

8
9 THE COURT: All right. This is Cause No.
10 10-2-05930-5, and we're here regarding an amended LUPA. All
11 right. Let's identify yourselves for the record.

12 MR. JOHNSON: Your Honor, Dale Johnson, counsel
13 for Respondent City of Tacoma.

14 THE COURT: All right.

15 MR. ROBINSON: Steven Robinson, counsel for
16 Petitioners in the consolidated matter, Save NE Tacoma,
17 Lovelace, Cooper, and Lyons.

18 THE COURT: All right.

19 MR. LAING: I am Aaron Laing, counsel for
20 Petitioner Northshore Investors, LLC.

21 MR. MOOMAW: And I'm Paul Moomaw, attorney for
22 Petitioner Northshore Golf Associates, Inc.

23 THE COURT: All right. Moving party.

24 MR. JOHNSON: Your Honor, Dale Johnson on behalf
25 of Respondent City of Tacoma; and I will also do my best to

1 be brief. This is a complex case, as I'm sure you've
2 gleaned from the pleadings.

3 THE COURT: Oh, yes.

4 MR. JOHNSON: It has a tortured history; but
5 fortunately, the issue before the Court, today, is fairly
6 straightforward; and that is an issue of what is 21 days?
7 Does this Court have jurisdiction to hear the amended LUPA
8 petition filed by Petitioners under RCW 36.70C.040? It does
9 not; and here is why, Your Honor.

10 First, the statute: As you are aware, the LUPA statute
11 clearly provides that a failure to timely serve a petition
12 within 21 days of issuance of a land use decision bars the
13 Court's jurisdiction, and a petition is deemed issued under
14 the statute in one of three ways; and I won't dwell on that
15 other than to say that the Court must decide in order to
16 resolve this motion whether 36.70C.040(4)(a), that is,
17 providing notice of a written decision that is mailed
18 applies or whether, in this case, the date that the decision
19 is entered into the public record controls when the decision
20 was issued.

21 It is the City's position, as is clear from our
22 pleadings, that this decision was issued on the 13th of
23 April, 2010. The amended LUPA petition was not served until
24 May 6, 2010. That is more than 21 days. This was an oral
25 decision issued by the Tacoma City Council made by motion.

1 There was no written decision issued; and, therefore, our
2 initial briefing was devoted almost exclusively to our
3 analysis under subsection (c) of the statute.

4 A brief review of the key facts, Your Honor, and these
5 are undisputed: On two occasions, the Respondents in this
6 case received notice from the City that the final -- that a
7 hearing would occur and of a hearing date and, on both
8 occasions, were provided with a copy of the Tacoma City
9 Code, specifically Section 1.70.050, which is amended to --
10 or attached to both declarations of Mr. Laing and myself,
11 and I have a copy if the Court would care to review it; but
12 it's -- that code provision provides, "The final date of
13 decision of the City Council on the appeal shall be deemed
14 to be the date the motion concerning the appeal is adopted
15 and shall be considered to have been entered into the public
16 record on that date." On two occasions, they received a
17 copy of that specific provision. On the 13th of April, an
18 oral motion was made. It was passed, and the Hearing
19 Examiner decision was adopted in this matter. The City
20 mailed a Notice of -- Notice of Appeal Results sometime on
21 or about the 15th of May, 2010, which Respondents received
22 on May 16, 2010. That's a key document because
23 Respondents -- or Petitioners have made that a key document.
24 Tacoma, clearly, doesn't consider that to be a written
25 decision. It is a writing. It is no more than what it says

1 it is. It is a Notice of Appeal Results which provides, "On
2 Tuesday, April 13, 2010, the Tacoma City Council heard the
3 appeal of Petitioners. At that time, the City Council moved
4 to concur with the findings, conclusions, and
5 recommendations of the Hearing Examiner and denied the
6 appeal. The decision was made on April 13, 2010.

7 Now, again, Petitioners filed their amended LUPA petition
8 in this matter on May 3rd consistent with the parties'
9 understandings of the rules governing LUPA as it represented
10 in the stipulation in this matter that is referred to in our
11 pleadings and failed, for some reason, to serve it until May
12 6th. We don't know why, and it really doesn't matter why;
13 and that's not central to the Court's decision on this
14 motion.

15 Now, Petitioners have argued in their response brief,
16 essentially, that a written decision is required under
17 either the Tacoma City Code, LUPA, common practice, or by
18 some other requirement; and, therefore, because there was a
19 Notice of Appeal Results issued, that has somehow become a
20 written decision. Now, there's clearly a flaw in the logic
21 there; but more importantly, the predicates to that argument
22 are incorrect. First of all, there was no written decision.
23 Again, on the face of the document, this isn't a written
24 decision. The Notice of Appeal Results is what it is.
25 There are no findings and recommendations in it. There are

1 no conclusions. There's no directive. It's simply a notice
2 that the decision was made; the decision was issued on April
3 13th. The Petitioners' own case law suggests that the
4 Notice of Appeal Results was not a written decision. Unlike
5 the facts in the Hale vs. Island County case cited by
6 Petitioners in support of their defense here, this case did
7 not involve a document that was prepared in advance of the
8 City Council's decision. It is not -- it was not written in
9 advance and provided to the counsel. It's not attested to.
10 It's not signed by the mayor. It was issued by the City
11 Clerk. Certainly, the City Clerk didn't make this decision.
12 The notice, here, was made by the Clerk after the decision
13 had been made, unlike in Hale.

14 Counsel heard, moved, and denied in the present tense, as
15 is set forth in the Notice of Appeal Results. This was not
16 a situation where the Council is saying, as in -- let me
17 back up. In Hale, the written decision was considered a
18 written decision because there was the present tense used;
19 and then here, we don't have that situation. It's all in
20 the past tense. This is what happened on the 13th of April
21 when the decision was made and the decision was issued which
22 brings me to the other predicate to Petitioners' argument,
23 which is: There was a requirement that the decision be
24 issued in writing. There is no requirement that the
25 decision be issued in writing in the City Council Code, in

1 the Tacoma Municipal Code. The Tacoma Municipal Code
2 provides that the Council's decision shall be in writing and
3 shall specify findings and conclusions whenever such
4 findings and conclusions are different from those of the
5 appealed recommendation, whenever they are different from
6 the appealed recommendation. They weren't different here.
7 As we -- as we set forth in our brief, that Counsel had four
8 options. It chose to simply affirm orally what the Hearing
9 Examiner had done below; and, therefore, there was no
10 requirement to issue a written decision.

11 I would note that Respondents have also argued obliquely
12 but, nevertheless, have suggested that this particular
13 provision should be read as some kind of a requirement that
14 a written decision be undertaken by the City Council. I
15 would note that as a matter of fact, that simply isn't the
16 case. That's not how business is done. Moreover, as I've
17 noted, the Municipal Code Section 1.70.050 clearly
18 anticipates oral decisions, those not being made in writing.
19 As we noted in our brief, LUPA clearly anticipates the
20 issuance of oral decisions, those not being made in writing;
21 and the seminal case on this issue, or at least the case --
22 the only case that speaks to the issue, the Habitat Watch
23 vs. Skagit County case, certainly in that case, the Supreme
24 Court contemplates the existence of oral decisions being
25 made. So just to wrap up and give Mr. Laing an opportunity

1 to respond, no requirement of a written decision, no written
2 decision, issuance of a final decision on April 13th by way
3 of oral motion, thus, application of subsection (c) of LUPA;
4 and, again, we have set forth in our argument why that was
5 entered into the public record on either the 13th or 14th by
6 various means, five or six ways, including live television
7 broadcasts, live webcast broadcasts, filing at the public
8 library. I mean, this decision was, clearly, entered into
9 the public record on the day it was made or, at the latest,
10 on the date that it was later provided in the public domain,
11 notwithstanding the fact that Mr. Laing was personally
12 present when the decision was issued. Therefore, it's
13 untimely. It's simply untimely; and under LUPA, the rule is
14 a bright-line rule. There is no -- it doesn't matter if
15 it's untimely by a day or by a month or a year. It is
16 untimely; and when it is, it terminates the jurisdiction of
17 this Court to hear the LUPA appeal.

18 And I would just finally, briefly, note that because
19 of -- because of the nature of this case and what is at
20 issue in terms of the rezone approval that was denied or the
21 rezone -- request for approval of rezone that was denied by
22 the City Council, in the event the Court dismisses this
23 Amended Petition as untimely, which it should, it,
24 necessarily, should dismiss the underlying petition because
25 there's simply no way that the proposed project can proceed.

1 And finally, and very briefly, it should be patently
2 clear that this is not a case that should result in
3 sanctions of the City for bringing this motion. It's well
4 grounded in fact. It's well grounded in law, and we would
5 ask that the Court not be distracted from the merits of the
6 City's position and arguments simply because there's been a
7 request that attorney's fees be awarded.

8 THE COURT: Counsel, Twain said differences of
9 opinion make horse races and by extension, lawsuits. All
10 right. Counsel?

11 MR. LAING: Your Honor, if I may, Mr. Robinson on
12 behalf of Petitioners.

13 THE COURT: All right.

14 MR. ROBINSON: Your Honor, I represent the
15 Petitioners in a consolidated case that face exactly the
16 same issues. We have joined the City's motion and moved, as
17 well, on the same grounds. Mr. Johnson eloquently stated
18 the case, and our submission will be: We agree.

19 THE COURT: All right. All right.

20 MR. LAING: Thank you, Your Honor. Well, the
21 fundamental question, here, is: It's kind of -- there's the
22 broad principle and the broad problem here that one of my
23 fine colleagues has long identified. You have to do
24 everything that Government tells you, but you can't rely on
25 anything it says; and within that kind of general concept,

1 the problem, here, is: When is a notice not a notice? What
2 we have, here, and there are only three cases that are
3 actually on point, apposite law that deal with a
4 quasi-judicial decision made by a legislative body at a
5 public hearing where there is a decision made; and then
6 subsequent to what happened at that public hearing, it is
7 reduced to writing and mailed to the parties; and we've
8 cited these and discussed these cases in the brief, the Hale
9 case, the Overhulse case, and the Lakeside Indus. case,
10 Lakeside and Overhulse being Division Two cases and being
11 neatly on point.

12 As a practical matter, what occurred here is exactly what
13 happens in all of these instances when you have a
14 quasi-judicial decision being made by a legislative body at
15 a public hearing and then the -- and then the decision is
16 issued; and I've -- in my declaration, I've identified nine
17 jurisdictions in Western Washington that that has been my
18 exact experience. I have never had a situation where the
19 legislative body doesn't come to some deliberation in a
20 vote. Sometimes it takes several council meetings.
21 Sometimes it takes a couple of board meetings, but they
22 deliberate. They take a vote; and then subsequent to that,
23 something is issued in writing, and that's exactly what
24 happened here. The City and Save NE Tacoma rely on the
25 Habitat Watch case. That's not a case involving a

1 quasi-judicial decision made by a legislative body that is
2 subsequently mailed. That's a -- that is a case -- and that
3 the portions of it that they cite to are footnotes and, at
4 best, dicta; but that's a case that dealt with some
5 administrative permits that were issued where the
6 Petitioners got notice of them because of a Public Records
7 Act request, so it's just -- it doesn't apply to the facts
8 here. What we have, here, is a -- is exactly what the City
9 code contemplates, exactly what experience dictates, and
10 exactly what, I think, the procedural due process, and I'll
11 get to that, would dictate.

12 The City's code: Let's talk about whether or not there
13 had to be a writing. It says that, "Council's decision
14 shall be in writing and shall specify findings and
15 conclusions whenever such findings and conclusions are
16 different from those of the appeal recommendation." There's
17 no comma before that "whenever," and it sounds like we're
18 technical; but actually, the grammatical construction is
19 pretty simple. "Whenever" is an adverb. Under the last
20 antecedent rule, which is a rule that Washington Courts
21 routinely apply to these types of statutes or codes, you
22 look at what the last antecedent is. Well, in this case,
23 because "whenever" is an adverb, it's modifying; and there's
24 no comma, so it's not pursuant to modify the two preceding
25 verbs but only the most immediately preceding verb. It

1 modifies "specified," and that makes sense. It shall -- it
2 shall specify findings and conclusions when those findings
3 and conclusions are different. It doesn't take away from
4 the fact that what we have are two intents here. The
5 decision shall be in writing; and if there's different
6 findings and conclusions, then you have to -- you have to
7 set forth those different findings and conclusions; so a
8 reasonable read of this code is that Council's decision
9 shall always be in -- shall always be in writing. This is
10 also consistent with the City Clerk's responsibilities as
11 set forth in the City's code, which is TMC 1.06.100.

12 Now, we didn't have an opportunity in our response brief
13 to address these arguments because the City and Save NE
14 Tacoma didn't address the -- as Mr. Johnson correctly
15 says -- the key document which is the Notice of Appeal
16 Results that the City mailed, we presume, on the 15th
17 because we got it on the 16th. However, in reply, the City
18 Clerk says, well, this has been our practice as a courtesy
19 for ten years. Well, the Court can take judicial notice
20 that on August 1, 2000, through Ordinance No. 26666, the
21 City amended Tacoma Municipal Code provision 1.06.100, which
22 is that provision ten years ago; so I don't believe that
23 it's a coincidence or a courtesy. We don't have an actual
24 copy of that ordinance because the City's online ordinances
25 only go back to 2004; but I don't believe that when you have

1 a mandatory ordinance saying that the City Clerk shall issue
2 these things, and it's been in place for ten years, it
3 appears, that they've been doing it for ten years; so the
4 City was required to issue a written decision. The City
5 Clerk was tasked with that job, and the City Clerk did that
6 in the same manner that, in my experience, is common in
7 basically every jurisdiction that I've worked in.

8 To the extent that the Court finds any merit, though, in
9 the arguments being advanced by the City or by Save NE
10 Tacoma, again, we have to look at this, also, from an
11 equitable standpoint. As a practical matter, we didn't file
12 and serve -- or we didn't file and serve this on Monday, May
13 3rd because we believed that that was the deadline as set
14 forth in my declaration. It's because I was convalescing
15 from a surgery and didn't return to work until May 24th. It
16 simply set things up so that my staff would take care of
17 these things while I was out. There was another filing
18 going out on the same day. It seemed like a convenient time
19 to have it done. Making anything of the date is -- of that
20 date shouldn't go anywhere.

21 From an equitable perspective, though, there are two
22 equitable doctrines that apply here. The first one is
23 equitable tolling, and this has been applied in the LUPA
24 context. This is a Mellish case. Equitable tolling is
25 appropriate when you have incidences of bad faith,

1 deception, or false assurances. I'm not suggesting in any
2 way that the City had bad faith in issuing that notice. I
3 think the City did exactly what it was supposed to do which
4 is issue a written notice of the decision. That's what it's
5 supposed to do. I think, however, that that notice, at
6 least as it's being now construed or, in my mind,
7 misconstrued by the City, as well as Save NE Tacoma, is a
8 false assurance. I've never had a situation where I get
9 something in writing, and my docketing department takes it,
10 and, you know, calendars a response to everything that all
11 of a sudden, the notice isn't a notice; so I think that the
12 equitable tolling should apply here in the event that the
13 Court isn't inclined to just follow the black letter of the
14 law.

15 Also, I believe that the doctrine of equitable estoppel
16 applies. Equitable estoppel, typically, has three elements.
17 A party makes a statement or act and later takes an
18 inconsistent position. You've got reliance on that
19 statement or act, and there will be injury resulting if the
20 first party is allowed to contradict or repudiate that
21 initial act. This is a classic instance in which the City
22 issued a notice. On the plain face of their code, it looks
23 like a written decision shall issue. It looked like the
24 City Clerk did exactly what the City Clerk was tasked to do
25 under the code, and that decision issued. We relied upon

1 that. We acted upon that. If the City is allowed to go
2 back and say the notice isn't a notice, that's not our
3 decision, that doesn't fall under LUPA, we will be
4 prejudiced in this case because that would result in the
5 dismissal of the appeal.

6 There are two other elements with regard to government
7 and injustice -- pardon me, estoppel with government. One
8 of them is manifest injustice. We believe that it would be
9 manifestly unjust to allow the City that controls this
10 entire administrative process, including its -- drafting its
11 codes, interpreting its codes, applying its codes, to issue
12 something that any reasonable person would take to be the
13 notice and the actual decision; which is why, for example, I
14 attached it, as LUPA requires, to the LUPA petition and
15 identified it as such. We believe it would be a manifest
16 injustice. In fact, more, we believe that it would be a due
17 process violation to allow the City to treat the notice as
18 anything but what it plainly is; and finally, you can't show
19 any impairment of government function. Well, I can't think
20 of any government function being impaired here because we're
21 not -- we're not asking the City to do anything but what it
22 did. We're just asking the City to honor what it did which
23 is consistent with its -- with what its code mandates.

24 With the issue of the due process violation, I'd just
25 like to point out that in one of those footnotes in the

1 Habitat case that the City and Save NE Tacoma rely upon,
2 there's a citation to Berry vs. Kitsap County, which is a
3 1974 Washington Supreme Court case. I believe it's -- I
4 believe that I've forgotten off the top of my head the
5 citation, but what Berry says is that notice -- and this is
6 a land use case. This is, clearly, pre-LUPA. What Berry
7 says is: Notice must be reasonably calculated under all the
8 circumstances, to apprise affected parties and to allow them
9 to raise objections. The notice in Berry was misleading;
10 and therefore, they reversed a rezone decision.

11 Here, clearly, we've been misled by what this is. If
12 this is truly what the code is, even though it's not been
13 the City's decade practice, if this is truly what the code
14 says, we've been misled; and there's a procedural due
15 process issue.

16 Finally, with regard to the sanctions, what was troubling
17 to me, when I came back and I read these motions, is that
18 counsel for the City and counsel for Save NE Tacoma surely
19 knew that the key issue, here, was: What is the effect of
20 that document? What is the effect of the City's April 15,
21 2010, Notice of Appeal Results? That, clearly, sets forth
22 the decision of the Council and was mailed to all the
23 parties to the -- of record to the appeal before it, and
24 they failed to address it. It was mentioned in a footnote.
25 The Neighbor's Council doesn't mention it, whatsoever. It's

1 not put before the Court. The Save NE Tacoma Council even
2 underlines and emphasizes RCW 36.70.040(b), which is --
3 applies to statutes and resolutions and ordinances and then
4 concedes that there's no ordinance or resolution here; so it
5 feels like there's a lot of misdirection there or at least,
6 as Ogden Nash would say, a sin of omission; so --

7 THE COURT: All right.

8 MR. LAING: -- thank you, Your Honor.

9 MR. MOOMAW: Just briefly. I don't have much to
10 add to what Mr. Laing ably argued. I just want to give you
11 the perspective of the property owner. My client,
12 Northshore Golf Associates, Inc., or as I'll refer to them
13 as, NSGA, owns the property. As the property owner, NSGA
14 has an agreement with the developer to sell the property to
15 the developer; but as the -- as the owner, it has been
16 cooperating in the -- in the land use process but not -- but
17 hasn't been actively engaged in the process because that's
18 really the developer's milieu; and so with that background,
19 fast forward to the City -- the City Council hearing.

20 I didn't attend the City Council hearing on behalf of
21 NSGA because I, frankly, would have gotten in the way.
22 There was limited time to argue, and I wouldn't have had
23 much to add. We haven't taken part in any of the hearings;
24 and so -- but nevertheless, as a party, NSGA, obviously, had
25 a strong interest in the outcome of that -- of that hearing;

1 and as a party, NSGA was, also, entitled to notice of the
2 outcome of that -- of that appeal; and unfortunately, as
3 Mr. Laing has argued, the Tacoma Municipal Code explicitly
4 provides that the Council's decision on appeal shall be in
5 writing; and I -- I don't think I need to add to Mr. Laing's
6 argument. I think it's clear. If you read the code, "shall
7 be in writing" is an independent clause; and sure enough on
8 April 16, 2010, I got my mail; and I received a document
9 entitled, Notice of Appeal Results. This was this first and
10 only notice that I received of the results of the appeal;
11 and in my mind, this was the written decision that is
12 required by the code; so in essence, you have -- you have a
13 party who didn't attend the hearing, for practical reasons,
14 and whose only notice of decision was the Notice of Appeal
15 Results dated April 15th.

16 The code requires a written decision. On April 16th, I
17 received what looked like a written decision. LUPA provides
18 that the 21-day clock starts running three days after the
19 written decision is mailing [verbatim]. In my mind, this
20 mailing -- or rather, is mailed. In my mind, the mailing I
21 received on April 16th was the written decision that started
22 the 21-day clock running; and, you know, if the -- the
23 City's argument raises a question: If the Notice of Appeal
24 Results was not a written decision, as required by code,
25 what was it? The City's -- the City's position, here,

1 creates nothing but confusion and uncertainty. How is
2 anyone supposed to know when the 21-day clock starts
3 running? Now, the purpose of the code provision requiring a
4 written decision, and LUPA's timeline requirements, is to
5 create certainty, so you know when that 21-day clock starts
6 running.

7 THE COURT'S RULING

8 THE COURT: All right. Counsel, I think I've
9 heard enough on this one. I'm going to allow the amended
10 LUPA petition to stand. I think that the written decision
11 is a written codification and oral decision. Given how
12 frequently the City and County Council backtrack on some of
13 their oral decisions, obviously, sending -- reducing it to
14 writing and sending it out, particularly when the Clerk, the
15 City Clerk, is charged with doing that, indicates that the
16 final decision is the written one. Once it's mailed out,
17 there's three days' time for mailing; and then you have 21
18 days to file a LUPA after that. It was timely filed.

19 I'm not going to award any sanctions. Obviously, both
20 parties have argued their cases zealously and have some
21 merit, here, to them. All right. So does anybody have an
22 order?

23 MR. LAING: I have a proposed order, Your Honor.

24 THE COURT: Okay. Why don't you go ahead and --

25 MR. LAING: We can --

1 MR. JOHNSON: Mark it up.

2 MR. LAING: -- mark it up.

3 THE COURT: -- mark it up and then present it.

4 All right. Now -- all right.

5 MR. LAING: Thank you, Your Honor. We'll --

6 MR. ROBINSON: Thank you.

7 MR. LAING: -- get out of your way.

8 THE COURT: Yes. Thank you.

9 MR. MOOMAW: Thanks, Your Honor.

10 (Proceedings concluded.)

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

NORTHSHORE INVESTORS, LLC, a)	
Washington limited liability)	
company; and NORTH SHORE GOLF)	
ASSOCIATES, INC., a Washington)	
corporation; and SAVE NE)	Superior Court
TACOMA, a Washington non-profit)	No. 10-2-05930-5
corporation, et al.,)	
)	Court of Appeals
Petitioners,)	No. 424890-8-II
)	
vs.)	
)	
CITY OF TACOMA, a Washington)	
municipal corporation,)	
)	
Respondent.)	

REPORTER'S CERTIFICATE

STATE OF WASHINGTON)	
)	ss.
COUNTY OF PIERCE)	

I, Kimberly A. O'Neill, Court Reporter in the state of Washington, county of Pierce, do hereby certify that the foregoing transcript is a full, true, and accurate transcript of the proceedings and testimony taken in the matter of the above-entitled cause.

DATED this 17th day of November, 2011.

KIMBERLY A. O'NEILL, CCR
License No. 1954

APPENDIX C

OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

FINDINGS, CONCLUSIONS, RECOMMENDATION AND DECISIONS

APPLICANTS: Northshore Investors LLC

PROJECT: The Point at Northshore

LOCATION: Northshore Golf Course located at 4101 Northshore Boulevard NE and 1611 Browns Point Boulevard NE. The project site is located within an "R-2 PRD" One-Family Dwelling and Planned Residential Development District.

SUMMARY OF REQUESTS:

File No. REZ2007-40000089068: Rezoning Modification - a request to modify an existing condition of approval placed on the golf course site in connection with Northshore Country Club Estates PRD in a previous rezoning which occurred in 1981 and established the PRD designation for the site.

File No. PLT2007-40000089069: Preliminary Plat - a request to subdivide the Northshore Golf Course site into 860 lots containing 366 single-family detached homes in the southerly portion of the site and 494 attached townhomes in the northerly portion of the site. In addition, the applicant proposes 65 separate tracts to serve various uses, such as private access roads, open space, storm water facilities, slopes, and critical areas/buffers.

File No. SIT2007-40000089067: Site Plan Approval - a request for site plan approval for development of the golf course, accompanying the rezoning request.

File No. MLU2007-40000089065: Variances/Reductions - a request for variances to building setback requirements, reductions to minimum lot area and minimum lot standards

File Nos: WET 2007-40000105839 and WET2007-40000105876: Wetland/Stream Assessments, and Wetland/Stream Exceptions - identification of regulated systems on the golf course and request for exemption of such systems from a Wetland Development Permit; request for interrupted buffers on two Category IV wetlands.

PUBLIC HEARING:

After reviewing the Staff Report of the Department of Public Works, the Hearing Examiner Pro Tempore conducted a public hearing on the applications. Hearing sessions were held on four days - October 12, 13, 15 and 16, 2009. The record was held open for response by the City to conditions proposed by the applicants. The record closed on October 23, 2009.

Two hundred, seventy-six (276) exhibits were admitted. Six of these exhibits are volumes containing several hundred public comment letters.

At the hearing Aaron M. Laing and Thomas Bjorgen, Attorneys at Law, represented the applicants. The City was represented by Jay Derr, Attorney at Law. Save NE Tacoma was represented by Gary Huff, Attorney at Law. Thirty-four (34) persons presented public testimony.

RECOMMENDATION:

File No. REZ2007-4000089068: Rezone Modification - The application should be denied.

DECISIONS:

File No. SIT2007-4000089067: Site Plan Approval - The Site Plan approval is denied, effective on the date the City Council acts on the Rezone Modification recommendation.

File No. PLT2007-4000089069: Preliminary Plat - The Preliminary Plat is denied, effective on the date the City Council acts on the Rezone Modification recommendation.

File Nos: MLU2007-4000089065, WET2007-40000105839, WET2007-40000105876: Variances/Reductions, Wetland/Stream Assessments, Wetland/Stream Exemptions - Because of the decisions on the Site Plan Approval and Preliminary Plat these matters need not be reached.

FINDINGS OF FACT**General Description of Proposal**

1. Northshore Country Club Estates (Country Club Estates) is an approximately 338-acre¹ planned residential district consisting of residential areas and an 18-hole golf course, located at 33d Street NE and Norpoint Way NE and west of 45th Avenue in the City of Tacoma.

¹ Different numbers have been used by the Applicants and the City. The differences are the result of the variations in historical records, GIS data, Pierce County Assessor data, property descriptions and surveys. The Examiner is using the number provided by City Staff in their Staff Report.

It is located within an "R-2 PRD" One-Family Dwelling and Planned Residential Development District.

2. The R-2 PRD zoning for the area was approved in 1981, along with general approval of Divisions 2, 3 and 4 of Country Club Estates, with specific Preliminary Plat approval of Division 2A. Since that approval, Divisions 2, 3 and 4 have been finally platted and developed around and within the golf course.

3. The golf course (Northshore Golf Course) is a privately owned 18-hole golf course which is open to the public. Since before the 1981 rezone through the present, the surrounding residential areas and the golf course area have been in separate ownership.

4. Presently, the golf course is the major green and open area in a neighborhood that is otherwise given over to housing. The fairways are bordered by mature evergreen and deciduous trees. There are six ponds which are both ornamental and a feature of the storm water drainage system.

5. The golf course sits in a kind of topographic bowl and is laid out on a north-south axis. Except at its south and southwest ends, the course is at a lower elevation than the adjacent residential developments. The single family residences around the perimeter have views into and over the golf course. Other parts of the development were built on a slightly elevated interior island which the northern portion of the golf course flows around. This area and a part of the northern perimeter contain clustered condominiums and apartments.

6. On January 29, 2007, Northshore Investors LLC (applicants) submitted an application for permits to redevelop the Northshore Golf Course by inserting 860 residential units consisting of 366 single-family detached units and 494 town home units, to be built in phases over the next six plus years. The development, called "The Point at Northshore," would also include the creation of multiple tracts which would contain open space, slopes, private access roads, utilities and recreation areas.

7. The principal matters requested in the application are approval of the Preliminary Plat of "The Point and Northshore," approval of a Rezone Modification and a Site Plan Approval. In addition multiple Variances/Reductions to development standards and Wetland/Stream exemptions or approvals are sought.

8. The golf course occupies approximately 116 acres² of the overall 338-acre PRD. The instant application, in short, proposes to fill the present golf course site with houses. To do so will require considerable grading to re-contour the rolling terrain of the course for level building sites and the installation of utilities. While perimeter trees will be retained as practical, interior trees will be removed. Landscaping, of course, will accompany the new development.

² Several different figures have also been used for the golf course's size. The Examiner has used the number initially used by the City Staff in their Staff Report.

9. The *Comprehensive Plan* designates the site as a "Low Intensity" housing area, suitable for single-family home development. The Generalized Land Use Element provides that overall densities for a low intensity residential development can range up to 15 dwelling units per acre. The existing density at the current level of PRD build-out is approximately 3.57 units per acre. The proposed development of 860 units would produce a density of about 7.4 units per acre on the 116-acre golf course area. Thus there is no density issue either with the proposal in isolation or as it would affect the PRD as a whole.

10. The applicants have presented analyses intended to show that their proposal can be built consistent with PRD regulatory open space requirements. Their view is that private yards may be counted as "usable landscaped recreation area," a phrase which is at the core of the open space definition to which the applications are vested. Under this interpretation, even though the golf course is eliminated, the proposed development and the pre-existing developments will provide enough open space within the PRD to satisfy the definition.

11. The 1981 Hearing Examiner recommendations, adopted by the City Council, called for approval of the rezone and the Preliminary Plat of Division 2A subject to the following condition:

The applicant shall submit a legal agreement, which is binding upon all parties and which may be enforced by the City of Tacoma. It should provide that the property in question will maintain and always have the use of the adjacent golf course for its open space and density requirement which has been relied upon by the applicant in securing approval of this request. In this regard, the agreement attached to File No. 128.9 may be used in concept However, the Examiner believes that there must be more certainty provided to insure the golf course use, which was relied upon to gain the density for this request, is clearly tied to the applicant's proposed use in perpetuity.

12. The restriction of the golf course to golf course (open space) use was implemented by means of an Open Space Taxation Agreement (OSTA) between the owners of the golf course and the City, as well as a Concomitant Zoning Agreement (CZA) between the developers and the City. Under the OSTA, the City must approve any change in the use of the golf course. The CZA requires adhering to the approved Site Plan which includes the golf course.

13. The current Rezone Modification application seeks to eliminate the Hearing Examiner's condition for the original PRD approval, to nullify the OSTA and to modify or remove the CZA condition that requires adhering to the approved Site Plan. In short, it asks for the City's approval to remove the golf course's open space designation. The primary asserted justification for making such a change to the original provisions of the PRD zone is that conditions have substantially changed.

14. The instant Preliminary Plat application relates solely to dividing the land on the golf course. There is no application to modify the terms of plat approval for Division 2A or any of the other Divisions of Country Club Estates.

Historical Background

15. The area rezoned to R-2 PRD was zoned R-2 in 1953. By 1981, Division 1 of Country Club Estates had been approved and was under construction. Except for Division 1, the area around the golf course was at that time undeveloped forest area.

16. The 1981 approval of the rezone to PRD allowed the residential developments to build to a greater density than allowed under conventional R-2 zoning.

17. At the time of the 1981 reclassification, the golf course was the subject of an "Agreement Concerning North Shore Golf Course," between the North Shore Golf Associates, owners of the golf course, and the developer of the Country Club Estates residential area. The Agreement allowed the developer to include the golf course as open space and recreation area needed to obtain the R-2 PRD zoning for residential development of the surrounding Country Club Estates.

18. In connection with the rezone in 1981, a Draft and a Final Environmental Impact Statement were written. The cover of the DEIS and FEIS has a drawing of a fairway lined with trees and two greens with pin flags waving. The FEIS expressly states that the project includes an 18-hole golf course.

19. The Staff Report for the 1981 rezone and preliminary plat proposals says that after development of the whole project, approximately 33% of the site will be occupied by the golf course. The Report declares that the applicants intend to use the golf course and other small on-site recreational improvements in satisfying its open space requirement. The Report expresses a concern that the City has no guarantee that the golf course will remain in perpetuity.

20. The agreement to use the golf course as open space, the environmental review documents, and the Staff Report all evidence the basic design concept. The residential project was to be built around the golf course which was to be used for open space.

21. The Examiner's decision in 1981 contains quotations from the developers of Country Club Estates showing that the existence of the golf course as a centerpiece for the development was reflected in the prices charged for homes in the surrounding plats. Higher prices were charged for units closer to the golf course with better views of it.

22. The Hearing Examiner's condition, quoted above, reflected the understanding underlying the creation of the PRD. The 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.

23. As to the golf course, the OSTA provides:

The use of such land shall be restricted solely to golf course and open space use. No use of such land other than as specifically provided here-

under shall be authorized or allowed without the express consent of the City of Tacoma.

The agreement by its terms "shall run with the land described herein and shall be binding upon the heirs, successors and assigns of the parties hereto."

24. Contingent upon the granting of Reclassification, and approval of the Site Plan and Preliminary Plat, the CZA requires the developers to comply with all CZA terms and conditions. Among the conditions is a provision that requires development and maintenance to be in accordance with the approved Site Plan.

25. In one way or another, the continued vitality of the original condition of approval was recognized by the City in the final approval of Country Club Estates Divisions 2, 3, and 4.

Procedural Background for the Subject Application

26. As noted, the instant application was filed on January 29, 2007. The following day a moratorium on PRD applications became effective in the City. Initially the City advised the applicants that their application was incomplete. This determination was appealed and resulted in a Hearing Examiner's decision which reversed the City's Notice of Incompleteness. Accordingly the application vested to the Code provisions in effect on January 29, 2007, meaning that the moratorium did not affect the application.

27. On July 10, 2007, the City Council enacted an ordinance which changed the terms of the PRD requirements for open space. The definition of open space to which the application vested is the version previously in effect.

28. On December 14, 2007, the City issued a Determination of Significance (DS) under the State Environmental Policy Act (SEPA) in reference to the applicants' proposal. This too was appealed, but the outcome was a Hearing Examiner's decision, dated May 19, 2008, affirming the DS.

29. On January 2, 2008, the City filed a Complaint for Declaratory Judgment, Breach of Contract, and Quiet Title in the Pierce County Superior Court against the applicants and the golf course owners. The complaint sought a determination by the court of the respective rights of the City and the defendants under the OSTA and the CZA.

30. The complaint alleged, among other things, that: (1) the OSTA prohibits use of the golf course for other than open space and golf course use without Tacoma's consent; (2) the OSTA remains in effect until Tacoma agrees to its nullification; (3) the OSTA runs with the land and is binding on the current golf course owners and all subsequent owners thereof; (4) the golf course is bound by restrictions imposed in the master planning and development process, including the restrictions set forth in the CZA; (5) that the defendants were estopped to deny that they and the golf course were bound by the CZA; and (6) that the CZA requires all development in the Country Club Estates PRD to be consistent with the approved Site Plan under which the golf course must be maintained as a golf course.

31. On February 3, 2009, the Court ruled that: (1) the golf course/open space land use designation in the OSTA remains binding and enforceable by the City of Tacoma, unless and until the City approves a different use of the golf course property through the applicable land use application process; (2) the OSTA cannot be unilaterally terminated by the golf course owners or their successors or assigns, (3) the R-2 PRD rezoned of the golf course and surrounding property was conditioned upon maintenance of the golf course as open space and the PRD master plan land use designation of the golf course is open space; (4) the CZA was implemented by the City's legislative rezone decision and remains binding on the golf course owners and their successors and assigns; (5) CZA condition 2(tt) requires development consistent with the approved site plan and designates the golf course as open space; (6) the open space and golf course use restrictions placed upon the golf course in the OSTA and CZA constitute land use designations; and (7) the defendants may request the City to amend, nullify or alter the land use designations set forth in the OSTA and CZA through the land use process, and that the applicants and golf course owners are in no different position than any other property owners within the PRD with respect to requesting to change the land use designation of, and to re-develop, real property within the Country Club Estates PRD. The Court also ruled that the City's processing of, and decision in response to, such a request is subject to the provisions of the City's PRD regulations as well as general land use laws, including the rules of inverse condemnation.

32. As a result of the DS scoping process, Draft and Final Supplemental Environmental Impact Statements were issued on May 4, 2009 (Draft) and August 17, 2009 (Final). These impacts statements were supplemental to the original draft and final statements for Northshore Country Club Estates issued in August 1979 and January 1981. An appeal of the adequacy of the supplemental impact statements was filed by the citizen's group Save NE Tacoma and several individuals, but the appeal was subsequently withdrawn.

33. The DSEIS contained an exhaustive discussion of various possible ways to evaluate the amount of open space needed to satisfy the definition of open space in former TMC 13.06.140(F)(6). That definition reads:

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. . . .

34. In the FSEIS, Staff determined that approximately 75.07 acres of open space within the PRD shall be maintained per the "usable open space" requirement. Applying the scenario of "average building footprint," where each lot (existing and proposed) constructs to an average footprint, open space of 172.73 acres would be provided if you count private yards. Only 44.55 acres would be provided if private yards are not included. Thus, the minimum of 75.07 acres of "usable open space" is not achieved if private yards are excluded.

35. In addition to evaluating the applicants' proposal, the FSEIS analyzed the environmental impacts of an alternative residential design (EIS Alternative) for the golf course involving larger lots and fewer units. The EIS Alternative proposal was intended to come close to achieving the applicants' objectives while lessening the environmental impact. No layout for the alternative was provided, but it contemplated 670 dwelling units (340 single family homes

and 330 townhouses.) It included an open space transition area (buffer) between the new buildings in the proposal and the adjacent developed areas. A pathway around the exterior of the new development would be placed in this transition area.

36. In paragraph 1.3 of its Summary, the FSEIS described the impacts of the applicants' proposal on land use compatibility and aesthetics under the heading "unavoidable significant adverse impacts (after mitigation)" The FSEIS stated:

The golf course area will be replaced with residential development. The impacts will vary based on the final location of the various elements of the development. The provision of open space transition zones will reduce but not eliminate the level of significance.

The FSEIS reached the same conclusion as to the EIS Alternative. Thus no mitigation was identified that would reduce the adverse impact of replacing the golf course to below the level of "significance."

37. Following issuance of the FSEIS, hearings on the application were scheduled and held on October 12, 13, 15 and 16, 2009.

Conduct of the Hearing

38. The public hearings were conducted in the standard manner for pre-decision permit matters. The City Staff presented an overview of the project and summarized its Staff Report. The applicants made their presentation introducing a redesign of the proposal that it called the "Perfected Alternative." Public testimony was taken from 34 citizens, most of them residents of Country Club Estates. Included in the public testimony was a presentation by counsel on behalf of Save North-East Tacoma, a neighborhood group organized in opposition to the proposal. Argument was heard from both the City and the applicants.

39. The Staff Report consisted of 118 pages devoted to describing the project, giving the history of the site, providing the regulatory framework for the application, and analyzing the proposal under the relevant Code provisions. The Staff found some areas of inconsistency with applicable standards, but overall provided no recommendation for action by the Hearing Examiner.

40. If the Examiner were to approve the applicants' requests, the Staff spelled out some 120 recommended conditions of approval. Many of these conditions reflect actions the Staff concluded the applicants should take in mitigation of the impacts of the proposal.

41. Evidence was presented of mitigation agreements acceptable to the City with regard to traffic (City of Federal Way) and schools (Tacoma School District). With appropriate conditions, the Staff was satisfied that adequate mitigation can be implemented for impacts from earthwork and grading and from impacts to storm water management and critical areas.

42. A mitigation agreement with the Metropolitan Parks District had not yet been

concluded as of the dates of hearing. The applicants are offering a payment of \$250 per unit in addition to the established \$25 per unit impact fee. The Parks District has a concern with the timing of the payments, *i.e.*, at the time of building permit issuance.

43. The applicants presented the "Perfecting Alternative" as a proposal designed to approach the reduced impact of the EIS Alternative, but without shrinking the development to the same extent. This would be achieved by positioning larger lots to the perimeter and smaller lots to the interior, reorienting buildings in relation to open space and adjacent uses, adding 7,900 lineal feet of trails, and providing variable buffers around the perimeter on the recommendation of a landscape architect with site-specific planting screens and fences.

44. The applicants' view is that the "Perfecting Alternative" better approximates the original proposal's objectives than does the EIS Alternative. The "Perfecting Alternative" includes 804 residential lots, resulting in a density for the golf course area of 6.9 dwelling units per acre. This is 56 lots fewer than the original proposal, equating to an eight percent reduction. The perimeter transition zone (buffer) areas would be 22.9 acres, in comparison to 24.7 acres in the EIS alternative. A total of 3.2 acres in park and landscape tracts is offered.

45. The record and testimony supports a finding that the applicants' proposal and revised proposal would, with associated infrastructure, be adequate to accommodate the impacts of the development on public facilities. Public water, sewer and roads systems, as improved, would have adequate capacity for this development.

46. During the course of the hearings, the applicants and Staff offered and responded to several iterations of proposals for project conditions. Ultimately, concerns with roads, cul-de-sacs and turnarounds were resolved. The applicants withdrew some variance requests, but persisted in asking for five foot side yard setbacks and reduction to minimum lot size and width.

47. The public testimony at the hearing covered a vast array of objections, including impacts on schools, aesthetics, trees, views, and mental health. Some felt the golf course was priced too high and that it could be sold as a golf course. Others questioned the adequacy of the proposed facilities to handle reasonably anticipated storm water in this glacial till environment. A recurring perception was that the City in accepting the golf course as the open space for Country Club Estates had made a commitment to the people who invested in homes there to preserve it as open space. It is apparent that many, if not most, of the people who bought into Country Club Estates did so because of the green open space provided by the golf course. Petitions of protest with thousands of signatures were introduced. Volumes of letters were submitted. There was not, in all of this, the faintest whiff of public support for the proposal.

Criteria for Approval

48. Rezone Modification

A rezone modification, under the Tacoma Municipal Code (TMC), is treated like a permit modification. The applicants seeks to eliminate a condition from the zoning approval that created the R-2 PRD district. The subject request, therefore, constitutes a major modification

(See *TMC* 13.05.080) and the standards for original approval apply. The relevant criteria are set forth in *TMC* 13.06.650, as follows:

- (1) That the change of zoning classification is generally consistent with the applicable land use intensity designation of the property, policies and other pertinent provisions of the comprehensive plan.
- (2) That substantial changes in condition have occurred affecting the use and development of the property that would indicate the requested change of zoning is appropriate. If it is established that the rezone is required to directly implement an express provision or recommendation set forth in the comprehensive plan, it is unnecessary to demonstrate changed conditions supporting the requested rezone. (Emphasis added.)
- (3) That the change of the zoning classification is consistent with the district establishment statement for the zoning classification being requested. (Emphasis added.)
- (4) That the change of the zoning classification will not result in a substantial change to an area-wide rezone action taken by the City Council in the two years preceding the filing of the rezone application. Any application for rezone that was pending and for which the Hearing Examiner's hearing was held prior to the adoption date of an area-wide rezone, is vested as of the date the application was filed and is exempt from meeting this criteria.
- (5) That the change of zoning classification bears a substantial relationship to the public health, safety, morals, or general welfare. (Emphasis added.)

A PRD zone, originally or as modified, must meet the relevant standard for open space. The standard to which the subject application is vested is for "usable open space." As set forth at former *TMC* 13.06.140(F)(6), the definition, in pertinent part, reads:

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.

49. Site Plan Approval

Under *TMC* 13.06.140(B), an application for site plan approval shall accompany a request for reclassification to a PRD District. In acting upon such a request the Hearing Examiner shall consider, but not be limited to, the following criteria:

1. The site development plan shall be consistent with the goals and policies of the comprehensive plan.
2. The plan shall be consistent with the intent and regulations of the PRD

district and any other applicable statutes and ordinances. (Emphasis added.)

3. The proposed development plan for the PRD District is not inconsistent with the health, safety, convenience or general welfare of persons residing or working in the community. The findings of the Hearing Examiner... shall be concerned with, but not limited to, the following:

- a. The generation of noise or other nuisances . . .
- b. Availability and/or adequacy of public services . . .
- c. Adequacy of landscaping, recreation facilities, screening, yard setbacks, open spaces, or other development characteristics necessary to provide a sound and healthful living environment and mitigate the impact of the development upon neighboring properties and the community.
- d. The compliance of the site development plan with any conditions to development stipulated by the City Council at the time of the establishment of the PRD District. (Emphasis added.)

50. Preliminary Plat

The request to subdivide the golf course area into residential parcels within the R-2 PRD District is subject to the general criteria for approval of preliminary plat set forth at TMC 13.04.100(E). The preliminary plat shall not be approved unless it is found that:

1. Appropriate provisions are made for made for the public health, safety, and general welfare, and for open spaces; drainage ways; streets or roads; alleys; other public ways; bicycle circulation; transit stops; potable water supplies; sanitary wastes; parks and recreation; playgrounds; schools and school grounds' and all other relevant facilities; including sidewalks and other planning features which assure safe walking conditions for students who walk to and from school and for transit patrons who walk to bus stops or commuter rails stations. (Emphasis added.)
2. The public use and interest will be served by platting of such subdivision and dedication. (Emphasis added.)

Environmental Impact

51. The applicants throughout the permit process have proceeded on the assumption that a commitment to appropriate mitigation measures could and would reduce the environmental impact of this proposal to below the level of "significance."

52. The applicants' position is that the various mitigation efforts it has offered or agreed to implement, as expressed through the "Perfected Alternative" plan and through its latest

response to the City's proposed conditions, represent a reduction of impacts to a level lower than "significance."

53. In most areas, the City and the applicants agreed that the mitigation offered will eliminate significant adverse impacts:

54. In terms of adverse impacts, the "Perfected Alternative" lies somewhere in between the applicants' proposal and the EIS Alternative. As noted, the FEIS concluded that in the category of land use compatibility and aesthetics, neither the applicants' proposal nor the EIS Alternative would reduce the adverse impacts of replacing the golf course with residential development to a non-significant level.

55. "Significant" under WAC 197-11-794 means "a reasonable likelihood of more than a moderate adverse impact on environmental quality." It involves context and intensity and does not lend itself to a quantifiable test. The context may vary with the physical setting. Intensity depends on the magnitude and duration of the impact. Severity should be weighed along with the likelihood of occurrence.

56. If the application were granted, replacing the golf course with residential development would be absolutely likely to occur. The impact would occur in a physical context where the change would radically alter the setting from green open space to housing, with attempts at screening and buffering. From higher elevations, much of what now appears as trees, grass and open vista would be replaced by roofs. The duration would be, more or less, permanent. The magnitude of the change would be profound. Simply put, the people living in and around the golf course would be looking at and experiencing adjacent land use that is quite different from the present.

57. The applicants contend that the various housing types, sizes and groupings contemplated by the proposal would be compatible with surrounding development. Even if so, this is not the appropriate comparison here. This is not a case of infill on a vacant lot where development is allowed and anticipated by the land use regulatory regime. Here the golf course is subject to a condition, purporting to guarantee that it remains as open space -- a condition that has been a critical factor in determining the character of the environment as perceived by those who live in the adjacent developed areas. To eliminate this open space raises a compatibility problem that cannot be resolved by residential design, housing scale or housing arrangement. The proposal and its variation are incompatible with the original design concept and, in context, this is a significant impact.

58. The quality of a significant impact is a matter of judgment, rather than objective measurement. Based on the record, the Examiner is not able to say that the FEIS evaluation of the impacts the proposal and the EIS Alternative on land use compatibility and aesthetics is in error. The impacts would be more than moderate and, again in the particular context, they would be adverse. Further, the Examiner finds that the "Perfected Alternative", as conditioned and revised, would not reduce the level of adverse impact below the level of "significance."

59. However, the SEPA process is about informed decision making. SEPA does not require that all significant adverse impacts be mitigated or, if such impacts exist, that a project be denied. The existence of significant adverse impacts is simply a factor to be considered in the evaluation process. Denial of a project must be based on some independent provision of adopted law or policy.

Comprehensive Plan

60. The DSEIS contains a comprehensive compilation of applicable *Comprehensive Plan* policies filling some 20 pages. In summary, the proposal was found to be consistent with many *Comprehensive Plan* policies or would be consistent with such policies if recommended mitigation were implemented. The Staff Report lists a number of policies with which the project might be considered inconsistent, including several policies from the neighborhood element for Northeast Tacoma

61. The *Comprehensive Plan* itself is a melange of policies both encouraging growth and promoting the protection of established neighborhoods. Those policies with which Staff finds the project arguably inconsistent tend to be in the latter category, as well as directed toward the preservation of natural values and open space. The policies, in general, speak in precatory rather than mandatory terms.

62. The proposal and the "Perfected Alternative" are both clearly consistent with the land use intensity designation of the *Comprehensive Plan*. Looking at the entire list of applicable *Comprehensive Plan* policies, the project does not appear on balance to be so contrary to the spirit of the planning document that it should be found to be inconsistent with it for regulatory purposes.

Definition of Open Space

63. The applicants' proposal is predicated on the assumption that private yards may be counted as "usable landscaped recreation area," under the former definition of "usable open space" quoted above. (See former *TMC* 13.06.140(F)(6). This is the definition to which the applicants vested. Under this interpretation, the minimum open space requirements for the PRD can be satisfied without even using the golf course.

64. However, the development concept on which the 1981 rezone was based was that the golf course would supply the open space needed for the PRD. Exactly how this worked out in terms of the minimum required open space was not addressed. It was apparently assumed that including the golf course would provide enough open space and that it was needed for that purpose.

65. Whether private yards could be included as open space was not addressed in the 1981 decision. From the manner in which the golf course was then treated, it can be inferred that no one considered the use of private lawns.

66. In the years between 1981 and 2007 there was apparently an evolution in the thinking of Staff about what could be considered to satisfy the requirement for open space. Over time, the City allowed the open space requirement to be satisfied both through the provision of common open space and through the use of private yard and road areas. In recent years, new PRD developments have provided relatively small amounts of common open space and have relied heavily on private roads and private yards to meet the requirement.

67. In the summer of 2007, after the instant application became vested, the open space definition was changed to "clarify" that, among other things, private yards are not to be counted in open space calculations. In the amended definition, the term "usable open space" is no longer used, nor is the formulation "usable landscaped recreation area." Instead, the open space requirement is expressed as "common open space," meaning space open to all owners or to the public generally.

68. Further, under the amended definition, the minimum required for "common open space" is a significantly larger area than formerly needed for "usable open space." Under the prior definition open space was 1/3 of whatever was left after buildings and public streets were subtracted, necessarily an area less than 1/3 of the whole. Under the 2007 amendment the minimum open space needed is now 1/3 of the gross site area of the PRD District.

69. There is nothing in the former definition that limits its applicability to "common" or "public" use. The Examiner is not persuaded that by including private lawns and roads the Staff was, under the past definition, making a mistake. The former language was broad enough to encompass the interpretation that Staff made.

70. The 2007 amendment changed both the descriptive language and the minimum size of required open space. The "common" or "public" use limitation was not required by the plain meaning of the prior definition. The Examiner concludes that the post-vesting definition must be seen as a change in the law, not as simply an explanation of what the law meant all along.

71. In the instant case, however, the question of what minimum open space was required under the prior definition is germane only if reducing the PRD's open space is somehow necessary. The golf course was designated as open space and that land use designation was by the conditions of approval to remain in perpetuity. The open space for the PRD whatever its size, is what it is. The setting aside of more open space than the minimum does not, ipso facto, require or imply that the excess should be converted to another use.

Changed Circumstances

72. The change in zoning sought by the applicants is, in effect, a request to be free of the condition imposed by the Hearing Examiner in 1981. The Examiner, then, wanted certainty to be provided that the golf course use was tied to the adjacent residential use in perpetuity. Under the OSTA, the golf course owners and their successors may not use the golf course for another use without the express consent of the City. The City is now being asked to consent to using the golf course for another purpose on the basis that "substantial changes in conditions affecting the use and development of the property" has occurred.

73. The applicants showed that the golf course, while initially successful, has been less so for a number of years. The number of rounds played there annually has been going down.

74. At the same time, there is evidence that the North Shore course has declined in terms of upkeep and quality over time. While it is expensive to run a golf course, there was no showing of any vigorous effort to upgrade the facility.

75. Evidence was presented of a decline in the national popularity of playing golf. However, the experience in this State may be to the contrary. The record shows that a number of new golf courses have opened in the local region in recent years. No specific information was given on how these newer golf course operations are faring.

76. Overall, the record is unclear as to whether the decline in popularity of the North Shore Golf Course is the result of implacable market forces or self-induced. The course's exact financial status is not known. Moreover, there was no analysis of what an infusion of investment in the quality of the course might do to improve its financial fortunes.

77. The golf course ownership has not changed. Now the owners want to retire. By a recent letter, the owners said that they had no intention of perpetually operating a golf course on the property. But, there is no record of any such sentiment being expressed in 1981. Then, they agreed be part of the PRD and to use the golf course as open space. They did not appeal the rezone. They registered no objections to the conditions of approval for the PRD.

78. The golf course owners have been trying to sell the property as a golf course for about a decade, but very little is known about the marketing effort. Whether the owners have been asking an appropriate price is not known. The record discloses the successful sale of a golf course in neighboring Kitsap County in 2003. The Examiner was not convinced that the property cannot not be sold as a golf course.

79. There was no evidence of any efforts to sell the golf course for any other kind of open space use. There is a need for athletic fields and park lands in the area.

80. As to the surrounding neighborhood, there has been no change in circumstances since the original rezone. The area has simply become what was envisioned in 1981. Country Club Estates was designed as and remains a residential development around a golf course. No new or different uses have been introduced nearby. The golf course continues to function as the open space centerpiece of the development.

81. There has been no change in public opinion as to the appropriateness of the use to which the golf course has been put. The sentiment of those who live in the vicinity is overwhelmingly in favor of keeping the golf course as open space. Many neighboring homeowners feel that the City made a promise of permanence to the residents of Country Club Estates in designating the golf course as open space for the surrounding residential development.

82. The Staff Report states the following:

Staff is unaware of any substantial changes in conditions that have occurred affecting the use and development of the golf course site that would indicate the requested modification to the zoning is appropriate. Specifically, in the general vicinity of the golf course, no major actions such as arterial street improvements, rezones, or significant development other than the development of the adjacent residential homes to the golf course have occurred. The *Northshore Country Club Estates* development (Division 2, 3 and 4) were constructed fairly consistent with the 1981 rezone, subsequent miscellaneous modification permits and the EIS. While the development may have been built at a somewhat lesser density than what was originally permitted, nonetheless, it was developed to surround an 18-hole golf course. During the 1981 rezone, the golf course was identified throughout the rezone process and environmental documents as being relied upon as an integral component of the overall development for density, open space and a significant feature of the proposed neighborhoods.

83. The Hearing Examiner concurs with and adopts the above Staff finding.

PRD Intent

84. The district establishment statement for the R2-PRD district is set forth in *TMC* 13:06.140 (A), as follows:

Intent. The PRD Planned Residential Development 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; 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 facilitate more desirable, aesthetic and efficient use of open space. (Emphasis added.)

The PRD District is intended to be located in areas possessing the amenities and services generally associated with residential dwelling districts, and in locations which will not produce an adverse influence on adjacent properties. (Emphasis added.)

85. The context here is not of a proposed new PRD development being inserted into a conventional zoning environment. It is rather of a proposed change to an existing PRD development designed around a golf course. The question, then, is whether this particular PRD as modified will achieve the more desirable living environment such districts are intended to create:

86. As applied to the present residents of the PRD, the change sought is not more desirable from the perspective of the availability of open space. Everyone understands this. It accounts in large measure for the outcry about this proposal. But the sense of what would be lost

is very difficult to articulate. Solid objects would occupy much of what is now air. Some sense of what this would mean was presented by the City's visual consultants, in the array of blocks they inserted into views of the landscape. Intervening vegetation can provide some masking. Modest buffers can provide some relief for the closeness of structures. Narrow view corridors can preserve some semblance of vistas. But, if the project goes forward, over 800 houses will occupy the golf course and they are not there now. Regardless of efforts at mitigation, this would make a profound difference in the sense of the openness of the surroundings for those in adjacent homes. The feeling of being closed in would be particularly acute for those in the clustered developments in the middle of the golf course.

87. The proposed development would vastly change the experience of open space by eliminating the central feature around which the PRD was planned. The effect on adjacent properties would be adverse.

88. In this application for change, compliance with conditions that were set forth in the establishment of the original PRD must be considered in the evaluating the new Site Plan. Of course, the whole point this application exercise is to get rid of the key condition of PRD approval. So, in a circular fashion, approval of the proposed Site Plan is dependent on meeting the criteria for revising the PRD. Unless those can be met, the original condition will still apply and that condition, of course, cannot be complied with by a Site Plan for residential development of the golf course.

Public Interest

89. The plat proposed here would only divide land within the golf course property. If the golf course is looked at in isolation as though it were an island, then (if the requested variances were approved) the proposal would meet the dimensional requirements for the R2-PRD zone, including the requirements of the open space definition to which the application vested.

90. However, in this case, the application of such standards to the golf course property is not the only relevant inquiry. This is because the effect of approving the proposed plat would be to alter the primary condition of approval for the surrounding plats. The approval of the plats was a part of the master planning process. Keeping the golf course as open space was a condition of approval for the plats, as well as of the PRD rezone.

91. While the golf course was not subdivided, it was tied to the adjacent plats by the Hearing Examiner's "open space" condition. The open space designation for the plats is the area of the golf course. In this sense, the golf course is part of the plats. The fact of different ownership of the residential areas and the golf course does not change this.

92. If the presently proposed plat of the golf course property is approved, the designated open space of the surrounding plats will have been largely eliminated. Necessarily this must be viewed as modifying those surrounding plats. That this open space might represent more open space than was needed when the plats were approved is immaterial. They were approved with the golf course as their designated open space.

93. To be sure, no application for the modification of the adjacent plats is presented for determination here. What we have instead is an application that, if approved, would indirectly have that effect.

94. By approval of the subject Preliminary Plat, the residents of the adjacent plats would be subjected to a decision that would effectively result in a major change in those plats without their consent. The Examiner, after much reflection, is convinced that such an effect on the adjacent plats brought about the unilateral action of a single applicant is not in the public interest.

General Discussion

95. The instant proposal represents exactly the kind of thing that the Hearing Examiner was worried about when he imposed his "open space condition" in 1981.

96. Assuming that the City cannot contract away its police power, the "in perpetuity" language of the Hearing Examiner probably expresses a concept beyond the City's ability to guarantee. Thus, the OSTA, represents a reasonable implementation of what the Hearing Examiner tried to do. It requires the golf course to remain as open space until the City gives permission for it to be used another way. Nonetheless, the "in perpetuity" language serves to emphasize that maintaining the golf course in open space was pivotal in the Examiner's decision to create the PRD zone.

97. The discussion of the mathematics of the former open space definition diverts attention from the function of the golf course in the original development concept. Certainly, as a provider of open space, the golf course was important in securing approval to the increased density allowed in the residential areas by PRD zoning status. But it also provided a visual and physical amenity for the residents that was a significant part of the inducement to live there. Country Club Estates got its name from the golf course. Developments that grew up there have names like "The Links" and "On the Green." Streets have names such as "St. Andrews Place," "Fairwood," and "Pinehurst." All of this underscores the essential qualitative function of the golf course in the very concept of the development.

98. The City is now being asked to abandon the original intent of behind the creation of Country Club Estates. The City is being asked to do this over the opposition of those who live in the developments that grew up in response to the idea of living on or near a golf course. This is not the casual opposition of a few. It is a massive outpouring of citizen outrage.

99. The overarching question here is whether circumstances are such now that "perpetuity" should be terminated by the City. Based on the entire record, the Examiner finds no compelling reason for doing so.

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

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the subject matter of these proceedings.
2. Notice of the hearings was provided as required by law.
3. The procedural requirements of SEPA have been met.
4. Because of the decisions on the Preliminary Plat and the Site Plan approval the Variances/Reductions, Wetland/Stream Assessments, Wetland/Stream Exemptions need not be decided and are not reached.
5. Counsel for Save North East Tacoma argues that the provisions of RCW 58.17.215 should be brought into play here. This is the subsection of the State platting statute that spells out the procedures for altering subdivisions. It provides that if a subdivision is the subject of restrictive covenants filed at the time of approval of the subdivision, and the application would result in the violation of such a covenant, the application must contain an agreement by all parties subject to the covenant that the covenant may be terminated or altered to accomplish the purpose of the subdivision change sought.
6. The Hearing Examiner declines to address this argument. First, whether the OSTA is a restrictive covenant or operates like one, is a question for judicial determination. Second, there is no application here to alter any of the adjacent plats. The only plat-related request is the application to plat the golf course.
7. However, the Examiner reaches a similar result by a different route. The effect of approving the subject plat would be to eliminate the designated open space in adjacent plats. It is contrary to the public interest to allow any applicant to achieve such a result unilaterally. The interests of too many others are left out of the decisional equation. The Examiner concludes that the Preliminary Plat should be denied because the public interest will not be served by the platting of the subdivision applied for. TMC 13.04.100(E), RCW 58.17.110. Ultimately this may mean that requests to alter the adjacent plats need to be made and approved before the subject application can be approved.
8. The question of whether the project's inconsistency with the *Comprehensive Plan* can form the basis for rejecting the subject application for Rezone Modification under TMC 13.06.650(1) is not presented in this case, because no inconsistency with the *Comprehensive Plan* for regulatory purposes was found.
9. Denial of a proposal based on SEPA is limited to the application of policies, plans or rules formally adopted as the basis for the exercise of substantive SEPA. See TMC 13.22.660. If violation of the *Comprehensive Plan* is enumerated among such policies, an alternative means for using the *Comprehensive Plan* for regulatory purposes is established. Here, notwithstanding the existence of significant adverse environmental impacts Tacoma's *Comprehensive Plan* does not provide a basis for denial of this particular project through SEPA.

10. The complex and convoluted discussion of the mathematics of the open space requirements for the PRD are essentially beside the point. As a matter of initial intent, the golf course was designated as open space for the PRD and it is performing that function. The issue is not about the minimum number of acres of open space the regulations require, but whether the open space designation of the golf course, whatever its size, should be eliminated. To conclude that this should happen requires some independent justification for departing from the original design concept.

11. The critical question here is whether conditions have so changed that the Rezone Modification is appropriate. TMC 13.06.650(2). The issue of "substantial changes in condition" requires a broader consideration of factors than just the financial viability of the present use of the particular parcel under consideration.

12. At least three factors are relevant: (1) changed public opinion, (2) changes in the land use patterns in the area, and (3) changes in the property itself. See Bjarnson v. Kitsap County, 78 Wn.App. 840(1995).

13. As to public opinion, there has been an unusually large outpouring of it here. It is all emphatically in opposition to getting rid of the golf course. So public opinion has not changed at all. If anything, it has hardened. The applicants quote cases saying that "community displeasure" should not be the basis for denial. But in rezone cases it is a recognized factor to be considered. The public sentiment expressed in this case is primarily from people who have a genuine and substantial interest in the outcome. There is little point in having public hearings, if such interested public sentiment counts for nothing.

14. As to changes in the land use patterns in the area, none have been brought to the Examiner's attention. No significant new infrastructure has been built in the vicinity. The only development has been the development of the Country Club Estates according to its original design.

15. The condition of the property itself is a matter of dispute. There have been no significant physical changes. The golf course is still a golf course. The problem is with the viability of that use or some other open space use. The Examiner was not convinced that the golf course cannot make it as a golf course or that some other reasonable open space use cannot be found.

16. On review of the factors listed in Bjarnson, the Examiner concludes that the "substantial changes in condition" necessary for Rezone Modification were not proven.

17. The applicants here have labored mightily to create a development that would mitigate all environmental impacts to below the level of significance. Despite all efforts, there is really no way to hide the insertion of over 800 new homes into an area where they do not now exist. And there is really no artfulness of design that can make such a development a less than significant change in the perception of open space by those living in the adjacent plats. The proposed development is well and thoughtfully designed, but given the history and physical context of this particular PRD, it is in the wrong place.

18. Therefore, the Examiner further concludes that the proposed rezone would not be "consistent with the district establishment statement." TMC 13.06.650(3). It was not proven that the rezone will facilitate a more desirable use of open space. Further, it will not avoid an adverse effect on adjacent properties. In this regard, the FEIS determination that there will be unmitigated adverse environmental impacts on land use compatibility and aesthetics is a relevant consideration.

19. The inability to approve the Rezone Modification, makes approval of the Site Plan impossible. Because the rezone is inconsistent with the district establishment statement, it is inconsistent with the intent of the PRD district. TMC 13.06.140(B)(2). Similarly the failure to demonstrate sufficient changes in condition removes any basis for modifying or removing the CZA condition requiring adherence to the original Site Plan. See TMC 13.140(B)(3)(d).

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

RECOMMENDATION

The Hearing Examiner recommends that the Rezone Modification be denied.

DECISIONS

The Preliminary Plat is denied.

The Site Plan approval is denied.

SO ORDERED, this 7th day of January, 2010.

ELECTRONIC COPY

Wick Dufford, Hearing Examiner Pro Tempore

APPENDIX D

Chapter 1.70

APPEALS TO THE CITY COUNCIL

Sections:

- 1.70.010 Right to appeal.
- 1.70.020 Notice of appeal.
- 1.70.030 Appeal procedure.
- 1.70.040 City Council action.
- 1.70.050 Review of Council decision.

1.70.010 Right to appeal.

A. Any aggrieved person having legal standing under the ordinance governing such application shall submit an appeal, in writing, to the City Council of those recommendations of the Hearing Examiner set forth in Section 1.23.050.A. Only those persons or entities having legal standing under the ordinance governing the application, or as otherwise provided by law, have the right to appeal the recommendation to the City Council. Such appeal shall set forth, with specificity, the alleged errors of fact or law.

B. Appeals to the Council must be filed with the City Clerk within 14 calendar days of the issuance of the Hearing Examiner's final recommendation, not counting the day of issuance of the recommendation. If the last day for filing the appeal falls on a weekend day or a holiday, the last day for filing shall be the next working day.

C. The Council may grant relief only if the appellant seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (d) of this subsection has been met. The standards are:

- (a) The Hearing Examiner is engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) The recommendation is an erroneous interpretation of the law;
- (c) The recommendation is not supported by evidence that is substantial when viewed in light of the whole record before the Council; and
- (d) The recommendation is a clearly erroneous application of the law to the facts.

D. The requirements set forth herein regarding the time limits for, and contents of, such appeals are mandatory.

Failure to comply with the above requirements shall result in the City Council's dismissal of the appeal. (Ord. 27387 § 1; passed Jul. 26, 2005; Ord. 25849 § 1; passed Mar. 12, 1996)

1.70.020 Notice of appeal.

Notice of filing of an appeal shall be made to all parties to the proceeding before the Hearing Examiner. A party with standing desiring to intervene in an appeal shall file with the City Clerk a notice of intervention within ten days of the date of mailing of notice of the filing of an appeal as provided herein. An intervening party, at the time of the filing of his/her notice of intervention with the City Clerk, shall send by first-class mail the notice of intervention to all other parties listed on the City Clerk's notice regarding the filing of the appeal. Thereafter, the City Council shall set the date on which the appeal will be heard and the City Clerk shall notify all parties to the appeal of the date and time of the hearing of the appeal. The City Council shall consider and decide such an appeal within 90 days of the filing of such appeal; provided, however, that the parties to the appeal may agree to extend the foregoing time period. (Ord. 26645 § 3; passed Jun. 27, 2000; Ord. 25849 § 1; passed Mar. 12, 1996)

1.70.030 Appeal procedure.

Parties to the appeal may submit written argument to the City Council in support of their positions. Such written arguments shall not contain any evidence or statement of facts not contained in the hearing record made before the Hearing Examiner, and shall be filed with the City Clerk no later than seven calendar days prior to the date the matter is scheduled to be heard by the City Council. At the time an appeal is heard by the City Council, each side shall be afforded an equal amount of time pursuant to the Rules of Procedure of the Council of the City of Tacoma for oral argument. In the event there are multiple appellants or respondents, each side shall divide its time limit between or among the appellants or respondents, or, if agreement cannot be reached, as directed by the Mayor. No new evidence or testimony shall be presented to the Council during such presentation. The City Council shall accept, modify, or reject any findings or conclusions, or remand the recommendation of the Hearing Examiner for further hearing. Any decision of the City Council shall be based on the original record of the hearing conducted by the Hearing Examiner; however, the Council, at its discretion, may publicly request additional information of the parties to an appeal, or from the Hearing Examiner. 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. (Ord. 27387 § 2; passed Jul. 26, 2005; Ord. 25849 § 1; passed Mar. 12, 1996)

1.70.040 City Council action.

When taking any final action, the City Council shall make and enter findings of fact of the record and conclusions therefrom which support its action. Such findings and conclusions regarding appeals of recommendations of the Hearing Examiner shall set forth and demonstrate the manner in which the action carries out and helps to implement the goals and policies of the comprehensive plan and the standards of the various land use regulatory codes. The City Council may adopt all or portions of the Hearing Examiner's findings and conclusions supporting the recommendation. In the case of an ordinance for reclassification of property or right-of-way vacation, the City Clerk shall place the ordinance on the Council's agenda for first reading or, after denial of appeal, on the next available City Council agenda for first reading. The final reading of the ordinance shall not occur until all conditions, restrictions, or modifications which may have been imposed by recommendation of the Hearing Examiner or added by the City Council have been accomplished or provisions for compliance made to the satisfaction of the City Attorney. (Ord. 27079 § 4; passed Apr. 29, 2003; Ord. 25849 § 1; passed Mar. 12, 1996)

1.70.050 Review of Council decision.

Any court action to set aside, enjoin, review, or otherwise challenge the decision of the City Council concerning an appeal shall be commenced in Superior Court within 21 days of the final decision of the City Council. Pursuant to RCW Chapter 36.70C, the final date of the decision of the City Council on the appeal shall be deemed to be the date the motion concerning the appeal is adopted by the City Council and shall be considered to have been entered into the public record on that date. (Ord. 25849 § 1; passed Mar. 12, 1996)

APPENDIX E

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come knock on your door, will come visiting may 1st. And to date, 65% of Tacomans have turned in their forms. Remember, participation isn't just important, it's mandatory, and these 10 simple questions will help us improve schools, infrastructure, and health care.

So please, if you haven't already, turn in your census form.

An accurate count of residents means a brighter tomorrow for the City of Tacoma.

So at this time, we're going to take a brief recess.

The public hearing is scheduled for 5:30, and we're not allowed to start before then.

We'll take a 10-minute recess and convene at 5:30 for the public hearing.

Thank you.

[Brief Recess]

>>Mayor Strickland: Okay, the Tacoma city council meeting is back in order.

At this time, we're going to have the quasi-judicial issue of the appeal regarding the recommendation of the hearing examiner to deny the point at northshore application for rezone modification.

The quasi-judicial hearing is now in session.

It is the council's intention that this hearing be fair in forum, in substance, as well as appearance.

And with that said, I'm going to read the appearance of fairness doctrine.

The doctrine's governed by

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statutory law, chapter 42.36
RCW, in corporate
interpretations.

The doctrine requires that a hearing regarding a land-use proposal, which is contested and quasi-judicial, not only actually be fair, but that it appear to be fair, and be objective, fair-minded observer.

This means that during the pendency of any quasi-judicial proceeding, no council member may engage in ex parte communications with the opponents or proponents with subject to the proceedings.

Ex parte communications are the communications regarding subject's with one party outside the presence of and/or with or without notice of any person adversely interested.

So again, the appearance in fairness doctrine is what we'll talk about for a while.

If any council members have a personal interest in this matter, have statements that might be interpreted to suggest they have prejudged this matter, or have any ex parte communications with the parties regarding this case, please disclose that interest, statement, or those contact at this time.

We'll just go down the row and give everyone a chance to speak to this.

Council member Boe?

>> Council Member: Thank you, mayor.

I was a member -- actually vice chair of the planning

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commission in 2007 when council adopted ordinance 27584, looking at an emergency moratorium.

And so, I was involved as a volunteer on the planning commission through that process.

Heard testimony about the moratorium specifically, and then in the capacity as -- on the planning commission after that moratorium, while the moratorium was going on, partook in the discussion and analysis of the PRD revisions to the code and saw that through to its completion. So that is the -- kind of not directly related to this action, but I was on the planning commission at the time when we were reviewing related action.

>> Mayor Strickland: Okay. Thank you, council member Boe. Do we have any comments or questions from either Mr. Lang or Mr. Derr for Mr. Boe?

>> Did you advocate for any position on the moratorium?

>> Council Member: I did not. I think that just came up for vote, and when the vote came up protecting the records, I actually voted against the moratorium based on duration of time in moratorium.

>> Thank you.

>> Mayor Strickland: Mr. Derr?

>> Yeah, if I might, we also want to make sure Mr. Huff, the counsel for the appellants, he's here, but I don't think has a seat at the table, because the room is full.

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There he is.

We'll want to provide him an opportunity as well since he represents the interveners, the parties to this appeal.

Mr. Boe, I think I have one question for you.

As you mentioned, the PRD code changes and the moratorium. Do you understand that this particular application is vested to the PRD code that existed prior to those changes and that your review tonight needs to be based on that prior code, not the current code?

>> Council Member: Yes, I do.

In fact, I think I understand that to great detail, because we analyzed that -- I don't want to say in minutia -- but using that as the basis from which we then revised the code during that moratorium.

Yes, I fully understand looking at this is under the vested PRD code.

>> Thank you.

>> Mayor Strickland: Thank you.

Mr. Huff, do you have any questions for council member Boe?

All right, thank you.

Council member Woodards?

>> Council Member: Thank you, madam mayor.

In my role prior to being elected to the city council, I was a metropolitan parks commissioner.

And on August 25th of 2008, we moved to put together an ad hoc task force consisting of business advisory count -- or business advisory council members and save northeast

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Tacoma contingency committee to discuss an open-space preservation proposal.

>> Mayor Strickland: All right. Thank you.

Any questions from Mr. Lang?

>> Did you take part in the preparation of a northshore task force called core subcommittee report dated January 22nd, 2009?

>> Council Member: Did I take part in?

>> The preparation of a task force report regarding the golf course?

>> Council Member: No, I did not.

>> Mayor Strickland: Mr. Derr?

>> I have no questions.

>> Mayor Strickland: Mr. Huff, do you have any questions?

All right, thank you.

Council member Lonergan?

>> Council Member: I have nothing.

>> Mayor Strickland: Thank you. Deputy mayor?

>> Deputy Mayor Fey: Mayor, a challenge has been made to my participation on this appeal based on an E-mail dated January 27th, 2007, from staff to city management, that references communications that I had with staff.

I will note that I was not copied on the E-mail at the time that it was written.

I was communicating with staff regarding the legislative options that council had relative to modifications of existing PRDs within the city, including the northshore golf course.

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My concern was whether existing regulations adequately addressed issues of neighborhood and open space.

I also made an appearance before the planning commission as reflected in the minutes of 2/21/07.

Council was provided on April 9th of this year.

That was for the purposes of advocating for changes to the new under consideration at that time PRD ordinance.

I have not had ex parte communications and made no statements evidencing prejudice of this appeal. I have all my E-mails that have been provided some time ago with -- to parties, through attorneys here at the City of Tacoma.

My response to those responses, to those inquiries about the matter, was to indicate what the process was and to refer to the proper officials of the city.

I did, also, have at the time last year when I was seeking re-election, an interview with the Tacoma-Pierce County master builders seeking their endorsement and financial support.

They raised subject of the issue of northshore, and I informed the group that I could not speak to the matter, because it was ex parte/quasi-judicial matter.

>> Mayor Strickland: Thank you, deputy.

Mr. Lang, any questions?

>> I don't believe I have any

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questions so much.

But -- well, I'll ask one.

My recollection, council member Fey, is that approximately January of 2007 you initiated -- we'll call it a grassroots door-to-door kind of movement to get a petition signed in order to bring forward the moratorium.

Do you recall that?

>> Deputy Mayor Fey: I did not participate.

>> Do you recall on January 29th, 2007, sitting at one of these chairs, I believe actually where council member Manthou is sitting now, advocating for the PRD moratorium?

>> Deputy Mayor Fey: It is true, I advocated for the PRD moratorium.

>> And you are the council member for northeast Tacoma?

>> Deputy Mayor Fey: I am.

>> And you met with community leaders in advance of advocating for the moratorium?

>> Deputy Mayor Fey: I don't recall that.

>> Okay, fair enough.

Well, I stand by the position set forth in the brief that I submitted that council member Fey should recuse himself under the appearance of fairness doctrine.

I think the January 23rd, 2007, E-mail is unequivocal about the contacting of staff to look at what could be done to quote/unquote effect, prevent, delay the redevelopment of the northshore golf course.

Which is almost exactly the

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language in the westmark
deBERIAN decision, so I would
ask that he recuse himself.
>> Mayor Strickland: Mr. Derr?
>> I might ask we switch order
this time to see if Mr. Huff
has any questions before I ask
my questions.
>> Mayor Strickland: Mr. Huff?
>> We're comfortable
>> Mayor Strickland: All right,
thank you.
Mr. Derr?
>> All right, Mr. Fey, I want
to dig into this deeper, if I
can.
We talked about a January 23rd
E-mail which is from Peter
Huffman to Eric Anderson, Ryan
petty, copied Peter KAVITCH and
Donna stinger.
Do you recall that E-mail?
>> Deputy Mayor Fey: I was
provided this E-mail.
I may have seen it before.
I was not a recipient of the
E-mail at the time.
>> And can you explain -- as I
understand it, it's an E-mail
from Mr. Huffman to other
people.
It's not an E-mail from you to
somebody.
>> Deputy Mayor Fey: No.
>> Can you explain any further
besides what you've already
done, what you think might have
precipitated Mr. Huffman to use
the phrase, "effect, prevent,
delay" the redevelopment?
What might you and Mr. Huffman
have been talking about?
>> Deputy Mayor Fey: This was
perhaps the first land-use
matter that I faced as a
council member.

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This was approximately a year from my swearing in.

And I had -- I had asked for a meeting when I heard about that there was an application out there regarding this matter. And I asked staff to explain to me if there were legislative actions appropriate to the situation that could be undertaken to address the matter.

When I -- what I found was an ordinance that was dated back in 1965 and out of date.

And so, I asked for the legislative review.

And asked for feedback.

>> Okay.

And it's my understanding that then led to some efforts regarding moratorium.

>> Deputy Mayor Fey: Yes.

>> And it led to some efforts regarding then-PRD code modifications, is that correct?

>> Deputy Mayor Fey: That is true.

>> I heard your answer to Mr. Lang's question, you advocated on behalf of the moratorium, is that correct?

>> Deputy Mayor Fey: I voted for it, yes.

>> But then, my next question is, do you understand which version of the PRD code applies to the particular application that's before you tonight?

>> Deputy Mayor Fey: It is the code that was in place at the time that -- prior to the moratorium, and any action by the city council.

So it is the old regulations that were in effect regarding

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PRDs.

>> So are you clear that -- what the moratorium might have done does not affect this project.

And the changes to the PRD code that have happened since do not affect your review of this project?

>> Deputy Mayor Fey: They do not affect it at all.

>> Okay.

>> Deputy Mayor Fey: I might add that, Mr. Derr, one of the things I found in the land-use matter earlier is that my simple going to the site of a land-use matter was advised to me by myself to check it out, because all I had was drawings. I was advised by Ms. Pauli that that was -- because I had done that on my own and without other parties being there, I had to recuse myself, which I did.

>> So which that segues to my next question.

Do you understand what you are to rely on in basing your decision on this appeal?

>> Deputy Mayor Fey: Yes, it's only on the record.

>> And the record, meaning the record that was extended to the hearing examiner?

>> Deputy Mayor Fey: The record that I have before me that was provided by staff, of the hearing examiner's official record.

>> Thank you.

And that is, just to clarify for the tape, that is the record of all exhibits presented to the hearing

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examiner.

You also have a copy of the hearing examiner decision, is that correct?

>> Deputy Mayor Fey: That's correct.

>> You understand your review is to be based on his decision and whether his decision that's supported by the information in his record?

>> Deputy Mayor Fey: Yes.

>> And then, lastly, I want to ask you about what's called "prejudgment" under the fairness doctrine.

This is really the concept, and it sort of builds from what we just talked about.

That you're to base your decision on the record that was before the hearing examiner. The hearing examiner's decision.

Of course, the arguments that are presented in the briefing and that will be presented by parties tonight.

With that understanding, do you believe you have already made a decision on this appeal, or can you base your decision on that information and base it on what's presented even tonight rather than coming into this meeting having already decided the outcome?

>> Deputy Mayor Fey: I can, I understand that to be my responsibility.

>> Okay, thank you.

>> Mayor Strickland: Thank you. All right, I will comment. Last year, during the course of the mayoral campaign, I was asked via E-mail at least a

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dozen times, where do you stand on this issue?

Are you for or against development on the golf course.

I replied by citing the appearance of fairness doctrines, I could not take a position because I'm a council member, and I didn't want to taint the outcome.

Also during forums, I was asked the question, and I cited the appearance of fairness doctrine.

Finally, when he was interviewed by the master builders's association, they asked me where do I stand on the golf course, and I cited the appearance of fairness doctrine.

That's my disclosure.

Any questions?

Thank you.

Council member walker?

>> Council Member: I really have nothing to disclose other than receiving E-mails from 2008 through 2009 because of the direction of the city attorney's staff.

I either did not respond to those E-mails, or I responded simply that I could not share any opinion on the matter because of the advice of the legal staff.

>> Mayor Strickland: Thank you, council member walker.

Council member Campbell?

>> Council Member: Thank you, mayor.

I've carefully reviewed my interactions with the parties in this matter, and while I believe that I'm capable of

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making an informed, impartial decision, my overriding concern is to help ensure that the council decision will not be subject to impeachment.

Based upon the assertion of even an appearance of fairness issue.

As a result, I've determined to recuse myself from these proceedings on this appeal.

>> Mayor Strickland: Thank you, council member Campbell.

Council member Mello?

>> Council Member: Thank you, mayor Strickland.

I want to disclose the following communications that have been made regarding this project during my tenure as an elected metro parks board member.

And I'll quickly detail these communications I've had in that role of being elected metro parks board member.

One of the first correspondence is an E-mail dated December 19th, 2007, from Ms. Sandra McDonald to myself.

And that was provided to all legal counsel on April 9th, 2010.

Another E-mail dated December 19th, 2007, from, again, Ms. Sandra McDonald, and that, too, was provided to legal counsel.

And then a correspondence on the same date, December 19th, 2007, from Ms. McDonald to Ms. Ward.

That, too, was provided to legal counsel on April 9th of this year.

Another E-mail correspondence

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dated December 24th, 2007, from myself to Mr. David Radford in response to an E-mail from Mr. Radford.

That was provided to legal counsel on April 9th, 2010. Another E-mail dated December 24th, 2007, from myself to Ms. McDonald, also provided to legal counsel on April 9th. An E-mail dated January 4th, 2008, from Ms. Sandra McDonald. And that was provided to legal counsel on April 9th, as well. Apparently, planning commission minutes of February 21st, 2007, I was referencing them.

Honestly, I don't remember that commission meeting.

But apparently, it was in the disclosure that was provided to counsel on April 9th, 2010. And then metro parks resolution dated August 15th, 2008, that was provided to counsel on April 12th, 2010, apparently I am on the record on a resolution, the same resolution that council member Woodards articulated earlier in her disclosure.

And then, minutes of a metro parks meeting on August 25th, 2008, that, too, was provided to counsel on April 12th of this year.

And then, finally, a letter received from an unknown constituent on February 1st, 2010.

It was placed in a file and logged by our assistant.

I honestly have not -- that letter never got to me, presumably by some mistake. The contents were never shown

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to me, but apparently the content was the issue of northshore.

>> Mayor Strickland: Thank you, council member Mello.

Do you have any questions, Mr. Lang?

>> None, thank you.

>> Mayor Strickland: All right.

Mr. Derr?

>> I don't think I have any questions either.

I think you've done a good job, thank you.

>> Mayor Strickland: Mr. Huff?

All right, thank you.

Council member Manthou.

>> Council Member: I have nothing to disclose, mayor.

>> Mayor Strickland: All right, thank you.

>> Mayor Strickland, if I may, just to be sure we don't skip one, I don't recall you asking if there are any questions of council member walker.

So we should just --

>> Mayor Strickland: I'm sorry.

>> We should be sure there aren't any questions -- maybe there aren't.

>> Mayor Strickland: Mr. Lang, do you have any questions --

>> No.

>> Mayor Strickland: Mr. Derr?

>> I do not, thank you.

>> Mayor Strickland: Mr. Huff?

>> Thank you.

>> Mayor Strickland: Thank you. Will before we go into our oral arguments, I want to talk of a point of order.

We have a lot of people in council chambers tonight and each side will get 10 minutes and we want to respect the time

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and give them the ability to use every second of it. Please refrain from cheering or jeering.

You can smile, nod your head, but we want to make sure we maintain order and decorum in the chambers tonight.

Each side will have a total of 10 minutes to present oral argument.

If more than one person intends to speak on behalf of either side, the 10 minutes will be divided.

The appellant may save some time for rebuttal.

Mr. Lung -- Mr. Lang with northshore developers, LLC.

Mr. Lang, do you want to divide your time?

>> I won't be dividing my time, but I will reserve some time for rebuttal.

>> Mayor Strickland: All right. Seven minutes for presentation and three minutes for rebuttal.

>> Thank you.

>> Mayor Strickland: Thank you.

>> Thank you, mayor.

And thank you, council members.

And, also, thank you to the public for showing up tonight.

It's part of what makes our society and the process what it is.

And I appreciate it, even if there may be some hard looks at my back this evening.

[Laughter]

Frankly, over the last three years of this, I've gotten accustomed to it, though I have had the pleasure of talking with some of the most vocal opponents, and I've appreciated

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their wit.

And humor, despite it all.

I think probably the best way to understand how we got here tonight is to understand how we got where we were about 30 years ago with the development of the northshore golf course. And so, what I'm going to do is provide a little bit of a historical background, and then look at the project -- talk a little bit about the project and then talk about how the hearing examiner erred as a matter of fact in law.

I submitted a 28-page brief that is replete with citations to the record and legal citations, and I found that when I'm speaking with anybody, whether it's my spouse or elected officials, when I start quoting a bunch of law, their eyes glaze over.

So I'm going to try to focus this presentation on just the practicalities of this and why you should reverse the hearing examiner's decision.

Back in the late '70s, the northshore golf course is a nine-hole golf course.

There's one subdivision, division one.

You'll have to forgive me, my son brings the best things home from day care.

The northshore golf course that existed as a nine-hole course, thank you, since the 1950s, and the -- pretty much the only development out there other than the golf course and division one was -- well, that was pretty much it.

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It was treed.

It was a forest.

Getting into the '70s, which is the interesting time period, a deal started to be made, and the folks who had the golf course property got talking with the folks who had some of the surrounding property, and they hatched a plan, and the plan was basically, "we could do a development by which we could have an expansion of the golf course and we could have a residential community around it."

And that residential community's called northshore country club estates.

And the newer portion of that's referred to as division two, and there are divisions two through four.

And what happened in the planning process was this, and this is what's important -- The folks who wanted to do the residential development didn't own the golf course land. They had some deals, and I'm not going to bore you with it. It's been well litigated. In fact, we're going to oral argument at the court of appeals in June.

But suffice to say, there wasn't a direct tie between the golf course owners and the owner of the property that was going to become the residential subdivision.

And what the residential subdivision developers wanted to do is they wanted to have a mix of housing types.

The land out there was zoned

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R-2, and it's still R-2.

And the only thing that's different today between the zoning then and now is that it's PRD R-2.

What the PRD allowed that the underlying zoning didn't allow is it allowed for multifamily development, and that was it. It didn't increase the density. It didn't change anything else. It just allowed for multifamily development.

That was one of the kind of flexible tools within a PRD.

And so, the developers came in, and they had their plan.

And what they needed were basically three permits.

Just as my client needs three permits and the golf course owner needs three permits.

They needed a PRD rezone.

They needed a site plan.

And they needed the actual subdivision applications.

In order to meet the open-space criteria for the PRD rezone, they asked if the golf course owners would let them use that property as if they owned it. And that's -- that's basically what they did.

They said, well, you can eyeball it.

The golf course is about 115 acres.

We got about 220 acres.

The code says something about a third.

115's about a third of 335.

And there you go.

So, they were allowed to get -- they came forward, and all the way back then, 30 years ago, the hearing examiner expressed

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some concerns about this arrangement.

And some bells should be going off for you, too.

And it's because of those bells is why we're here today.

The simple fact was, back then, there was no tie between that residential development and the golf course other than this zoning designation.

And that's what my client's asking to change here.

Because there is no tie there, there is no mechanism to support the golf course in the event that the economy changed or the golf course declined or something else happened.

And it's interesting, because a city attorney back then said, this is Mr. Fishburne, he indicated he could not guarantee the economic operation of the golf course, but he felt comfortable land is rare and difficult to find, and he feels if they have to close the golf course, it will be passive open space unless somebody seeks approval to build on it.

Prescient.

Here we are.

We have submitted a variety of applications before you, the one on appeal, application for rezoning modification.

There are two ways to get an application for a rezoning modification, if you will, passed.

One is to show changed circumstances.

The other one is to show that the proposal will implement

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direct policies of
comprehensive plan.

The record is replete with both
of them.

The entirety of the hearing
examiner's decision rests on
the public option.

And it's significant.

You can see it behind me and
you've seen it over the last
three years.

I'm not going to go into it at
length.

The record is lengthy.

It's multiple boxes.

But I will tell you, even in a
staff report, the staff says a
portion of the comprehensive
plan policies were found -- are
either found to be consistent
with the proposal or could be
consistent if the recommended
mitigation is required.

Staff report lists many
policies.

We've submitted two analyses
that show many, many, many,
many, many policies and goals
and policies of the
comprehensive plan, implemented
by this.

Recreation policy, stormwater
policies, environmental
protection policies.

We've also showed the change in
circumstances.

Bottom line --

The golf course is failing --
[Bell sounds]

-- the golf course owners are
ready to retire and move on,
and unless the city's in a
position to take over the
maintenance of that course --
because there is no link with
those residences -- we need to

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move on, reverse the hearing examiner, approve the permit. I'll take my three minutes after I hear Mr. Huff.

>> Mayor Strickland: All right. Thank you, Mr. Lang. Mr. Huff?

>> Good evening. I was asked to bring this up since I'm not --

>> Mayor Strickland: In case I forget who you are. Thank you.

>> Yes.

[Laughter]

>> Gary Huff from law firm in Seattle representing save northeast Tacoma. And I'm not going to try, because it's impossible, to summarize four days of testimony. Boxes of exhibits. That's why you have a hearing examiner. He is given the responsibility of reviewing all the evidence and making a recommendation. And he did a great job with that, as you might think that we would. And that's entitled to great respect. But most of that -- most of that voluminous record is really irrelevant. There are a few key facts, some of which I'm surprised Mr. Lang brought up in part, that really should dictate the outcome of this. And you've heard not so much facts from the other side, but a few common things. Citizen outrage. Well, yes, there is evidence of

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that.

But that is an acceptable -- one of the acceptable criteria for reviewing these applications.

Has there been a change of circumstances or does one need to be required?

And then this taking argument, which you heard again veiled reference to at the end, if they're denied, that somehow constitutes a taking of their property rights.

Yes, this started for these purposes in 1979.

But not in the way that Mr. Lang describes.

Northshore golf associates, the owner and one of the two appellants here, agreed as a condition of their ability to acquire the golf course, that the golf course shall serve as the open space for the PRD. That's exhibit 101, this 1979 agreement.

Don't take my word for it.

Judge Hartman in the county case already interpreting this explicitly found that the golf course owner was only able to acquire the golf course because it agreed in writing and as a condition of its ability to purchase the property to subject the golf course to the master planning process, restrict the use of the golf course for such period as required by the city, for density and open-space requirements, execute all documents so that the owners of the surrounding property may use the property for density,

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and open space as if it were owned by the surrounding owner. In return, northshore was able to obtain the purchase rights to develop that property.

So their whole entitle, their ability to hold that, is based on this tie that is supposedly missing, that this is the open space for the property.

Now, the hearing examiner in 1981 was a remarkably clairvoyant person, and the attorney representing the golf course and residential owner talked about what would happen if this did fail.

And the examiner indicated, this is in exhibit 214, he's concerned over the fact that there are two separate ownerships and that the golf course is being used for open space.

How do we make sure that the golf course remains that way? And Mr. Fishburne indicated that he could not guarantee the economic operation of the course.

But if -- if he feels that the -- the minutes say, he feels if they have to close the course, it will be a passive open space.

This possibility was contemplated if the golf course fails, it's passive open space. Now, he did go on to say, unless someone -- Mr. Fishburne said, unless someone seeks approval to build on it. That was unacceptable to the examiner, and he said -- that's when he imposed the perpetual open-space condition.

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There must be certainty provided to ensure that the golf course use, which was relied upon to gain density for this request, is clearly tied to the appellant -- applicant's proposed use in perpetuity. It was understood the golf course might fail.

And if that happened, we'd likely have perpetual open space.

The requirement was not for a perpetual golf course.

That seems to be one of the basic misunderstandings of the appellants.

It was for perpetual open space.

What they did with that open space, whether they could make the golf course work, was up to them.

And there were three separate applications.

And that condition of perpetual open space was made a condition of all three approvals.

The rezone, the site plan, and the preliminary Plat of division 2-A.

All three were conditioned on that perpetual open-space language.

The applicant has only applied to modify two of those.

He asked for site plan approval to remove that.

That was denied by the examiner.

We have the rezone approval here to remove that condition, but there's never been any application to remove that open-space condition as required -- a condition of the

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Plats.

And there's very interesting language, again, from the minutes of the 1981 approval.

Mr. Fishburne -- or the examiner asked what happened if after a while the owners of the golf course decided they wanted to sell it for single-family development.

Mr. Fishburne indicated that if this PRD followed normal course, they would at least have to have a preliminary Plat approval for the golf course, which has already been denied, and, also, this is the golf course owner's attorney, have an amendment to the preliminary Plat.

The preliminary Plat being division 2-A at that point.

That's that link.

It is a condition of the Plat that this remain as open space, and they've never applied to do that.

Now, subsequent city councils looked at that, in '85, '86, and '88, and they reinforced that language, because there were concerns about the enforceability of that.

And language was then added to the phase of the Plat of division 2, which is all of the southwest Tuscan area to reinforce the city's commitment to this perpetual open space. Prior to the issuance of any building permits.

And building permits were issued, so the city was obviously satisfied that this happened.

The city would need to make

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sure that that was enforceable covenant, and at the end of the language that the city council approved, and which is on the face of each Plat of every homeowner here, that it would be referenced in their title, the foregoing shall be necessary to assure the continued availability of the golf course for open space and density purposes in perpetuity. That's condition of approval in every single Plat.

And the examiner noted that in finding 25, when he said the continued vitality of the original condition of approval was recognized by the city and the final approval of country club estates divisions 2, 3, and 4.

That brings us to another complication for the appellants, RCW 58.17.215. This is a state law that has very specific language to guard against this kind of thing happening.

It says, when any person is interested in the alteration of any subdivision or altering any portion thereof, that person shall submit an application to the city.

That application shall contain the signatures of the majority of those persons having an ownership interest in the lots, tracks, parcels, sites, or divisions of the subdivision sought to be changed.

Removing that space revises and amends every one of those Plats.

There's no way to do what they

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are asking you to do without complying with state law, and they haven't even applied for that.

Let's talk about rezone criteria and substantial change.

Both the staff report and the examiner determined that there's been no substantial change.

The key one is at finding 80 as to surrounding neighborhood, there's been no change in circumstances since the original rezone.

The area has simply become what was envisioned in 1981.

Country club estates was designed and remains a residential development around the golf course.

There's been no change in public opinion.

And the appellants argue, well, the failure of the golf course.

The fact that they claim it's declining is a change in circumstance.

But they're again confusing the purpose of the restriction.

It's perpetual open space, not perpetual golf course.

And it was contemplated from the very beginning what would happen.

John Lovelace testified at the prior hearing about the reason for declining Plat.

It's the declining maintenance of the course.

It's not well maintained.

They claim they tried to resell, but the examiner wasn't sure of the sincerity.

-- if the change is required to

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directly implement and express provision or recommendations of the comprehensive plan.

That's not this case.

That deals with the situation where you've got a comp plan and an inconsistency between a comp plan designation and zoning, and you need to bring your zoning into compliance with the comp plan.

Here, they've got the same zoning already.

The only question is open space.

To follow their logic, there is a requirement, then, that every bit of open space within a designation -- a particular comp plan designation should be developed to its maximum, or could be, without having any open space left, because that implements the overall comp plan.

I'm obviously running out of time.

[Bell sounds]

But the examiner did a very good job in going through condition by condition, and also noting that to do this, you have to assume that it's acceptable for people's private yards to be open space.

There's no way for this to be approved and to remove what was relied upon and intended to be the open space without saying, it's okay.

That we view people's private yards as satisfying that one-third open space requirement.

>> Mayor Strickland: Okay, you --

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>> Thank you.

>> Mayor Strickland: Thank you, Mr. Huff.

All right, at this time, we will entertain -- I'm sorry. Your rebuttal, that's right. Your three minutes.

>> I get three minutes.

Unlike homer Simpson, I will not moon for rebuttal.

>> Mayor Strickland: All right.

[Laughter]

Go ahead, Mr. Lang.

Sorry about that.

>> It would be briefer.

Mr. Huff is half right, but when you're half right, you're half wrong.

So here's the issue, and this is really the rub of it.

If the golf -- if the golf course does still need to provide open space for the PRD, and it will as a matter of mathematical certainty, and this is the whole issue going back to the definition of open space and the moratorium and the rest of it, the record demonstrates conclusively that under the definition of "open space" to which the application vested, a definition that's not been challenged by Mr. Huff before you this evening -- and, therefore, you have to take what the examiner found as a Verity on this appeal -- private yards are open space. And that's how they were treated until you amended -- until you amended the code in 2007.

So the golf course will continue to be there for open space and recreation.

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In fact, what it will be now is trails and parks that are open to everybody in the public instead of the approximately 9.5% of the population that is essentially -- let's just call it what it is -- middle-aged, upper-income white males who golf.

[Groans]

That is who -- that is -- by the record, we have expert -- expert exhibits in the record that show what the statistics are.

[Groans continue]

Because I aspire to be a little older some day, that's fine. But the problem is, the golf course is failing economically, and it only serves a very, very small segment of the population.

If this rezone modification is granted, there will be a trail network, which implements your recreation policies for northeast Tacoma linking the parks, the existing regional and local parks in the area. It will address the flooding situation, which there's a stack of documents two inches thick in the record showing a flooding out there at northshore golf course.

It will provide enhanced environmental protections for Joe's creek, which has been a big issue throughout all of this.

It will upgrade -- upgrade the roads out there that don't meet the city's current standards. So there are many, many, many, many, many amenities and many

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as pecks of the comprehensive plan that without this project will not be implemented.

If you don't allow for that golf course to be redeveloped, it's not just going to be passive open space.

It is going to be a blight unless the city is in a position to pay the roughly \$500,000 a year just to water and mow the grass out there. Look at the exhibit that even the opponents put together showing the short-term and long-term maintenance costs. Millions and millions of dollars just to get that thing going, and it's a declining, failing business.

So unless the city is in a position to render that golf course economically unviable entirely, render it barren of any economically viable use, and essentially condemn it, then you need to approve this rezone.

[Bell sounds]

Times have changed.

It will implement your comp plan.

Please, reverse the hearing examiner.

Thank you.

[Groans]

>> Mayor Strickland: Thank you. Order, please.

Okay, at this time, we'll entertain questions from the council members, and I will look for you to buzz in.

We'll start with council member Boe.

>> Major Strickland, if I could just have -- to kick this off,

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be sure I've introduced who's here to help answer questions.

>> Mayor Strickland: Yes, go ahead, Mr. Derr.

>> Staff's role in this proceeding is simply to assist you in your review of the record and your consideration of the hearing examiner's decision.

I've been introduced and I'm here to help.

I also have two people from my office, Duncan Green and Anna Nelson, who have participated with city staff on review of this for some years.

And then we have three staff members from the building and land-use services department. We aren't doing any presentation.

We're simply here to help you find things in the record, or understand things in the record.

And to be very clear, we cannot be providing any new testimony or any new information.

So we'll do the best we can to answer your questions if you have any.

>> Mayor Strickland: Thank you. And as a reminder to the council members, the questions should be in the context of the evidence as presented and the issue before the city council. Go ahead.

Council member Boe.

>> Council Member: Thank you, mayor.

I guess I'll just start with some -- a few questions.

And I guess it's probably more for staff.

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To make sure I understand it.
Because it is a large file of information.

To review in a very quick and short timeframe.

One of the -- Mr. Lang brought forward the issue of the open space and how there was no tie or no mechanism to bind it together.

So I'm a little confused, because I saw in the record there was this open-space tax agreement, and that has been basically a tax relief for the golf course.

And that was part of the 1981 subdivision, or was that some time later?

>> That's correct.

There are actually two documents that came out after the hearing examiner's decision that was referred to by the appellants in 1981.

Both documents attempting to implement the open space position that the hearing examiner had recommended.

The first -- and both are exhibits in the record.

The first is the concomitant zoning agreement, and that agreement was recorded.

That agreement refers to development of this property consistent with this site plan, and it shows a golf course in the middle of the residential development.

That's kind of one document that is referred to.

But it doesn't continue -- or doesn't include the language, the golf course shall be golf course in perpetuity.

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It says development should be consistent with the site plan and you have to look at the picture to figure out what that means.

That was one document that was adjudicated in the declaratory judgment.

Judge Hartman looked at that, and you've heard, again, references to what he concluded in the appeal statements and in the record.

Secondly, in the one you were mentioning specifically, there's a second document that was executed shortly after the 1981 rezone, an open-space tax agreement.

That also was a document that went through city process, puts that property into open space. A typical open-space agreement under the statute is for limited term and can be revoked, and then there are consequences for paying back some of the tax benefits that you receive by putting in an open space.

The specific open-space tax agreement that was executed and recorded on this property had a couple extra paragraphs in it that referred to, but you cannot revoke this unilaterally.

You have to get the permission of the city.

And that also was adjudicated in the declaratory judgment, and judge Hartman ruled that that document is still in force and effect, cannot be unilaterally revoked by the property owner and requires the

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city approval.

And so, those two ties are documents, if you will.

And judge Hartman's ruling that those are still valid, but he also ruled that they can ask to be changed.

The terms of the open-space agreement says unless the city approves termination of that. So that took us into this process, brings us back to this request to change that condition.

>> Council Member: Okay, if I could follow you up, mayor.

>> Mayor Strickland: Mm-hmm.

>> Council Member: So while Mr. Lang says there was no mechanism tying those together by sort of the function of getting the tax relief, that was for the full 115 acres? I mean, it wasn't for just the portion that the code at the time said was open space? It wasn't, you know -- I'm not sure what the exact number is, proposed now.

It wasn't that amount.

It was the full 11 --

>> It referred to -- that open-space agreement referred to the parcels where the golf course was located.

So roughly 116 acres, if I recall.

>> Council Member: So the tax benefit was 116 acres, not a smaller amount, which, if you followed the code minimums, it would have been a much smaller amount for those -- for the duration of the agreement?

>> If you follow the code minimum -- I'm not sure I

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understand that part of the question.

>> Council Member: Well, as I'm reading this, one of the -- the argument points is that, well, if you look at the existing code of the time, that your open-space requirement is actually much smaller, because you can use the private yards and all the rest of it.

So I was just trying to think in my head, looking at the record, if you were just getting that tax benefit for the minimum, you know, then that open space is kind of that minimum amount, versus the tax benefit for the whole area. And so there's -- it seems like there may not have been a physical connection tying those again, but more a procedural one by the tax benefit.

>> Well, I think -- I think I understand it better.

The open-space tax agreement and tax benefits that went with that are tied to the entire golf course property.

>> Council Member: Okay.

>> Not just some smaller acreage that might have been necessary for open-space calculations.

So it's attached to the whole golf course property.

Now, there really isn't evidence in the record that talks about what was the amount of that tax benefit and how much taxes would it have been if something else.

I can't really tell you what dollar amount that is.

And how that might differ if it

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were a different acreage. Back in 1981, the evidence in the record really does not reflect a precise calculation with backyards or without backyards.

It really more simply reflects they offered a golf course to satisfy open-space requirements, and I think even Mr. Lang tonight may have said, well, okay, that's about right, sounds good, we'll take it. So there wasn't a lot of calculation.

There was no discussion that we could find in the record back then as to whether backyards could or could not be included. That actually came out sort of later in the course of history, and the hearing examiner's decision does reference sort of a course of practice in the city way after the 1981 rezone that reflects at least occasionally the city allowed the use of backyards in calculating open-space requirements for PRDs.

Based on that, the hearing examiner did conclude that counting private backyards was a reasonable, in his mind, interpretation of the code.

>> Council Member: Okay, thank you.

>> Mayor Strickland: Deputy mayor?

>> Deputy Mayor Fey: Mr. Derr, I'm not sure who the proper person is to answer.

I'm looking at page 15.

>> Of the hearing examiner's decision?

>> Deputy Mayor Fey: Yes.

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And it's under changed circumstances.

And I'm trying to understand the record better with respect to the economic viability of the golf course.

It looks to me, and if I get this wrong, please correct me, it looks to me that there was not a specific offering of financial statements indicating the financial condition, or there's, you know, it looks like it could be opinionated as to whether, I think, the examiner says opinionated whether it was viable or not. Was there any record provided about -- about how the golf course was doing in terms of year-to-year cost effectiveness or profit or loss?

>> There actually was some. I think what the hearing examiner seemed to conclude is that the information on that was mixed, and therefore, when you recall in requesting a rezoning, the applicant bears the burden of demonstrating the criteria.

So I think part of what the hearing examiner say, based on sort of a mixed record, I don't find sufficient evidence of lack of economic viability of the golf course.

But let me draw your attention to a couple of exhibits that really deal with that.

One is exhibit 275, which was referred to in the oral argument tonight.

That is a document that came out of a task force that -- I believe it started with metro

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parks.

They appointed some citizens to take a look at sort of golf course issues.

And there was a task force that looked at costs associated with running the golf course and capital improvements that might be necessary, and exhibit 275 contains information that has some assumptions in it about how many rounds of golf you might have and what they might charge and whether the driving range fees could be the same or different than the comparable golf course in the city.

And what that document 275 basically concludes is the -- there may be about awash revenues versus expenses to run the golf course.

There are certain sort of implied suggestions such as refunding of admissions tax that might kind of help if the city were willing to do that. It did conclude, however, that the longer-term capital improvement needs of the golf course were a bigger number and would have to be financed by bonds or something else.

So that's one exhibit that suggests maybe the annual expenses and annual revenues would be about awash.

But the large -- the long-term capital improvements, you'd have to find another source to deal with that.

So that's one exhibit.

The second exhibit was then presented by the appellants at the hearing examiner hearing.

That's 196.

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That is actually a letter and some information presented by the golf course owner, who was unable to attend the hearing, but he presented this letter. And he did attach that letter -- a chart, excel spreadsheet, that showed the income or loss from the golf course over the last approximately 10 years or so, if I remember correctly. And what that -- what his letter said and what that attached spreadsheet showed was a loss over the last several years from the golf course. Now, it didn't -- it didn't -- that exhibit didn't contain a lot of information, but here's the detailed balance sheet or all of my expenses and all of my revenue. It just had a total number for net loss or a net income from the golf course operations. So that's -- that's the key documents that the hearing examiner had before them. And then they had testimony from the applicant, and you heard some of it reiterated tonight in Mr. Lang's argument. And you had some testimony from a citizen, I believe it was a citizen Mr. Huff mentioned in his argument tonight, that spoke about sort of differing opinions as to whether the golf course could be viable if managed differently or not.

>> Council Member: If --

>> Deputy Mayor Fey: If I could follow up?

>> Mayor Strickland: Yes, go ahead, deputy mayor.

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>> Deputy Mayor Fey: This is a complicated matter.

So are there financial statements?

>> Not what I would call the full set of financial statements.

There is sort of a list of -- in fact, maybe we could -- why don't you pull out, Duncan, the exhibit --

I'll just give you a little more information.

>> Deputy Mayor Fey: Okay.

>> This is from the exhibit, 196.

This is a letter to the hearing examiner, and it's from Jim borne, who is the owner of the golf course, as I understand it.

And he speaks to -- let me read you a couple of key paragraphs in here.

There's a little bit of who he is, how long he's been involved in the golf course.

When he took over ownership of the golf course, circumstances under which they've been operating it.

What happened when they bought it.

And then I'll read this part, if I can.

As it turned out, although the golf course was profitable in the beginning, it has become less and less so over time.

For example, around 1990, there were around 65,000 rounds of golf played on the course each year.

As of 2008, that number has gone down to less than 41,000.

Attached to this letter is a

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spreadsheet showing a comparison of the numbers of golf rounds played on the course from 1985 to present. As you can see, it's gone downhill.

There are many reasons for this.

There is negative growth in the number of rounds played not only in the northwest but also nationally.

Further more, 15 to 20 new courses have been built in our trading area.

Private courses cannot fill their memberships and many are accepting public play as well as soliciting corporate events. And he goes on, next paragraph, as a result of the declining numbers of golf rounds, our income has also gone downhill. Also attached is a letter and spreadsheet showing taxable income from 1991 through 2008. As you can see, we've been taking a loss for a number of years.

Northshore golf course is entirely supported by green fees, memberships, other revenues coming directly from people who play golf at the golf course.

None of the surrounding homeowners or homeowners associations pay fees to keep the golf course in operation. At this point, in large part because of declining business at the golf course and also because of our advancing age of ready to retire, and some discussion about that. And then, attached to that is a

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spreadsheet that goes from 1981 to 2008, and it shows income, some years negative, some years positive, but I think kind of most directly to his point in the letter, 2002 shows negative \$9,300.

2003, negative \$240,000.

And I'm using round numbers.

2004, negative \$227,000.

2005, negative \$160,000.

2006 --

2008, negative 252,000.

So that's the evidence that the document evidence that was presented.

So whether I'd call that -- I wouldn't call them financials, but I'd call them the testimony of the golf course owner regarding their income.

And then there's another table, which I'm not going to read, because it's a whole page of little numbers, but it's about the rounds of golf that basically tally up golf played each month and shows a decline in the number consistent with what he put in his letter.

So that's the one piece.

And then the 275 is this review that was done by this task force of several people, and they looked -- according to the exhibit, they weren't able to get access to the financial records of northshore.

But they looked at -- took some information about golf rounds, looked at cost comparisons with another -- a couple of other golf courses, and made some assumptions and projections about costs.

They toured the course,

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evaluated improvements necessary on a short-term basis, like replacing the fleet of golf carts and then improvements needed on a long-term basis, like it needs a new clubhouse, new irrigation system.

And that's where they, to slightly paraphrase that exhibit, where they concluded the sort of expected income and the expected expenses are about awash.

But you need a different source of money for the long-term capital improvements.

>> Mayor Strickland: Okay, thank you, Mr. Derr.

Would you like to add any information, Mr. Lang?

>> I would only comment that beyond those two letters, or those two documents, which Mr. Derr has drawn your attention to, and which are cited in my brief, there is no other evidence in the record of documentary form regarding the golf course's viability -- economic viability.

I would also draw the council members' attention to the powerpoint presentation, which I believe is exhibit 207, and there are also local, as in Washington, as well as national, statistics both about the demographics of golfers, who the golfing community is, and also corroborating the impetus of the decline.

Finally, there is testimony under oath, and I don't know if you will be reviewing the tapes, but the golf course

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owner's representative did provide the same testimony. And so, that is your record on this issue.

>> Mayor Strickland: Thank you. Mr. Huff, would you like to add anything?

>> Only to remind the council, while this is interesting, this is really beside the point.

It's the recorded conditions of approval that are important.

And I'm curious, though, procedurally, are we going to be responding council to questions, that's fine.

But wasn't -- it isn't what I was expecting.

So I'd just like to make sure of the ground rules before --

>> Mayor Strickland: No, and that's a good point.

Reminder to my fellow council members, it's the information you were provided and make sure it stays on topic here.

So thank you.

We do want council members to have the opportunity to ask any questions to get clarification on anything.

>> May I clarify something for council member Boe?

>> Mayor Strickland: Sure.

>> He had asked a question about the tide of the golf course, and I don't think I explained that well.

The tie I was referring to, or the lack of tie, was the tie of lack of fees from the homeowners that go to support the golf course.

That's what I was referring to. So my apologies for the ambiguity there and the

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question when attorney Derr was attempting to answer.

I was hoping that's where he would get with it.

>> Mayor Strickland: All right. I think we're going to wrap up this particular question, because we're creeping -- scope creeping here.

Next, council member walker followed by council member Boe.

>> Council Member: It is my understanding of reading the documents that there is a difference in opinion on the open-space in perpetuity position.

Could you -- might you be able to explain to me whether you think that the hearing examiner made an error of law in treatment of the '81 decision?

>> What the hearing examiner concluded on that was he believed based on practice that the -- including backyards and the open-space calculation as a reasonable interpretation of the code.

It's actually -- I want to state clear on what my job is tonight and what your job is tonight.

Part of your job is evaluating the hearing examiner decision to see if you think he made an error in law or not.

So I'll try to clarify what I think he said.

>> Council Member: And that's what I'd like you to do, thank you.

>> And why.

And you get to decide if you think he was right or not.

So what he looked at was he

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looked at the language -- again, he correctly, I believe, looked at the prior PRD code, so he applied the old code, I'd call it, rather than the new amendments, because the new amendments have a way of dealing with this, vested with the old code, he looked at the language in the code which talked about usable landscape to recreation areas, the phrase in the code.

And he then also looked at the -- sort of the arguments and the explanation that were presented to him, the environmental impact statement, for example, went through a very exhaustive analysis of here's what it might look like if you did allow backyards and here's what it might look like if you did not include backyards.

And basically provided data on whether open space could be met or not.

But really, what the hearing examiner looked at is based on the city's sort of course of practice and its own staff's interpretation of the code over the years, the hearing examiner concluded that counting backyards was a reasonable interpretation of the code.

So again, you need to look at the phrase and the old code and see if you agree with that.

So probably, almost as importantly or more importantly, he said that's kind of beside the point, because there are these other issues like changed

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circumstances and whether they've been satisfied with impacted, influenced, directed his decision, such that he didn't really need to get into a calculation of exactly how much open space is required, and exactly how much of that is in the backyard or not.

He found because of changed circumstances in the public interests, and his findings on that, that that was sufficient reason to recommend denial of this rezone.

>> Council Member: Thank you.

>> Mayor Strickland: All right, thank you.

Council member Boe.

Again, reminders to the council, we're not here to ask for their opinions.

We're here to sort through the facts and get things straight.

Council member Boe.

>> Council Member: Thank you, mayor.

Mr. Lang, actually in his opening remarks and in his rebuttal, used the phrase, "many, many, many" items of the comprehensive plan.

Support the appellants' appeal. Those who don't know what the comprehensive plan is, this is what it is.

It covers the general policies for the city, and not to go into the weeds, mayor, but having been on the planning commission for five years, we kind of live and breathe the comprehensive plan.

So I guess -- I have a question for staff is, I kind of found three main exhibits for the

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comprehensive plan.

One was in the draft supplemental, environmental impact statement.

I think there was 20 pages of comp plans, values.

And then there was a powerpoint, which I think was already referenced, which had a section on comprehensive plan. And then there was a much more detailed report the appellant put forward, a really detailed summary of the relevant comp plan elements, and then kind of a commentary on how that was being submitted.

Do I have that right?

Are those the kind of three --

>> Those are the three key document exhibits.

There was testimony that kind of explained those documents primarily from representatives for the applicant.

And so, but they really put up the powerpoint, for example, and they referred to that other document that you were mentioning, and then talked about why that was their conclusion about the comprehensive plan.

That's the -- you've hit on the key documents and the key information that was presented in the record on comp plan compliance.

>> Council Member: Okay.

Because when I was looking through -- oh, hang on a minute.

Again, if I got this right, one of the criteria, obviously, is just being consistent with the applicable land-use and

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comprehensive plan, but the other one is something in the comprehensive plan that's required to directly implement net -- which would be a necessity for the rezone.

So as I understand that, and I don't want to make light of this, but if there was a comprehensive plan amendment that said something, like, "golf courses are bad and they use a lot of water and that open space should be developed in high-density residential," if that were in the comp plan, then that would be the type of comp plan element that you could point to and say, "look, we need to comply with this," you know, versus -- I think the hearing examiner said something about -- it's a great word.

PRECATORY.

[Laughter]

My credibility --

>> That's a lawyer word.

>> Council Member: Yeah, I got the mandatory right.

Which really is kind of a wishful statement.

So the staff, did they find any kind of -- something that just is so clear, because again, as I'm going through this, you can pick -- comprehensive plan is kind of like the Bible, in my estimation.

You can make it say whatever you want in many ways.

But actually, the hearing examiner's review, he kind of had that same view, so I was just trying to look through the exhibits, if anything was pulled out that, you know,

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expressly addressed this situation.

>> I would say there was nothing in any of the exhibits that expressly addressed it along the lines of what you're talking about.

What staff did in the I.S. is really go through every conceivable comp plan policy they thought might apply and talk about whether they thought it was consistent or not.

And I actually think Mr. Lang, in his brief, sort of reiterated that, that of about 80 policies, the staff analysis found compliance with about 50. So that's a significant chunk of compliance.

And it's the balance, 30, not in compliance in the I.S. analysis.

The applicant provided a different interpretation of several and proposed, argued stronger comp plan compliance. The hearing examiner kind of considered all of that, looked's those arguments, looked at the comprehensive plan as well, and his conclusion basically was, as you indicated, there's some they don't comply with, always some they don't comply with some they do comply with, there's always some you do comply with, concluded on balance in general, this project complies with the overall -- overall complies with the comprehensive plan, and he found those that staff had noted did not comply were PRECATORY, wishful, instead of

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mandatory, required.

Now, a bit of what might be in your question is when you talked about a standard, there is a criteria for the rezone, which shows -- you have to show change circumstance.

That's criteria B-2.

And what that criteria says is you have to show change circumstances, but it provides an exception.

And the exception is, if -- and I'm going to read it, because this is, again, your job to interpret your code.

But what that says is, if it's established that a reason rezone is required to directly implement an expressed provision or recommendation set forth in the comp plan, it's unnecessary to demonstrate change conditions supporting the rezone.

So in this issue of changed circumstances and what did the hearing examiner do with that and was the hearing examiner required to find change circumstances, and again, Mr. Lang briefed this issue quite a bit in his appeal brief, that you need to look at that code section and determine whether you think it is -- a rezone is required.

So if you have a situation where your comp plan says get rid of all golf courses, then you probably would have to require a rezone if you had zoning that required golf courses.

So that's to use your hypothetical.

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But it needs to be required to directly implement an expressed provision or recommendation set forth in the comp plan.

So you should think through, does this record, does the hearing examiner's decision, should he have ignored changed circumstances, because instead, you were required to grab this change, this rezone to implement -- directly implement an expressed provision or recommendation of comp plan.

>> Council Member: Okay, thank you.

>> Mayor Strickland: Council member Manthou.

Followed by council member Mello.

>> Council Member: Thanks.

I apologize going back to the open space.

Was trying to get in here when we were talking about it before.

It seems to be a lot with both Mr. Lang and Mr. Huff talk a lot about open space.

And I still need to understand the definition of open space.

Is open space, in the old rules, does that allow for public access?

Or how does it speak to that?

Open space having to be for public access or for public benefit?

>> The old rules were not clear on that, is unfortunately the answer.

The old rules use this phrase, landscaped recreation area, usable landscaped recreation area.

It didn't say it had to be

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common, it had to be available to the public, didn't say anything about that.

And so, you and the hearing examiner are left with figuring out what do those words mean, as applied to this rezone request.

>> Council Member: Which means, then, since backyards were used to count as open space, it was considered public, and backyards would be public? Public access?

I mean, I don't mean to be -- I don't mean to be a joke out of it.

Just, I need to understand this to make my decision.

>> And that was -- there was testimony at the hearing along those lines, including, like, I do -- I recall some testimony about that I'm going to show up tomorrow and swim in your pool if that's the way this works.

>> Council Member: Or, I'm guessing the other case, if the golf course had financial difficulties and closed down, then they could put a fence around the golf course and nobody could access it?

>> Conceivably, they could. There's nothing in the 1981 conditions that say you can't fence it.

It talks about, as Mr. Huff indicated, it talks about open space and/or golf course. So it could be golf course, it could be -- and there's nothing that says the golf course has to be free to the public. It just says golf course. And so, again, I think part of

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the real challenge to this decision for everybody is that old cold language, what did it mean.

And it might be counterintuitive to what you think it ought to mean now. It's certainly different than what current code says. It's probably what drove some of the discussion for code amendments.

But the reality is, this application is vested under the old code.

You have to decide what you think that means.

The hearing examiner looked at that, concluded, again, in -- I think in significant part, based on course of practice, that counting backyards was a reasonable interpretation of that phrase.

The hearing examiner found that the amendments that were made were not an attempt to clarify what was always the intent, but an attempt to change what had been happening and how the code had been used.

But again, as I mentioned earlier, he kind of said that's almost beside the point, because these are these other issues, changed circumstances, public interests, that in his mind caused him to recommend denial, so he didn't have to get to how much open space is necessary for what.

>> Council Member: Okay, thank you.

Appreciate the clarification.

>> Mayor Strickland: Council member Mello.

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>> Mayor Strickland: Thank you. I'm not sure if this question would be for you, Mr. Derr, as a matter of course of practice, or maybe the staff will let you decide.

I wanted to hone in on findings number 80 and 99 in the hearing examiner record.

I'm trying to clarify that with criteria for rezone, B-2, which were exploring here.

I'm trying to understand if it's a normal course of practice that in order to establish the rezone is required, would the normal course of practice be that an applicant, whoever they are, would have to -- would have to get a conditional use eliminated or amended prior to coming to a hearing examiner for a rezone decision?

So in this case, coming to the city council, which is the body that could eliminate or amend a prior conditional use item?

Would they have to come to the body prior to applying for the rezone?

>> I would say -- I'm not sure what you mean by normal course. I would say based on your code, no.

Your code treats this request as a modification of the PRD. Your code then specifies what that process is.

It's basically a rezone process.

They go first to the hearing examiner, and then it comes to you, which is where it is tonight.

So that's -- and rezones

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generally are handled in a similar fashion.

Sometimes it's a planning commission instead of a hearing examiner.

But often a rezone would come either always or upon appeal to city council for final decision.

And because, again, this was set up initially as a zone change, this significant of change being requested goes through the same process.

>> Council Member: If I could have one follow-up, mayor.

>> Mayor Strickland: Sure.

>> Council Member: Is it of normal practice that this -- this body, I guess looking back in the record, that taking a condition of use, in this case, setting aside the golf course, that that is fair -- that someone could consider that in perpetuity, a conditional use permit, and the condition being the set aside of the golf course?

Is that considered in perpetuity?

Or would the applicant have to put a deed of right restriction on it, or some sort of other legal deed on the title, that is, of more binding?

What is the normal course of determination by the hearing examiner in that respect?

>> Well, again, I'm going to stick with Tacoma code, and I think that's what you mean by normal course, because that's what we're governed by, what your code requirements are.

There's sort of -- I think I

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understand your question, maybe a couple of different answers I'd offer.

First, this is not a conditional use permit.

This is a condition of the rezone.

They're a little different in Tacoma.

I would say it's normal course back in 1981 that if the hearing examiner concluded that that golf course that was offered was necessary and appropriate to provide open space for the PRD and was necessary and appropriate to satisfy the then-PRD code requirements, it'd be normal for the hearing examiner to say I want that as a condition.

That's what happened in 1981.

He said in perpetuity.

As you heard in the argument tonight, there's some dispute was that fully and completely implemented?

It was implemented in two agreements, the open-space, tax agreement we talked about earlier.

It was not implemented by private covenants.

Sometimes, I don't know if it's normal course, and it's not required by your course, and in some ways it's a private matter not a public matter, but there were not -- there was not in this case restrictions that were imposed and recorded against the golf course in the form of covenants that would benefit the adjacent property owners.

Some projects would do that.

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And they would record these covenants.

It would benefit all of the adjacent lot owners and the golf course.

Those are documents that would be recorded.

If that had happened, then each lot owner surrounding the golf owner would also have rights to enforce those covenants.

And that did not happen in this case, at least not that I've ever been able to find in the records.

I don't know why.

I wasn't here in 1981.

So we don't really know why.

But that's one of the relevant facts here.

However, the fact that that private contract, if you will, didn't happen, doesn't really change the fact that the hearing examiner conditioned anyone to require it, and it was implemented by the city in the form of the covenant zoning agreement and the open-space tax agreement that judge Hartman last year said at least are still valid.

Now, he said they can ask to change them, which is why we're all here.

But they're still valid and can't be unilaterally terminated.

>> Council Member: Thank you, mayor.

>> Mayor Strickland: All right. Any other council comments or questions?

Okay, I move to concur in the findings, conclusions, and recommendation of the hearing

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examiner and deny the appeal.

>> Council Member: Second.

>> Mayor Strickland: A motion has been made and seconded.

Any council comments?

Council member Boe?

>> Council Member: Thank you, mayor.

My review of the record, and I guess it goes really back to those changed conditions, and I guess it was well pointed by Mr. Lang, there was really those two elements in the record as well as some public testimony and the powerpoint, I don't see anything in the hearing examiner overlooked on that -- on that decision. Because when I was reviewing it, I guess I was somewhat -- as I was digging through trying to find a much more quantitative analysis -- it seemed more of a testimonial from the owners, more of a -- I hate to say it, a bunk of guys playing golf and the other one thinking through the task force one, but I couldn't find anything that compelled to show me there's changed conditions. And then tied to that is the comprehensive plan, which recognizes -- the hearing examiner, again, references that, and so does the appellant, that Tacoma has all different types of open space. And so, I think there's lots of discussion about, well, what if this goes foul and natural, and I hope not. But Tacoma has lots of steep gulches and open space and tracts that are -- so I don't

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see a changed condition that would make me overturn the hearing examiner's decision on those two key points.

And while the comp plan is, you know, referenced, and my questioning is going back and forth, these kind of weighing things, and I don't want to say spinning things, it's kind of how you read the -- how you read the comprehensive plan. But I could not find in the record anything that just -- hang the hat on that said this is something that, you know, you must do to -- I'm trying to find the correct word in our code.

But you must do to implement an element of the comprehensive plan.

So in summary, I guess I'm going to be supporting the motion, because I can't find anything in here that tips it -- tips it the other way in the hearing examiner's review. Thank you.

>> Mayor Strickland: Thank you. Council member Lonergan.

>> Council Member: Thank you. Well, I think I would tend to agree with council member Boe, but for different reasons. I'm fairly satisfied that there have been a change in conditions for the property, and I'm satisfied that there's some evidence of that, and there is Bush but I don't feel the evidence in the record, which is what I'm required to review, meets the burden that the appellants are required to approve.

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We have many, many documents, some of which are after this, such as vision 2040, that gives a projection into the future of our population growth and what that's supposed to look like and where it's supposed to go. But again, it's not in the record, and I don't feel that the burden has been met.

Additionally, I have some concern about the statement in the hearing examiner's conclusions -- conclusion 7 -- where, quote, it is contrary to the public interest to allow any applicant to achieve such result unilaterally, the interests of too many others are left out of the decisional equation is a little narrow in its perception and scope given that there are proposed number of people whose voices the appellant carries in the 860 homeowners that would like to make northeast Tacoma their home and would be unable to, given that the houses aren't there.

But again, I don't feel that the -- in this case, the burden of proving the hearing examiner's decision was in error, has been met, based on the record.

>> Mayor Strickland: Thank you. And I think I will say that I've obviously been following this journey for about three years now, when it first started.

When it first started, it was save the golf course, and then it got turned into save the open space.

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You know, northeast Tacoma is unique, because it's a suburb in a city.

But people who bought property there were expecting an open space.

And the phrase that sticks with me is open space in perpetuity.

And I think that was the intent.

You know, I typically will side on the rights of property owners, but in this case, we have property owners that are the golf course owners as well as the people who own property around the golf course.

And purchased property for that particular intention, to have that type of community.

I also agree with council members Boe and Lonergan that the burden of proof that the hearing examiner's decision was in error has not been met for me.

So I'm going to support this. This motion.

Any other comments?

Council member Mello.

>> Council Member: Thank you, mayor Strickland.

I guess because so many folks have been -- put so much energy into this on all sides, I think it's only fair that I, too, explain my reasoning.

I guess the things that were very compelling to me in reading the record are especially finding 72, 80, and 89 of the hearing examiner's findings.

Had that not been in place, had the 1981 agreement not been in place, I guess I would really

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struggle with what my decision would be.

But since that finding of fact is replete in the record, and it was validated by judge Hartman, and because the applicant cannot unilaterally undo the condition and I'm forced to review this record and only this record, I feel compelled to support the motion and that there's -- there is no overwhelming reason to undo the hearing examiner's decision in this case.

So I'll be supporting this motion, as well.

>> Mayor Strickland: Council member Manthou followed by council member walker.

>> Council Member: I guess I'm going to agree with most of what's been said so far about the changed circumstances and definitely the public input or opposition, or however you want to phrase it.

But I do have some concerns on how the records did not speak to open space, what that meant. They did not speak to the document that was filed in 1981 and the concurrent documents, the conveyances and stuff. To me, that's real -- there's not a lot of information on there, in here.

And like everybody has said, we have to base our facts -- or base our decisions on the facts.

And there's just not a whole lot of facts in there that allows me not to support it. So I'll be supporting it. But I do have some concerns,

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because there is -- there's not the fact there that does not allow me, and if I had more information and there was more facts presented on the open space, and what that meant and more facts on the conveyances and how those are filed, I probably wouldn't be supporting it.

But that's not in there.

It's not in the record for me to go against the hearing examiner.

So I'll be supporting it.

But a little -- reluctantly.

Thank you.

>> Mayor Strickland: Thank you, council member Manthou.

Council member walker.

>> Council Member: I hope the public that are here tonight and are watching realize how seriously the council has taken this matter.

We have read page after page of documents.

And it has -- and it's a lot of legal documents.

And it's been a very interesting process, even to be up here tonight.

One of the statements that was made again and again in the appellant's documents was that the hearing examiner really made the decision alone based upon public opinion.

And I took that very seriously in looking at the documents.

But I just don't see it.

I really see that the 1981 decision in terms of the intent of open space was very clear.

And I felt that the hearing examiner was really clear in

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looking at the specifics of the case in addition to the public testimony.

So I will be supporting this motion.

>> Mayor Strickland: Deputy mayor?

>> Deputy Mayor Fey: Thank you, mayor.

I think most has been stated already.

But I would just emphasize a couple of things, not the entire reasoning on my part. But one is the 1981 decision and the tie of the golf course to the property in total. And secondly, the evidence or lack of evidence about change conditions in terms of the economic viability of the golf course, and item 78 is the last sentence, the examiner was not convinced that the property cannot be sold as a golf course.

So I don't believe that they've satisfied the changed circumstances requirements, and I would concur in the hearing examiner's.

>> Mayor Strickland: Council member Woodards?

>> Council Member: I just want to say I -- all of the comments have been made, and I concur with most of them.

I will be supporting this motion tonight.

The appellant made a great case.

But I agree, as has been said by several of the council members, the burden of proof has not been met.

And so, I want to uphold the

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decision of the hearing
examiner's.

>> Mayor Strickland: All right.
And this -- I want to thank
everyone who came out tonight.
We appreciate your efforts.
And sitting through this
meeting with us, and I think
we're ready to vote now.
Clerk, please call the roll.

>> Mr. Boe?
>> Aye.
>> Mr. Campbell recused.
Mr. Lonergan?
>> Aye.
>> Mr. Manthou?
>> Aye.
>> Ms. Walker?
>> Aye.
>> Mayor Strickland?
>> Aye.
>> Mayor Strickland: Motion
passes.
[Cheers and Applause]
The public hearing is now
closed.
I will entertain a motion to
adjourn.

>> Deputy Mayor Fey: Move to
adjourn.
>> Council Member: Second.
>> Mayor Strickland: A motion
has been made and seconded.
[Council meeting adjourned]

APPENDIX F



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April 15, 2010

APR 16 2010

Schwabe Williamson
& Wyatt

NOTICE OF APPEAL RESULTS

Please be advised that on Tuesday, April 13, 2010, the Tacoma City Council heard the appeal of Schwabe, Williamson & Wyatt, P.C. representing the Appellants Northshore Investors, LLC and North Shore Golf Associates, Inc. on the recommendation of the Hearing Examiner regarding the request to modify an existing condition of approval placed on the golf course site in connection with Northshore Country Club Estates Planned Residential Development District in a previous rezone which occurred in 1981 and established the PRD designation for the site. (Northshore Investors, LLC; File No. REZ2007-40000089068)

At that time the City Council moved to concur with the Findings, Conclusions and Recommendation of the Hearing Examiner and denied the appeal.

Doris Sorum
City Clerk

Notice sent to parties of record:

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