

66125-6

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Appellate Case No. 66125-6

COURT OF APPEALS,
DIVISION I OF THE STATE OF WASHINGTON

PATRICK JONES,

APPELLANT

v.

TOWN OF HUNTS POINT,

RESPONDENT.

APPELLANT'S OPENING BRIEF

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8

TABLE OF CONTENTS

	Page
I. Assignments of Error	
No. 1: The Hearing Examiner erred by finding the Jones application for a short plat of his property would affirmatively result in a violation of a restriction on the face of the original plat.	1
No. 2: The Hearing Examiner erred by accepting the Town Engineer's assumption that Jones would sell the property after it was platted because there was no evidence to support the assumption and, without the assumption, there was no basis on which to conclude that the original covenant would be violated.	1
No. 3: The Hearing Examiner erred when he found that the Town Engineer had jurisdiction to interpret, review, and implement a plat restriction and that he should defer to the Town Engineer's decision on that issue.	1
No. 4: Hearing Examiner erred when he made findings of fact based upon attorney argument rather than sworn testimony.	1
II. Statement of the Case	2
A. Statement of Facts	2
B. Statement of Procedure	2
III. Summary of Argument	6
IV. Argument	9
A. Standard of Review	9
B. The Hearing Examiner erred by finding the Jones application for a short plat of his property would affirmatively result in a violation of a restriction on the face of the original plat.	10

Issue 1 re: Assignment of Error No. 1	10
Is a plat restriction violated when the events that could potentially cause a violation have not occurred and there is no proof they will occur?	
Issue 2 re: Assignment of Error No. 1	21
Does RCW 58.17.215 permit a municipality to speculate as to what may happen in the future to determine whether a plat restriction may be violated in the future?	
C. The Hearing Examiner erred by accepting the Town Engineer's assumption that Jones would sell the property after it was platted because there was no evidence to support the assumption and, without the assumption, there was no basis on which to conclude that the original covenant would be violated.	24
Issue re: Assignment of Error No. 2	24
When it makes a decision on a short subdivision application, does the municipality's jurisdiction end at the conclusion of the short subdivision process?	
D. The Hearing Examiner erred when he found that the Town Engineer had jurisdiction to interpret, review, and implement a plat restriction and that he should defer to the Town Engineer's decision on that issue.	30
Issue re: Assignment of Error No. 3	30
Did the Hearing Examiner err by deferring to the Town Engineer when he was interpreting a restrictive covenant and not a Town ordinance?	
E. The Examiner erred when he made findings of fact based upon attorney argument rather than factual sworn testimony?	36

Issue re: Assignment of Error No. 4	36
Did the Examiner err by using argument as evidence and failing to use sworn testimony and properly admitted exhibits?	
F. The Examiner erred when he continued to rule as if the Town Engineer had accepted the application and denied it rather than remanding it to be accepted and properly processed by the Town Engineer.	38
Issue 1 re: Assignment of Error No. 5	38
Should Conclusion of Law 1 (AR 797) be affirmed for the second time on appeal?	
Issue 2 re: Assignment of Error No. 5	39
Jones should be awarded attorneys fees under RCW 4.84.370.	
V. Conclusion	41

TABLE OF AUTHORITIES

		Page
<i>Statutes</i>		
	HPMC 2.35.020(1)	8,25
	HPMC 17.50.010	7, 10-11
	HPMC 17.50.090	4, 25, 35
	HPMC 18.25.040	4
	RCW 58.17.215	2,7,9-12; 14,16,20,25
	RCW 36.70C.130	9,10,30
	RCW 36.70C.120(1)	10
<i>Court Rules</i>	RAP 18.1	38
<i>Case Law</i>		
	<i>Baker v. Tri-Mountain Res., Inc.</i> , 94 Wash.App. 849, 854, 973 P.2d 1078 (1999).	40
	<i>Bauman v. Turpen</i> , 160 P.3d 1050, 139 Wn. App. 78 (Wash. App., 2007)	27
	<i>Duckworth v. City of Bonney Lake</i> , 91 Wn.2d 19, 586 P.2d 860 (1978)	36
	<i>Friends Of Cedar Park Neighborhood v. City Of Seattle</i> , 156 Wash.App. 633, 234 P.3d 214 (Wash. App., 2010)	22
	<i>Habitat Watch v. Skagit County</i> , 120 P.3d 56, 155 Wn.2d 397 (WA, 2005)	40
	<i>Hearst Commc'ns, Inc. v. Seattle Times</i> , 154 Wash.2d 493, 504, 115 P.3d 262 (2005).	13
	<i>Hollis v. Garwall</i> , 137 Wn.2d 683, 695, 974 P.2d 836 (1999)	31
	<i>Jones Associates, Inc. v. Eastside Properties, Inc.</i> , 704 P.2d 681, 41 Wn.App. 462 (Wash. App., 1985)	13

<i>Leighton v. Leonard</i> , 22 Wn. App. 136, 139, 589 P.2d 279 (1979).	26
<i>Martel v. City of Vancouver Board of Adjustment</i> , 35 Wn. App. 250, 257, 666 P.2d 916 (1983)	29
<i>Meresse v. Stelma</i> , 100 Wn. App. 857, 864, 999 P.2d 1267 (2000).	10, 30
<i>Norco v. King County</i> , 97 Wash.2d at 688, 649 P.2d 103 (1982).	22
<i>Suess v. Vogelgesang</i> , 151 Ind.App. 631, 281 N.E.2d 536 (Ind.App. 1972)	30
<i>West Hill, LLC v. City of Olympia</i> , 63 P.3d 160, 115 Wash.App. 444 (Wash. App., 2003)	10,30,31
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wash.2d 169, 176, 4 P.3d 123 (2000).	10
<i>Wimberly v. Caravello</i> , 136 Wash.App. 327, 336, 149 P.3d 402 (2006).	13
<i>Viking Properties, Inc. v. Holm</i> , 155 Wn.2d 112, 118 P.3d 322 (2005),	29
<i>Vogt v. Hovander</i> , 27 Wash.App. 168, 178, 616 P.2d 660 (1979)	13

Other Authority

McQuillin, <i>Law of Municipal Corporations</i> § 25.09 (3rd ed. J. Kightlinger, 1976)	30
6 J. Moore, <i>Federal Practice</i> ¶ 56.11[1.08], at 56-202 (2d ed. 1948)	36

**I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO
ASSIGNMENTS OF ERROR**

A. Assignments of Error

The Hearing Examiner erred by finding the Jones application for a short plat of his property would affirmatively result in a violation of a restriction on the face of the original plat. (Assignment No. 1)

The Hearing Examiner erred by accepting the Town Engineer's assumption that Jones would sell the property after it was platted because there was no evidence to support the assumption and, without the assumption, there was no basis on which to conclude that the original covenant would be violated. (Assignment of Error No. 2)

The Hearing Examiner erred when he found that the Town Engineer had jurisdiction to interpret, review, and implement a plat restriction and that he should defer to the Town Engineer's decision on that issue. (Assignment of Error No. 3)

The Hearing Examiner erred when he made findings of fact based upon attorney argument rather than sworn testimony. (Assignment of Error 4)

The Examiner erred when he continued to rule as if the Town Engineer had accepted the application and denied it rather than remanding it to be accepted and properly processed by the Town Engineer. (Assignment of Error 5)

B. Issues Pertaining To Assignments of Error

1. Issues relating to Assignment of Error No.1:

Is a plat restriction violated when the events that could potentially cause a violation have not occurred and there is no proof they will occur?

2. Issues relating to Assignment of Error No.2:

When it makes a decision on a short subdivision application, does the municipality's jurisdiction end at the conclusion of the short subdivision process?

May a municipality speculate about future events to decide that a covenant will be violated under RCW 58.17.215 and require a plat amendment under that statute?

3. Issues relating to Assignment of Error No. 3:

Did the Hearing Examiner err by deferring to the Town Engineer when he was interpreting a restrictive covenant and not a Town ordinance?

4. Issues relating to Assignment of Error No.4:

Did the Examiner err by using argument as evidence and failing to use sworn testimony and properly admitted exhibits?

5. Issues relating to Assignment of Error No. 5:

Should Conclusion of Law 1 (AR 797) be affirmed for the second time on appeal?

Jones should be awarded attorneys fees under RCW 4.84.370.

II. STATEMENT OF THE CASE

(Statement of Facts And Procedure Combined)

This matter centers around the plat restriction located on the Hunts Point Park Addition Plat which reads as follows:

No lot or portion of a lot in this plat shall be divided and sold or resold, or ownership changed or transferred, whereby the ownership of any portion of this plat shall be less than the area shown on the face of this plat.

All lots in this plat are restricted to R-1 Residence District as governed by and subject to restrictions rules and regulations of the County Zoning Resolution No. 11373 and subsequent changes thereto by Official County Resolution.

Approved for Septic Tanks installed in accordance with specifications of the King County Health Department EXCEPT Lots 2,5,6,13,14,15,16,17,18 & 21 Block 1 and Lots 1,2,3 & 4 Block 2 which must receive written approval from the Health Dept. before a building permit can be obtained. All lots in this Plat are to be Subject to individual approval by the Health Department.

(Certified Record of Adjudicative Administrative Proceedings Abbreviated as Administrative Record (AR) (AR 6; 8.)

Patrick Jones owns lot 11 of Block 2 in the Hunts Point Park Addition. (AR 6; 8; 789.) Jones made a short plat application to the Town of Hunts Point to “convert 24,045 square foot lot into two lots.” (AR 393-4, 431) The Town Engineer refused to accept the application claiming that “dividing lot 11” violated the plat restriction when read as a whole and, in particular, the first portion of the first paragraph, “No lot or portion of a lot in this plat shall be

divided and sold or resold, or ownership changed or transferred,” (AR 425.) The Town Engineer’s decision came in the form of three letters, which were appealed to the Hearing Examiner. (AR 403-4; 422-3; 425-96.) The Hearing Examiner ruled that refusing to accept the application altogether was in error and granted Jones’ appeal on that issue. (AR 797.) However, rather than remanding the decision back to the Town Engineer to accept the application and complete the process mandated by the Town ordinances, the Hearing Examiner decided that the ultimate issue of whether the application violated the plat restriction was already determined by the Town Engineer and following the statutory procedure would be pointless.¹ (CP220-1 20-1; AR 797-9.) The Hearing Examiner held that the Town of Hunts Point had authority to interpret its own ordinances and plat restrictions, particularly when the Town had reviewed this plat when it was first formed.² (AR 798.) The Hearing Examiner upheld the Town Engineer’s interpretation of the plat restriction which resulted in denial of Jones’ application. *Id.*

Jones appealed to the King County Superior Court. (AR 1-14; 417-419.)

The Superior Court recognized that the Hearing Examiner erred in finding that

¹ Mr. Willis agreed that Jones’ proposed short subdivision met the minimum lot size of 12,000 square feet in the R-28 zone as set out in HPMC 18.25.040 (AR 795)

² Upon appeal to the Superior Court, Jones improved his position because the court affirmed the Examiner ruling, including the first issue upon which Jones prevailed and also ruled: “The court notes that the evidence does not support the portion of Hearing Examiner’s conclusion two which provides: “The Town Council itself reviewed and adopted the plat restriction at issue. . .” AR 419.

the Town of Hunts Point reviewed the initial plat because the Town of Hunts Point was not incorporated in 1951 when the platters, Ted Valdez and George Bell, subdivided Hunts Point Park Addition. *Id.* At the time of the original plat, the controlling governmental entity was King County and its Board of Commissioners. (AR 88, 90, 92, 94.) The Town of Hunts Point was not incorporated until August 1955. (AR 148-9.) Despite this error, the trial court affirmed the Hearing Examiner's decision. (AR 417-19.)

Jones attended a pre-application meeting on August 5, 2009. (AR 430.) The Town Engineer's notes from that meeting indicate that the plat restriction may be a barrier to the short plat application. (AR 430.) The notes further state, "Bob [Sterbank, the town's attorney] to draft letter for me to review." (*Id.*) The Town Engineer signed three letters, all of which applied the language of the plat restriction to refuse to accept Jones application for short plat. (AR 403-4; 422-23, 425-26; *see also* 406-420.)

If the Town Engineer's analysis of the plat restriction were accurate, then there are three distinct areas, affecting thirteen of its thirty-eight lots (over a third of them), which do not comply with the plat restriction. (AR 10;100-5; CP 57-102; CP 43-45; 50.) Nine of these lots are within Block 1 and four are within Block 2. (AR 74-6; 81.) Until now, the plat restrictions have never been interpreted as preventing an owner from changing the configuration of his or her

lot. AR 31-308; *see generally* entire relevant record) A review of **all** of the Town Planning Commission Minutes, Town Council Minutes, Ordinances, Resolutions, and all historical data in the records maintained by the Town or the Puget Sound Regional Archives, establishes that there is not a single time when the plat restrictions were raised as an issue and interpreted and applied in a manner as the Town Engineer now proposes. (AR 148-381.)

The original plat was drawn with 38 residential lots. (AR 2.) There are currently only 35 lots and, until a few years ago when a short plat was approved by Mr. Willis, the same Town Engineer who refused to accept Jones plat application, there were only 34 lots. (AR 2 and 10 (compare); 476-7.) The issue of the plat restriction was never raised in relation to any changes to that plat, much less used as a basis for refusing or denying the application. (AR 476-477.)

The Town asserts that Jones will sell the property once the short plat is approved. (AR 469.) There is no evidence to support the Town's assertion. (CP 31-308 entire relevant record) The application simply asks the Town to approve dividing the property into two lots that the Town Engineer and the Hearing Examiner concede comply with the Hunts Point zoning ordinance. (AR 431; 457; 464.) Jones will own the same area of property within the plat before and

after approval of the short plat. Id. An approved short plat, does not change the “area” the applicant owns. Id.

III. SUMMARY OF THE ARGUMENT

Upon application for a short plat, the Town Engineer is empowered to determine whether the application meets the requirements of state law and the Town ordinances. RCW 58.17.215; HPMC 17.50.010. The Engineer concedes that, in all regards the Jones short plat application complies with both. However the Town Engineer determined that there was a **potential** for a plat restriction to be violated if the Town Engineer approved the application. RCW 58.17.215 provides a plat amendment process in the event the application submitted **would** result in a violation of a covenant. When the Town Engineer reviewed the Jones application and made his decision, he inserted into the application an unfounded assumption that Jones’ application was to “divide and sell the 2 lots.” (AR 403-4, 422-3, 425-6) There is no evidence in the application or in the record that Jones intended to “divide and sell the 2 lots.” (AR 393-4; 431) Nevertheless, the Town Engineer used this assumption to deny the application.

The Town Engineer has no authority to enforce covenants in this manner. His sole job was to review the application and determine whether the proposed plat meets the requirements of the Town ordinances and the state law. Even if he has some authority to review the plat restriction to determine under

RCW 58.17.215 whether the proposal contained in the application would result in a violation of a covenant, here, there is no proof of any violation because the Town cannot establish that Jones intends to sell the property as opposed to leasing it or taking any other action which would not result in a violation. Moreover, the Town Engineer admits in his testimony that he did not apply the specific wording of the plat restriction to determine whether Jones' application would indeed result in a violation. Thus, the error the Town Engineer made is compounded because first, he misapplied the facts of the application to the plat restriction and second, he exceeded his authority under the statute by deciding there was a violation based upon possibility rather than the actual facts.

There is no basis on which to defer the Engineer because he is not interpreting an ordinance and that is the only authority the Town Council has given him. HPMC 2.35.020(1). The Town Engineer opined in a conclusory manner that the intent of the 1951 plat restriction was to prevent subdivision. But the plat restriction does not say "subdivision is prohibited". The only evidence presented in the record supports Jones' interpretation that the purpose of the plat restriction was to deal with the septic system problems that concerned King County when it approved the original plat. The restrictions assured the County that portions of property would not be transferred back and

forth between neighbors for the purpose of complying with the Health Department regulations related to building and septic system requirements.

The proof is clear in the record, and ignored by the Examiner, that this plat restriction has never been interpreted or applied as a prohibition against subdivision. In fact, there are numerous examples of changes in the area of lots in the plat where the plat restriction was not even mentioned, much less applied to deny a division of property. In particular, the same Town Engineer approved a short plat application in 2004 dividing 2 lots into 3 and the plat restriction was not violated by that application to subdivide.

IV. ARGUMENT

A. Standards of Review

A party seeking relief under LUPA has the burden of establishing one of the following statutory standards:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow prescribed process, unless the error was harmless;
- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (d) the land use decision is a clearly erroneous application of the law to the facts;
- (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision;

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

RCW 36.70C.130.

In alleging the Town Engineer and the Hearing Examiner misapplied RCW 58.17.215 and did not have authority to interpret the statute and the plat restriction to include a future event, the Examiner reached a decision that was not supported by substantial evidence (RCW 36.70C.130(1)(c)), erroneously applied the law to the facts (RCW 36.70C.130(1)(d)); and is outside the authority or jurisdiction of the body or officer making the decision (RCW 36.70C.130(1)(e)). The case presents legal issues of statutory construction and application. Legal issues are reviewed *de novo*. *West Hill, LLC v. City of Olympia*, 63 P.3d 160, 115 Wash.App. 444 (Wash. App., 2003)

The review should be based solely on the record created before the hearing examiner. RCW 36.70C.120(1); 36.70C.130(1).

B. The Hearing Examiner erred by finding the Jones application for a short plat of his property would affirmatively result in a violation of a restriction on the face of the original plat. (Assignment No. 1)

Is a plat restriction violated when the events that could potentially cause a violation have not occurred and there is no proof they will occur?

The Examiner's decision that "the Town Engineer interpreted the plain language of the plat restriction to prohibit a division and subsequent sale of lots" is a clearly erroneous application of the law to the facts. The Hearing Examiner

upheld the Town Engineer's decision that there would have to be a plat alteration as set out in RCW 58.17.215 and HPMC 17.50.010. *See* RCW 36.70C.130(1)(d). (AR 796, para 18; 798-9) The court interprets a covenant as a question of law. *Meresse v. Stelma*, 100 Wn. App. 857, 864, 999 P.2d 1267 (2000). Questions of law are reviewed *de novo*. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 176, 4 P.3d 123 (2000).

The requirements of RCW 58.17.215 do not apply in this case. The Town Engineer did not use the plain language of the plat restriction in his interpretation. Rather, he revised the words of the plat restriction to achieve a specific result. "Mr. Willis testified that in order for the Appellants to proceed with a short subdivision application, there would have to be a plat restriction alteration as set out in RCW 58.17.215 and HPMC 17.50.010." (AR 796, para. 18.) RCW 58.17.215 provides in pertinent part:

If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, **and the application for alteration would result in the violation of a covenant**, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof.

The first paragraph of the plat restriction can be referred to as the first half which reads:

No lot or portion of a lot in this plat shall be divided and sold or resold, or ownership changed or transferred,

The second half of the first paragraph of the plat restriction reads:

whereby the ownership of any portion of this plat shall be less than the area shown on the face of this plat.

The half of the first paragraph of the plat restriction uses the phrase, “divided **and sold**,” while the second half of the first paragraph of the plat restriction requires, “whereby the **ownership is less than**. . .” (AR 6; 8) *emphasis added*. The change in ownership or sale is determinative when considering whether the application would result in a violation of a covenant under RCW 58.17.215. Without a change in ownership, there can be no violation.

The Examiner erred by accepting as fact the Engineer’s assumption that one or both lots would be sold.³ Without this assumption, there is no violation of the plat restriction in the application. Because there was no proof of this assumption, there was no basis for the Town Engineer to either refuse to accept or deny the application.

The application requests that Jones be able to “convert 24,045 square feet into 2 lots.” (AR 393-4; 431.) The Town Engineer’s decision letter restates the application incorrectly as: “your proposal seeks to divide Lot 11 into two

³ Jones filed a prehearing motion requesting that the Town Engineer’s letter decision which would become part of the record, not be submitted for the truth of the matter asserted because it contained the language “and sell them both” which were not true. (AR 780)

lots, and sell them both.” (AR 403-4, 422-3; 425-6.) The only evidence at the hearing was that there was no proposal to “sell them both”, and the Town Engineer admitted that he knew nothing about any sale of property. (CP 172-3:14-2.) The Hearing Examiner failed to apply the words of the plat restriction to the facts that were admitted at the hearing in order to determine whether the application would result in a violation of a covenant under RCW 58.17.215. Had the Hearing Examiner applied the facts that were in the application and in the record rather than basing his decision on his assumption that the property **could** be sold, he would have rejected the Town Engineer’s position and remanded the application for processing under the existing municipal rules.

The Town Engineer admitted that he did not apply the words of the plat restriction to the facts of the application to determine whether there was a violation. (CP 210: 4-20) Mr. Willis testified that he did not apply the second half (of the plat restriction the “whereby the ownership” language) as a condition to the first half of the plat restriction even applying. (CP 210: 4-20)

Basic rules of contract interpretation apply to review of restrictive covenants. *Wimberly v. Caravello*, 136 Wash.App. 327, 336, 149 P.3d 402 (2006). Under those rules, reviewing courts must give words in a covenant their ordinary, usual, and popular meaning unless the entirety of the agreement

clearly demonstrates a contrary intent. *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wash.2d 493, 504, 115 P.3d 262 (2005).

The second half of the first paragraph of the restrictions creates a conditional restriction. *See generally Jones Associates, Inc. v. Eastside Properties, Inc.*, 704 P.2d 681, 41 Wn.App. 462 (Wash. App., 1985 citing *Vogt v. Hovander*, 27 Wash.App. 168, 178, 616 P.2d 660 (1979) (An intent to create a condition is often revealed by such phrases and words as "provided that," "on condition," "when," "so that," "while," "as soon as," and "after.") *see also* AR 6, 8.) This covenant states, “whereby the ownership of any portion of this plat shall be less than the area shown on the face of this plat.” *Id.* The word “whereby” requires one to read the words that follow as a condition precedent that must exist or be satisfied before the first part of the restriction becomes applicable. *Id.* Therefore, in order to determine whether the application violates the restriction, the inquiry must be whether the short plat results in Jones owning less than the area shown on the face of the plat.

The area of Jones’ ownership of “any portion of the plat” is currently 24,045 square feet, and the application provides that the ownership portion will still be 24,045 square feet following completion of the short plat process. (AR 393-4, 431.) The Jones application requests no reduction of ownership in the area shown on the face of the plat. *Id.* Since the restriction is conditional and

the condition is not met, the Town cannot use plat restriction to refuse or deny the application. RCW 58.17.215.

The first part of the plat restriction is also inapplicable. The first part of the plat restriction reads, “no lot or portion of a lot in this plat shall be divided and sold or resold, or ownership changed or transferred . . .” (AR 6,8.) The conjunction used with the words “divided” and “sold” requires both events to occur for the plat restriction to be invoked. The Jones application requests only to divide Lot 11. The application does not include any reference to selling, transferring, or a changing ownership. (AR 393-4, 431.) Nor was there evidence of such an intention. (AR 31-308; *see generally* entire relevant record) Thus, the first part of the plat restriction also doesn’t apply because there is no request to divide made in connection with a sale, resale, transfer or ownership change, and there are no facts to support a determination that the plat application will result in a change in ownership.

The Town Engineer and the Examiner failed to read and apply the full text of the plat restriction and apply it to the facts of the application Jones actually tried to submit. There has never been any transfer of ownership proposed in the application for short plat, nor will the short plat result in the Jones having ownership of any less area of the plat. (AR 393-4, 431.) The application provides that the area shown on the face of the plat totaled 24,045,

which is Jones' ownership portion of the plat. Id. Jones' ownership portion would remain the same at the conclusion of the short plat process. Id.

The source of the Examiner's clear error is found in the direct examination of Mr. Willis by the Town Attorney, Mr. Sterbank. The Hearing Examiner's decision cites this precise language as the basis for upholding the Town Engineer's decision that the application violates a plat restriction and requires Jones to comply with RCW 58.17.215. (AR 796: para 17 Hearing Examiner Decision) Jones repeatedly objected that the question being posed used similar but critically different words from the words contained in the plat restriction. (CP 195-196.) Specifically, the Town focused on the wrong issue: i.e, that **any** division of **any** lot is a violation of the plat restriction. (Id.) The questioning omitted the critical ownership language and included a subtle but important change of words relating to the "area" twice. The Town Attorney asked:

in your view, would the lot size - ---would the **area** of the two proposed lots that would result from a division of lot 11 be less than the **area** shown for lot 11 on the face of the Hunts Point Park Addition Plat?

(CP: 195-4:23-2.) (*Emphasis Added.*)

The Town Engineer answered,

Dividing the parcel would result in two parcels that would be less than the area shown as lot 11. The total of them would be lot 11. But each one would be less than the area of lot 11.

(CP: 195:20-23)

But this question focused only on the part of the plat restriction which says: whereby the **ownership of any portion** of this plat shall be less than the **area** shown on the face of this plat. (AR 6, 8.) (*Emphasis Added*) It entirely omitted the condition precedent to a violation: that the property be sold or transferred.

The evidence from the Town Engineer fails to acknowledge that “ownership of any portion of the plat” is what is to be considered when determining if there is a plat restriction violation. In fact, when the Town Attorney asked the Town Engineer whether he was considering “ownership,” the Town Engineer responded he was referring to a portion of the lot, thereby implying that he did not include ownership in his interpretation of the plat restriction words which is, in turn, directly contrary to the plain language of the plat restriction. The testimony was:

Q: But does he interpret the words "less than the area shown on the face of this plat" to be less than the area of someone's ownership shown on the face of the plat or less than the area of the lot shown on the face of the plat?

A: I'm referring to the lot, or portion of the lot is what it says.

And on cross-examination by Jones, the Town Engineer admitted that the ownership remains the same under the Jones' application.

Q. Okay. How is the ownership of lot 11 less than the area shown on the face of the plat? It's the same. Isn't the ownership the same?

A. Ownership is the same, but once your short plat is processed and approved, the ownership **can** change.

(CP 209: 9-14) (Emphasis Added)

The testimony was essentially irrelevant to the real issue and should not have been relied upon because it failed to address the key concept of the plat restriction -- the change in the ownership portion of the plat.⁴ The Hearing Examiner cited this testimony specifically as the basis for upholding the Town Engineer's decision that the application was "inconsistent" with the plat restriction. (AR 798 quoting "could then be sold"; "subsequent sale of lots") The testimony should not have even been considered much less quoted in the conclusions of law. On *de novo* review this court should rule that the testimony on which the Examiner relied does not provide a basis in law or fact for affirming the Town Engineer's decision.

The evidence presented by the Town Engineer has another fatal flaw. The Town Attorney's question and the answer it elicited focuses on the "area of the two proposed lots" rather than asking about "any portion of the plat," which is the actual language of the plat restriction. This is an important distinction

⁴ Thus the question is irrelevant because the plat restriction does not refer to actual areas being smaller but rather to ownership of areas being smaller. Ms. Jones's objection as to relevance was overruled. (CP 165:9)

because the area of two proposed lots is not a consideration raised by the plat restriction, which clearly refers to ownership of “any portion of the [original] plat”. The direct examination between the Town attorney and the Town Engineer proceeded:

Q: Okay. Thank you. So that, just to circle back, so when you said the reason that you concluded the Joneses' proposal would violate the restriction was using that interpretation that you just explained, you concluded that the proposed half-lots of lot 11 would be less than the area shown for lot 11 on the face of the plat?

A: That's what I'm trying to say.

(CP 198-7: 21-10)

Jones’ application for short plat does not propose to transfer ownership, and the Town Engineer admitted as much. (CP172-3:14-2) Thus, the questioning was irrelevant and it confused the issues to prejudice Jones because the Hearing Examiner found “the Town Engineer interpreted the plain language of the plat restriction to prohibit a division and subsequent sale of lots” (AR 798). The “plain language of the plat restriction” was not what the Town Engineer testified to and it was not what was quoted in the decision.

On cross-examination, Mr. Willis testified that he did not apply the second half (of the plat restriction the “whereby the ownership” language) as a condition precedent applying to the first half of the plat restriction. (CP 210: 4-

20) This was critical testimony because the Town Engineer admitted that he did not apply the words of the plat restriction to the facts of the application to determine whether there was a violation. (CP 209:9-14)

The misapplication of the law to the facts in this case resulted in the Hearing Examiner finding that “reasonable minds can differ” about whether the application violates the plat restriction. (AR 798) On the contrary, reasonable minds can only differ in this instance when those minds are not giving meaning to each word in the plat restriction. The decision should be reversed.

Nowhere in the decision is there any finding of fact or conclusion of law that the ownership would in fact change. Thus, it is not possible to conclude on this record that the plat restriction would be violated by the proposal contained in the application. The Town Engineer admitted there was no evidence of intent to sell in the record. (CP 172-3:14-2) He testified that Jones “can” sell the property. (AR 209:9-14) That is not enough to create a violation of the original covenant. It was clear error to allow and rely on testimony contrary to the actual wording of the plat restriction. The error was not harmless because the Hearing Examiner relied upon this specific testimony in his decision to support his assumption that the application violated the covenant because Jones could later sell the lots.

Does RCW 58.17.215 permit a municipality to speculate as to what may happen in the future to determine whether a plat restriction may be violated in the future?

The Town provides authority to the Town Engineer to make certain determinations with respect to a short plat application. HMPC 17.25.090. However, there is no authority from the Town Council or any where else in the law that grants the Town Engineer authority to determine what Jones may or may not do with his property **after** the short plat process ends or that the Town Engineer's authority extends to speculate about future disposition of the property. The Hearing Examiner found that "based upon the Town Engineer's professional experience, that sale or transfer of ownership of the proposed lots **would be** the result of any subdivision and subsequent sale of lots." (AR 798) (*Emphasis Added*). HPMC 17.25.090, gives no authority to the Town Engineer to use his professional experience to deny an application that otherwise conforms to the zoning codes based upon the selection of one future possibility amongst many.

On cross-examination, Ms. Jones questioned Mr. Willis about how ownership is changed given the fact that the Jones proposal does not propose a change of ownership. Mr. Willis testified, "Ownership is the same, but once your short plat is processed and approved, the ownership **can** change." (CP 177:12-14) (*Emphasis Added*.) Ms. Jones then asked, "Isn't that speculating that

something can happen in the future after the short plat process is recorded and done? The question was not allowed because the Hearing Examiner agreed with Mr. Sterbank that Mr. Willis had testified that based upon his experience that's the reason that short plats of this type occur. . .” Id.

The Town Council did not give to the Town Engineer to determine what may or may not happen in the future following the conclusion of the short plat process. There is no law providing that authority. In fact, the Washington Supreme Court has rejected attempts by municipal governments to expand this type of discretion in *Norco v. King County*, 97 Wash.2d at 688, 649 P.2d 103 (1982). Quoting *Norco*, this court later ruled that conferring unlimited discretion upon the Council would make the other sections of the platting statute meaningless and place plat applicants in the untenable position of having no basis for determining how they could comply with the law. *Friends Of Cedar Park Neighborhood v. City Of Seattle*, 156 Wash.App. 633, 234 P.3d 214 (Wash. App., 2010) *citing Norco*, 97 Wash.2d at 688, 649 P.2d 103 (1982).

The facts in evidence in Jones application and at the hearing were completely contrary to the “professional opinion of the Town Engineer,” and this contradiction between the actual evidence and the Town Engineer’s opinion based upon experience was admitted by the Town Engineer in cross examination:

Q. What do you see in this application as being the proposal?

A. The proposal is to divide lot 11, block 2, Hunts Point Park Addition into two separate parcels.

Q. The proposal does not include selling, is that correct?

A. Town Engineer: I wouldn't know about the sale. I just know that when the short plat was approved and recorded, the person who owned those could sell them.

(CP172-3:14-2.)

Q. And I just want to be sure. Once the dividing is done, both lots can sit there; they don't have to be built upon, is that right?

A. No, they don't have to be built upon.

Q. And they don't have to be sold?

A. They don't have to be sold.

(CP 187-8: 24-4)

The law was not applied to the facts of the case when the Hearing Examiner found that because a sale is **possible**, there is a violation of the plat restriction. As the Town Engineer admitted, the property does not have to be sold, nor does the property have to be built upon. It was evident that there are other choices equally available to Jones which do not violate the plat restriction. For the Town Engineer to assume the one possibility which arguably results in a violation of the plat restriction places Jones in the untenable position of being unable to ascertain how to comply with the law (i.e. the Town Engineer's opinion) and it expands the municipality's discretion well beyond its statutory authority.

The Hearing Examiner should have recognized that the Town Engineer had no authority to speculate into the future and decide that a plat restriction violation did in fact exist because something might happen in the future. This is particularly true when it is just as likely that Jones intended to do something with the lots that would not result in a change of ownership. For example, the property could be leased or the current owner could build another home and own it for his children or elderly parent to live in. In either case, he would still own the entire 24,045 square feet shown on the original plat. There is no evidentiary support for the assumption of a sale upon which this decision was based.

C. The Hearing Examiner erred by accepting the Town Engineer's assumption that Jones would sell the property after it was platted because there was no evidence to support the assumption and, without the assumption, there was no basis on which to conclude that the original covenant would be violated. (Assignment of Error No. 2)

When it make a decision on a short subdivision application, does the municipalities' jurisdiction end at the conclusion of the short subdivision process?

The Town lacks the regulatory authority to condition or deny an application for reasons that exceed the criteria established by the zoning code and other applicable municipal laws. Interpretation and enforcement of a restriction on the plat is outside the codes and laws governing the authority of the municipality. Hunts Point Municipal Code 17.25.090 establishes the criteria

the Town Engineer may consider in rendering a decision on a proposed short subdivision.⁵ HPMC 17.25.090 provides:

The town engineer shall examine the proposed short subdivision and any associated dedication to ascertain whether it conforms to the town comprehensive plan, the zoning ordinance (HPMC Title 18), to the design standards and other requirements of this title, and to all other applicable ordinances. The town engineer shall inquire into the public use and interest proposed to be served by the establishment of the short subdivision and dedication and make determinations pursuant to RCW 58.17.110(1).⁶

This local grant of authority is supplemented by general municipal powers granted under the State Subdivision Act, Chapter 58.17 RCW.

The Town's authority in reviewing an application for a short plat is limited and it does **not** include the authority to interpret, review, or enforce a plat restriction. RCW 58.17.215 only permits the municipality to inquire into whether the application results in the violation of a covenant. HPMC 2.35.020(1) permits the Examiner to interpret review and implement land use regulations. A plat restriction is not a land use regulation and thus there is no

⁵ A short subdivision and short plat are the same.

⁶ The Town Engineer has the ability to inquire into public use and interest proposed to be served; in this case those were not reasons for the denial of the application. Instead the only reason for the denial of the application was the Town Engineer's determination that the plat restriction could later be violated in the event of a sale after the process was completed. The Town Engineer's only reason for denial of the application related to the plat restriction and not the public use and interest proposed to be served. In doing so, the Town Engineer conferred with the Town Attorney prior to ruling whether the application constituted a plat restriction violation. (CP 202-3: 11-2) Nowhere in the decision letters from the Town Engineer or in his testimony does he say that the application was denied because it did not serve the public use and interest.

statutory or municipal authority for either the Town or the Examiner to interpret, review, or enforce a plat restriction.

In pretrial motions, Jones moved for an order to determine whether the Hearing Examiner had jurisdiction to consider the enforcement of the plat restriction. (AR 646-651) Specifically, Jones raised the question whether plat restrictions are private and, therefore, not subject to public enforcement and interpretation by a municipality. *Id.* The Town Engineer's decision should be reversed for lack of jurisdiction to interpret and enforce a private covenant.

Restrictive covenants benefiting and burdening lots within a subdivision create a private right of contract. Persons who can enforce that contractual right are those who share in the benefits and burdens of the restriction, i.e., those with vertical and horizontal privity to the original contracting parties. *Leighton v. Leonard*, 22 Wn. App. 136, 139, 589 P.2d 279 (1979). Here, the Town lacks horizontal and vertical privity to the original contracting parties. The Town was not incorporated until 1955, well after the condition on the plat was created in 1951. Thus, the Town never had the opportunity to review the Plat restriction in any official capacity prior to it being accepted on the face of the plat. Further, the Town is neither benefited nor burdened by the restriction primarily because the septic concerns were alleviated in late 1959 when sewers were installed and

everyone in the town was required to hook up to them, thus obviating the need for restrictions on septic systems.

The primary goal in interpreting covenants that run with the land is to determine the drafter's intent and the purpose of the covenant at the time it was drafted. *Bauman v. Turpen*, 160 P.3d 1050, 139 Wn. App. 78 (Wash. App., 2007) In *Bauman*, neither the 1997 UBC [Uniform Building Code] nor the SBC [Seattle Building Code] was in effect when Gilbert drafted the "one story" covenant that restricts building on the Turpen lot. The trial court could not define the intent or purpose of a covenant drafted in 1949 based on these later-enacted codes. *Id.* Similarly, the subdivision act 58.17 RCW which exists today was codified in 1969, and the Examiner cannot conclude as a matter of law that the purpose of the 1951 plat restriction was to prohibit subdivision under the later-enacted act. RCW 58.17 adopted 1969. (AR 798)

At the time this plat was approved by King County in 1951, sewers were being installed but were not available in all areas. (AR 145-6) A similar plat restriction was used in a variety of other subdivisions around Bellevue during the same period of time. (CP151:15-25) Sewers were eventually installed in Hunts Point, and Ordinance 37 required homeowners to connect to the sewer system during 1960 pursuant to the ordinance adopted December 14, 1959. (AR 201) This is important because all of the health concerns resulting in the septic

requirements imposed in the plat restriction were alleviated when all properties were required to connect to sewer. (CP 175-6:23-5)

The Town of Hunts Point was incorporated in August 1955 and at that time became the governing body with respect to zoning. (AR 148-9) This plat restriction and similar restrictions were quite common at the time because the subdivision statute (RCW ch. 58.17) had not yet been adopted and there was extensive use of septic tanks and drain fields as a means of handling sewage. (AR 96, 98, 144-6) In order for King County's health department to approve the new plat, they had to be assured that, after the home had been built on a lot subject to a certain size septic drain field, homeowners would not later sell off part of their property, and by doing so, cause the drain field for their property to no longer be contained within their property. (CP 154-5:24-4; 156-7:21-4) Therefore this plat restriction was used by the Health Department as a means of making sure that all lots owned by different owners they approved for occupancy maintained their size for septic drainage purposes. (AR 96, 98)

The plat restriction in question does not prohibit "subdividing". (AR 6; 8; CP 160:3-19) What it prohibits is dividing and selling portions of a lot within the plat that would lessen the ownership of the lot in the plat of a given owner. (AR 6, 8) This is because "post construction" sales of land would be difficult for the County to monitor and/or regulate with regard to septic drain field

mandatory lot sizes. (CP 159-60:20-2) Subdividing or short platting in and of itself did not create the same problem, as it presented the County with the opportunity to approve or not approve the subdivision/short plat and the drain field sizes associated with the short plat. (CP 160:3-19) Short platting was not the problem they were regulating. *Id.* Selling off pieces of land necessary to accommodate a legal drain field was what the County was trying to stop, and the plat restriction wording was successful in doing so. *Id.* All of the public health concerns the plat restriction was designed to avoid were no longer applicable by 1960 when the septic systems were replaced by sewers.

The Town cannot enforce a private contract right under its municipal regulatory powers. For example, in *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005), addressing a declaratory judgment action for enforcement of a restrictive covenant that, in part, imposed a density limitation of no more than one dwelling on each one-half acre, the Washington Supreme Court found that the City of Shoreline “correctly conceded it ‘has no authority’ to enforce or invalidate restrictive covenants[.]” *Id.*, 155 Wn.2d at 130.

Similarly, the Washington Court of Appeals has held that “[a]lthough a private contract may provide grounds for a separate action to enjoin a proposed usage of land, the general rule is that such a covenant is not grounds for denial of a zoning variance.” *Martel v. City of Vancouver Board of Adjustment*, 35

Wn. App. 250, 257, 666 P.2d 916 (1983) (citing McQuillin, *Law of Municipal Corporations* § 25.09 (3rd ed. J. Kightlinger, 1976); *Suess v. Vogelgesang*, 151 Ind.App. 631, 281 N.E.2d 536 (Ind.App. 1972)). The only reason this application was denied was because the Town chose to exceed its jurisdiction to interpret and enforce its interpretation of a private covenant. Because it lacks the authority to do so, the Examiner's decision should be reversed.

D. The Hearing Examiner erred when he found that the Town Engineer had jurisdiction to interpret, review, and implement a plat restriction and that he should defer to the Town Engineer's decision on that issue. (Assignment of Error No. 3)

Did the Hearing Examiner err by deferring to the Town Engineer when he was interpreting a restrictive covenant and not a Town ordinance?

Deference is only given to the local jurisdiction when it is interpreting its own laws. RCW 36.70C.130(1)(b) There is no deference given to administrative interpretations of plat restrictions. *Id.* This Court reviews *de novo* applicable state statutes and the common law of contracts and real property and unambiguous provisions of local law. *West Hill, LLC v. City of Olympia*, 63 P.3d 160, 115 Wash.App. 444 (Wash. App., 2003) Here, the Town Engineer has no authority to prevent approval of a short plat based on his legal conclusion about the application of the common law of contracts and real property intended purposes; and contract interpretation rules. The court will make it the primary goal in interpreting covenants that run with the land is to ascertain and give

effect to the covenants' intended purposes. *Hollis v. Garwall*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999); *Meresse*, 100 Wn. App. at 864. The court will apply contract interpretation rules when construing covenants. *Hollis*, 137 Wn.2d at 695-96.

This court reviews errors of law *de novo*. *West Hill, LLC v. City of Olympia*, 63 P.3d 160, 115 Wash.App. 444 (Wash. App., 2003) Here there was a clear error of law. The Town could not consider what the owner of the property might do with it as a basis for rejecting his application. The application is only to divide the property, not to “divide and sell” it. Thus, the Examiner erred when he denied the application based on the assumption that it would be sold and applied an erroneous interpretation of the original covenant.

In this case there is no ordinance at issue. In fact, the Town Engineer admitted that it appears that the application complies with all ordinances related to the short plat. AR 430; 796. The Town Engineer was only considering a plat restriction and determined that it barred the short plat. However, a plat restriction is not an ordinance, nor had it ever been considered by the Town Council. The plat restriction has never been enforced or applied until now.

If the Town Engineer’s analysis of the plat restriction were accurate, then there would not be so many examples throughout the record of different lots or portions of lots in the Hunts Point Park Addition being divided and sold,

resold, ownership changed and transferred whereby the ownership portion of the lot is less than the area shown on the face of the plat.

The prime example is connected with lots 1,2,3 and 4 within Block 2. Lot 4 is now only sixty feet wide (i.e. it is smaller) and is used as a public road, with its division resulting in the remaining 20 feet of the original lot from the face of the plat going to lot 3. Part of lot 2 also became part of lot 3 and part of lot 1 went to lot 2. Lot 1 on the face of the plat was greatly reduced in size and was able to secure additional land from **outside** the face of the plat from the adjoining plat to make Lot 1 of conforming size despite the extreme reduction in size of Lot 1 within the Hunts Point Park Addition plat. Again, four lots were consolidated into three lots, and two of the lots (lot 2 and lot 4) were made much smaller by this consolidation. The authorization for the division of 60 feet from lot 4 and transferring ownership to the Town by Statutory Warranty Deed was Ordinance 17. There is nothing within that ordinance that refers to how they dealt with the plat restriction, but it was deeded by the original platters. (AR 100-1; CP95-6:18-1; 98:10-19)

On page 2, second paragraph of both the December 2, 2009 and December 3, 2009 letters from the Town Engineer, he cites his reasons why many lot size changes (described below) to the plat in the Hunts Point Park Addition were not in fact violations of the plat restriction as read by the Town

Engineer. (AR 423; 426) However, the Town Engineer does not address the issues presented (above) with regard to Lot 4 of Block 2 and how Ordinance 17 would be a plat restriction violation under the Town Engineer's reading of the restriction. He also does not address his 2004 approval as Town Engineer, of a short plat within the Hunts Point Park Addition involving what used to be lots 2,3 and 4 in Block 1.

All of the examples here are in direct conflict with the restriction on the plat as interpreted by the Town Engineer. He does not have answers for why they do not implicate the plat restriction.

If the Town Engineer's analysis is accurate, then there would be three distinct areas, affecting thirteen of its thirty-eight lots (over a third of them), where the plat restriction was not followed. (AR 100; TP 74-76; 81) Nine of these lots are within Block 1 and four of these lots are within Block 2. Just across the street from the Jones' home are lots 10,11,12,13 and 14 (Block 1). These lots have been consolidated into only four lots, making lot 13 disappear, and making lots 10,11,12 and 14 larger. (AR104-5) Therefore, the consolidation of these five lots into four lots did in fact make the ownership of a portion of this plat to be less than the area shown on the face of this plat, as lot 13 is no more and there are now just four homes there instead of five. (TP 81-83).

Also within Block 1 to the far north end of the plat are lots 1,2,3, and 4. These four lots have also been consolidated into three lots and there now is a “missing” lot 2. Lot 1 is larger, lot 3 is larger and lot 4 is larger; however, lot 2 disappeared. Pursuant to the Town’s reading of the plat restriction, the town has previously permitted the ownership of a portion of the plat to be less than the area shown on the face of the plat for lot 2 as well. (AR 133-4; TP 140-1:15-23)

The tax records show that on October 17, 1952, Lot 11 of Block 1 was divided and 10 feet of Lot 11 was sold by the original plat makers along with all of Lot 10 and it was sold to a different person (Ries). (AR 104-5 supported by 106-136) Later there was another 10 feet transferred from Lot 11 to Lot 10, making a total of 20 feet of Lot 11’s eastern portion being transferred in two different instances from one owner to a different owner. (Id.) On April 5, 1954, 34 feet of Lot 12 was divided and sold (again by the original plat makers) to James Bryce along with the rest of Lot 11. (Id.) On December 2, 1954, Lot 13 was divided and sold with its eastern 50 feet being sold off along with the remaining western fifty feet of Lot 12. This, again, was done by the original plat makers and was sold to J.A. Stanley. (Id.) Also on December 2, 1954, the remaining 34 feet of the divided Lot 13 was divided and sold with Lot 14. (AR 105 supported by 106-136) This was done by the original plat makers and was also sold to J.A. Stanley. (Id.) These transfers were not done as boundary line

adjustments because they were done many years apart from each other and King County Archive and Hunts Point Archives have no records of these as being “boundary line adjustments.” (Id.) Rather the division of property was done at the time of sale, when ownership changed—which was the common practice at the time. (Id.)

Ordinance 17 very clearly shows that lot 4 of Block 2 was in fact divided (the southern sixty feet were “deeded to the town”) which is not only a division, but also a sale, a transfer, and a change in ownership. (AR 182) So, the Town Engineer’s interpretation of the words of the restriction does not comport with the facts of what occurred. When these properties were divided, they did in fact include a sale, they did include a transfer, and they did include a change in ownership. Therefore, the claim made by the Town Engineer in his December 2, 2009 and December 3, 2009 letters that “boundary line adjustments did not appear to include a sale, resale or change of ownership, and so did not implicate the second part of the plat restriction,” is simply factually incorrect. First, they were not boundary line adjustments, and second they did in fact include a sale and a change of ownership.

There is no dispute that the Town Council charges the Town Engineer to review the short plat and apply the ordinances on application for short plats. HPMC 17.50.090 There also is no dispute that the Town Engineer may be

accorded substantial deference in interpreting the Town's ordinances. The problem here is that a plat restriction is not "the Town's ordinance" and therefore no deference is permissible. Thus, there is no basis on which to properly defer to the Town Engineer in this case.

E. The Examiner erred when he made findings of fact based upon attorney argument rather than factual sworn testimony? (Assignment of Error 4)

Did the Examiner err by using argument as evidence and failing to use sworn testimony and properly admitted exhibits?

The Examiner concluded as a matter of law that he was not left with a clear and definite conviction that the Town Engineer erred in his interpretation of the plat restriction. Within the same conclusion the Examiner states, "the Town Engineer determined that the plat restriction was imposed as a limit on residential density, and that the restriction continues to apply to the plat." This conclusion is based solely on information in unsworn oral argument by the Town Attorney and in the Town's Hearing Brief. In the brief, the "Town argues that plat restrictions must be construed in a way that protects the homeowners' collective interests. The Town contends that the purpose of the plat restriction is to limit density...Consequently, the Town argues that approving the subdivision would violate the explicit restriction placed on the plat."

A trier of fact may not consider factual matters raised solely in the trial brief and oral argument to resolve factual issues. 6 J. Moore, *Federal Practice* ¶

56.11[1.08], at 56-202 (2d ed. 1948); *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 586 P.2d 860 (1978). There is no testimony or exhibit about who the homeowners are or what their interests are. There is no exhibit or testimony about whether approving the subdivision would violate their interests. There is no evidence that remotely discusses or implies that the purpose of the plat restriction is to limit density. The word “density” is present on only the following pages of the transcript: CP 256:3; 290:13-14 and 23; 291:17; 292:2; 293:19. Each of these references is argument by Mr. Sterbank who was not under oath and presented no testimony. No document was admitted that supports this assertion that density is the purpose of the restriction. There is simply no evidence in the record to support a finding that the purpose of the plat restriction was to limit density. This finding is pure conjecture, argument, and not based upon any evidence in the record. The inclusion of these statements as evidence is improper. This was the only support for the Town Engineer’s determination about the purpose of the plat restriction, and the Examiner’s conclusion of law must be reversed as a matter of law.

Similarly, the Examiner concluded, “the Town Council itself reviewed and adopted the plat restriction at issue here when it approved the final plat.” The Superior Court judge who reviewed this record concluded, as she must, that level, that this conclusion could not be supported by the evidence. (AR 798)

The Town was not incorporated until 1955, well after the condition on the plat was created in 1951. (AR 148) This conclusion of law is not supported by the evidence and must be reversed.

Finally there is no authority for the conclusion that the Town Council authorized the Town Engineer to review and decide short plat applications **on the basis of his interpretation of plats covenants and restrictions**. Neither the Hunts Point Municipal Code nor any statutory or case law supports this conclusion. The Examiner impermissibly extended the Town Engineer's authority beyond what the municipality gave him. Thus, this portion of the Examiner's conclusion of law must be reversed.

F. The Examiner erred when he continued to rule as if the Town Engineer had accepted the application and denied it rather than remanding it to be accepted and properly processed by the Town Engineer. (Assignment of Error 5)

Should Conclusion of Law 1 (AR 797) be affirmed for the second time on appeal?

In prehearing motions, Jones requested that the Examiner predetermine the issues to be decided on appeal prior to the hearing. (AR 648-9) The Examiner denied the motion and decided, "the appellants submitted an appeal of whether the Town Engineer erred in refusing to accept an application for division of Lot 11. The question of whether this decision was appropriate is the issue before the hearing examiner." (AR 781) In the first conclusion of law the Examiner ruled in Jones favor on the entire issue and determined that the Town

Engineer failed to follow process under RCW 36.70B.030(2) by failing to make a determination of completeness or issuing a notice of application. (AR 796-7) The Town Engineer misapplied the law in failing to accept the application. The Examiner granted Jones' petition on that issue. Id. The application must be remanded and accepted by the Town. When the ruling was appealed; it was affirmed by the Superior Court. CP 417-419. This ruling was correct and since it was affirmed by the Superior Court; Jones requests that this court affirm the Examiner's Conclusion Number 1 and remand it back to the Town Engineer to accept the application for processing following this court's decision on the other assignments of error which were necessitated by the Hearing Examiner proceeding further than he intended under the pretrial order.

Jones should be awarded attorneys fees under RCW 4.84.370.

The Examiner's ruling then went further, despite the pretrial motion made by Jones, and the pretrial ruling made by the Examiner. Had the ruling ended there, the application would have gone back to the Town for Notice to be given to the residents in the plat, and the Town Engineer would have had to complete the full list of requirements for preliminary plat approval. At that point Jones could have begun to comply with the entire list of conditions which often can take time. However, because the Hearing Examiner expanded his ruling to include a decision on whether the Town Engineer properly determined

that the application sought violated the plat restriction, Jones had to preserve all issues and appeal prior to the application being remanded back to the Town for acceptance and proper processing. Jones was essentially placed in a position of prevailing on the primary issue (acceptance of the application), but then not prevailing on a single condition of preliminary plat approval.

Subject to compliance with RAP 18.1, Jones requests attorney fees be awarded to him upon remand pursuant to RCW 4.84.370. Under this statute, parties are entitled to attorney fees only if a county, city, or town's decision is rendered in their favor and at least two courts affirm that decision. The possibility of attorney fees does not arise until a land use decision has been appealed at least twice: before the superior court and before the Court of Appeals and/or the Supreme Court. RCW 4.84.370(1). *Habitat Watch v. Skagit County*, 120 P.3d 56, 155 Wn.2d 397 (WA, 2005) citing *Baker v. Tri-Mountain Res., Inc.*, 94 Wash.App. 849, 854, 973 P.2d 1078 (1999).

Upon appeal to the Superior Court, Jones improved his position because the court affirmed the Examiner ruling, including the first issue upon which Jones prevailed and also ruled: “The court notes that the evidence does not support the portion of Hearing Examiner’s conclusion two which provides: “The Town Council itself reviewed and adopted the plat restriction at issue. . .” AR

419. While the court also found it did not result in a reversed decision on conclusion two, it improved Jones' position from the Examiner's decision.

If conclusion one is affirmed then Jones prevails on this appeal as well, and the court agrees that the Town Engineer did not have the authority to not accept the application, or even if Jones improves his position with remand from the other assignments of error, attorney's fees should be awarded to Jones. Jones prevailed in proving the only issue that the Examiner predetermined based upon Jones' motion, Jones then improved the position in the Superior Court, and Jones will have prevailed a third time if the matter is remanded with instructions for the Town to accept the application.

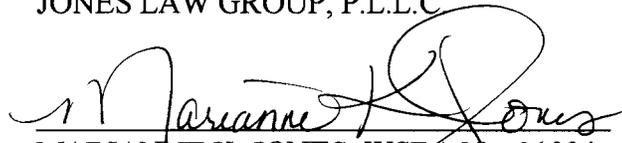
V. CONCLUSION

In an attempt to afford deference to the Town Engineer's decision, the Examiner failed in his obligation to review the actual evidence presented at the hearing. He made conclusions of law that were specifically not supported in the record. The Examiner upheld the Town Engineer's decision to change the requirements of the statute from a requirement that a violation would occur to a possibility that it could occur. The Examiner then upheld the Town Engineer's decision to not read the words of the plat restriction as written but to ignore the requirement that there be a change in ownership. Despite the evidence presented in testimony, including the admissions of the Town Engineer himself,

the Examiner accepted an obvious but wholly irrelevant argument that the plat restriction is violated when the two halves are less than the whole. Clearly, that is called subdividing. If subdividing in this plat was not permitted the restriction would clearly say: "No subdivision allowed." It does not say that and to rule that it does excludes all of the other possibilities that Jones can do with his property once he divides it. He can divide and build; divide and lease; divide and stay; divide and own; divide and do nothing else. In prohibiting Jones' request to turn 24,045 square feet of property into two lots, the Town Engineer restricted the admittedly proper uses that Jones had available to him when he denied the application for short plat, and the Examiner allowed it.

RESPECTFULLY SUBMITTED this 25th day of February 2011.

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