Court of Appeals No. 48016-6-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

MARK AVOLIO, JOHN BAKER,
MAUREEN DeARMOND, and ANDY MERKO,

appellants,

v.

CEDARS GOLF, LLC,

respondent.

REPLY BRIEF OF APPELLANT

Mark A. Erikson, WSBA #23106
Erikson & Associates, PLLC
Attorneys for Mark Avolio, John Baker,
Maureen Dearmond, and Andy Merko,
as appellants
110 West 13th Street
Vancouver, WA 98660-2904
Telephone (360) 696-1012
E-mail: mark@eriksonlaw.com
kris@eriksonlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Washington Statutes

Battle Ground Municipal Code

CORRECTION OF FACTUAL MISSTATEMENTS

Respondent Cedars Golf alleges that it "subdivided Lots 1 & 8 through the proper procedures in the City of Battle Ground." *Brief of Respondent* at 1. Battle Ground is governed by the *Growth Management Act* and the *Subdivision Act*; hence, decisions outside of hearing examiner competence are not "proper procedures." *Infra.*

Cedars Golf alleges "[t]he practical effect of the approval is to reduce the allowed development of lots from the 42 townhomes that could have been built prior to the approval, to only allowing 13 single family homes after the approval." *Brief of Respondent* at 5. The deception here consists in the word "only," and the false implication that 42 attached townhouses somehow results in greater sprawl than 13 detached single-family residences and associated structures. For comparison of townhouse density to single-family lots in prior Phase I, see *CP 272.*

Cedars Golf's quotation from final judgment on the LUPA appeal omits paragraphs "A" and "B" (signified by an ellipsis), which affirmed the examiner's determination that the proposed division was *not* a plat alteration subject to RCW 58.17.215, resolving the issue entirely and rendering quoted paragraphs "C" and "D" surplusage. *Brief of Respondent* at 6.

ARGUMENT

RESPONDENT'S ISSUE 1 (following division by assignments of error)

Cedars Golf argues exhaustion, applicable to administrative remedies: "this court should affirm the trial court's dismissal of Plaintiffs' claims because the trial court did not have jurisdiction over this case, pursuant to LUPA." *Brief of Respondent* at 13. However, appellant Avolio appealed the examiner's determination. *CP 151, et seq.* While LUPA is "the exclusive means of judicial review of land use decisions," RCW 36.70C.030(1); it does not mandate exhaustion of Superior Court decisions at the Court of Appeals.

LUPA "replace[d] the writ of certiorari for appeal of land use decisions;" however it did not replace the *Uniform Declaratory Judgments Act*, which confers power upon "[c]ourts of record within their respective jurisdictions . . . to declare rights, status and other legal relations whether or not further relief is or could be claimed." RCW 7.24.010. Neither did LUPA replace court actions to interpret restrictive covenants, which are "enforced and protected by both legal and equitable remedies." *Lake Limerick v. Hunt Mfg. Homes*, 120 Wash.App. 246, 253, 84 P.3d 295 (2004). "Superior Courts have original jurisdiction in all cases . . . which involve the title or possession of real property." RCW 2.08.010.

Cedars Golf argues that the examiner had "authority to determine whether the CC&Rs required approval of the owners" in order to apply RCW 58.17.215. *Brief of Respondent* at 15. The statute requires written agreement from all parties subject to the covenant waiving any provision which would be violated by the proposed amendment:

> 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.

RCW 58.17.215. The examiner had only to determine whether Phase II is subject to a covenant filed at the time of approval of the subdivision, which prohibits the proposed amendment. "The Cedars Declaration of Covenants, Conditions and Restrictions" is dated February 23, 1973, *CP 203*; and signed March 2, 1973, *CP 217-19*. Legal descriptions in Exhibit A and Exhibit C describe the entirety of The Cedars. *CP 202, CP 232*. While the Phase I plat and dedication dated November 14, 1972, *CP 272-74*, the Phase II plat was accepted by the County Assessor on June 10, 1980. The 1973 Declaration had been filed when the Phase II plat was approved, but not when the Phase I plat was approved. Hence, Phase II is encumbered by the 1973 Declaration.

Of course, it was only Phase II that Cedars Golf sought to amend, so the examiner could have stopped his analysis with the prohibition against further subdivision of "Lots," including Lots 1 and 8 of Phase II. *CP 209* ("No lot as platted shall be resubdivided into separate building sites.") Legal issues such as covenant violation, authority to annex phases, and incorporation into the 1973 Declaration were unnecessary to the examiner's decision under RCW 58.17.215. *CP 54*, paragraph 3(b). There is no administrative determination which could not be complicated by introducing legal issues, but that does not expand hearing examiner competence.

In *Halverson v. Bellevue*, the Court of Appeals affirmed a decision quieting title and invalidating an approved subdivision where a neighboring landowner had satisfied the all of the elements of adverse possession as to a portion of the platted lands, but had not signed the subdivision application as required under RCW 58.17.165. *Halverson v. Bellevue*, 41 Wash.App. 457, 460, 704 P.2d 1232 (1985). Bellevue had authority to determine whether the application was signed by all landowners, but that did not prevent the Court from construing the law of adverse possession so as to quiet title and invalidate the subdivision plat. *Halverson*, 41 Wash.App. at 458-59, 460.

Because appellant Avolio exhausted administrative and LUPA

remedies, the present appeal devolves upon doctrines of preclusion, as discussed in the *Brief of Appellants*. Preclusion depends upon the hearing examiner's competence and the decision actually made. While the examiner may "have authority to determine whether the CC&Rs require[] approval of the owners," *Brief of Respondent* at 15, he actually decided they do not:

> 3. The examiner finds that the plat alteration complies with RCW 58.17.215.
>
> a. The applicant is requesting alteration of the plat to remove the "townhomes" designation on Lots 1 and 8. Lots 1 and 8 of the Cedars Phase II are the only portion of the subdivision proposed to be altered. Therefore RCW 58.17.215 only requires the signature of the majority of persons with an ownership interest in Lots 1 and 8 of the Cedars Phase II. **The further division of these platted lots is not a "plat alteration" subject to RCW 58.17.215.**

CP 54, emphasis added.

On the other hand, the examiner lacked authority to interpret and enforce the covenant, as discussed in the *Brief of Appellants*; hence, any determination beyond the application of RCW 58.17.215 was outside his competence. Of course, any determination made *after* the above-quoted ruling was surplusage because paragraph 3(a) disposed of the issue entirely.

Determinations outside the examiner's competence are contained in Subparagraph 3(b) of his *Final Order*, pertaining to: covenant violation,

authority to annex phases, and whether documents governing Phase II incorporated the 1973 Declaration. *CP 54*. Those topics are outside of examiner competence because they are unnecessary to decide the application of RCW 58.17.215. Courts lack authority to give advisory opinions, surely hearing examiners are similarly limited.

Cedars Golf argues that "[t]he CC&Rs are . . . 'rules regulating the improvement, development, modification, maintenance, or use of real property'" within the LUPA definition of "land use decision" in RCW 36.70C.020(2)(b). *Brief of Respondent* at 18. To the contrary, the cited provision actually defines "land use decision" as follows:

> (2) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on: . . .
>
> (b) An interpretative or declaratory decision regarding the application to a specific property of **zoning or other ordinances or rules** regulating the improvement, development, modification, maintenance, or use of real property; . . .

RCW 38.70C.020, emphasis added.

The disjunct "or rules" is governed by the preceding phrase "zoning or other ordinances." To the degree that the word "rules" may imply a meaning so general as to include restrictive covenants, "*ejusdem generis*

requires that general terms appearing in a statute in connection with specific terms are to be given meaning and effect only to the extent that the general terms suggest similar items to those designated by the specific terms." *Silverstreak v. Department of Labor & Industry*, 159 Wash.2d 868, 882, 154 P.3d 891 (2007). Specific terms "zoning or ordinance" limit the meaning of the general term "rules" to those adopted by local governments. Interestingly, it is precisely the specific terms "zoning or ordinance" which Cedars Golf chose to excise from its quotation. This interpretation is supported by a phrase in the opening paragraph: "final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals." RCW 36.70C.020(2).

There is no authority to enforce restrictive covenants administratively; rather, administrative jurisdiction is defined in the Battle Ground Municipal Code, as follows:

> 1. Hearing and reporting on any proposal to amend a zoning ordinance or comprehensive plan map amendment proposals to change the land use and implementing zoning designation of specific parcels of land, including such annual reviews which are applied for and are not of general applicability;
>
> 2. Revisions or rescissions of agreements concomitant to rezones;

> 3. Preliminary subdivision plat applications;
>
> 4. The authority herein to decide variances in lieu of provisions for boards of adjustment under RCW 35A.63.110;
>
> 5. All other applications for permits or approvals, including appeals, under Titles 16, 17 and 18 of this code which call for an appeal of an administrative decision or a hearing on a quasi-judicial decision.

BGMC 2.10.080(A). There is no mention of restrictive covenants in the Battle Ground delegation of hearing examiner authority.

In an attempt to persuade that issues are identical between the LUPA proceeding and the present action to enforce the covenant, Cedars Golf alleges, without citation, that "[n]o new arguments are presented in this proceeding, as acknowledged by Plaintiffs' counsel at the hearing on the cross motions for summary judgment." *Brief of Respondent* at 21. In fact, Cedars Golf's only citation to the record evidences a far different proposition:

> THE COURT: . . . So [the appellants] didn't have any problem with the idea that if [the hearing examiner] ruled for them, he had the authority to enforce the covenant. It's only after he said, No, I'm not going to do it, that all of a sudden he didn't have the authority.
>
> MR. ERIKSON: You're correct.

RP 15, ln. 14-19. While this colloquy raises an interesting issue, to which we move to directly, it says nothing regarding arguments presented in the LUPA

proceeding or the present action. Appellants' briefing in the present action discloses arguments not raised in the land use proceeding concerning administrative competence, Superior Court jurisdiction, separation of powers, impairment of contractual relationships, collateral estoppel and *res judicata*. As noted by Cedars Golf, the only issue raised by appellant Avolio in the LUPA proceeding was "the applicability of the CC&Rs and the corresponding effect of RCW 58.17.215." *Brief of Respondent* at 5.

What the appellants believed, or "had a problem with," can only be inferred from the record. Because land-use counsel argued that RCW 58.17.215 mandates denial of the plat amendment, we may infer that appellants would have been satisfied with that result. To assume that the appellants had any understanding of administrative competence, jurisdiction or authority to enforce the covenant is highly speculative.

More interesting is the affect, if any, that appellants' posture in the land use hearing has upon covenant enforcement. Because the two proceedings have entirely different criteria, seeking different remedies, the posture taken in land use proceedings should have no affect upon subsequent enforcement of the covenant. Judge Lewis noted as follows:

> [T]he plaintiffs in this case asked the hearing examiner to make certain findings – factual findings: One, that the

> subdivision that we're talking about was subject to restrictive covenants. They wanted to find that as a fact.
>
> And two, that the application for the alteration would result in a violation of the covenant. . . .

RP 30, ln. 4-11. Superior Court findings are surplusage on appeal of summary judgment; however, the foregoing discussion illuminates the distinction between land use decisions and covenant interpretation. As Judge Lewis ruled, the examiner's determination was a "factual finding," *id.*; while "[i]nterpretation of a restrictive covenant is a question of law," *Wilkinson v. Chiwawa Communities*, 180 Wash.2d 241, 249, 327 P.3d 614 (2014); and preclusion applies to administrative determinations only "when the agency . . . resolves disputed issues of fact . . ." *United States v. Utah Construction & Mining*, 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966). As limited to factual findings, the examiner's decision cannot preclude Superior Court judgment on questions of law.

In 1974, the Washington Supreme Court reviewed a three-part distinction between questions of law and questions of fact:

> The first major group consists of '(c)ases . . . where the chief problem is the propriety of an administrative conclusion that raw facts, undisputed or within the agency's power to find, fall under a statutory term as to whose meaning, at least in the particular case, there is little dispute'. The second is '(c)ases where there is dispute both as to the propriety of the

> inferences drawn by the agency from the raw facts and as to the meaning of the statutory term . . .' The third category is that of '(c)ases where the only or principal dispute relates to the meaning of the statutory term . . .' . . . Generally, cases in the first category present questions of fact, those in the third category questions of law, and those in the second mixed questions of law and fact.

Leschi Improvement Council v. Washington State Highway Commission, 84 Wash.2d 271, 283, 525 P.2d 774 (1974). The present case involves questions in the second and third categories including: whether the 1973 Declaration has been violated, whether the developer had authority to annex Phase II, and whether the Phase II plat and dedication incorporated the 1973 Declaration.

When interpreting restrictive covenants, "[c]ourts place 'special emphasis on arriving at an interpretation that protects the homeowners' collective interests.'" *Wilkinson*, 180 Wash.2d at 250; citing *Riss v. Angel*, 131 Wash.2d 612, 623-24, 934 P.2d 669 (1997). In the present case, the examiner elevated development concerns over the homeowners' collective interests in ruling that proposed subdivision by Cedars Golf "is not a 'plat alteration' subject to RCW 58.17.215." The statute would have required waiver by all homeowners subject to the 1973 Declaration, including the appellants, and it is difficult imagine a more blatant denial of collective interests than deprivation of a project veto. We do not ask the Court to

review the examiner's determination, but to view his failure to follow legal cannons of covenant interpretation as evidence that he rendered decisions of law outside of administrative competence. Land use decisions cannot preclude covenant enforcement because they resolve only factual issues pertaining to land use decisions, while covenant enforcement involves issues of law not delegated to the examiner.

Under RCW 36.70C.130(1), "[s]tandards (a), (b), (e), and (f) present questions of law, which [Washington courts] review de novo." *Whatcom County Fire District No. 21 v. Whatcom County*, 171 Wash.2d 421, 426, 256 P.3d 295 (2011). If courts sitting in LUPA capacity review questions of law *de novo*, then no less scrutiny should be applied in review of defenses alleging collateral estoppel which require courts to determine whether the exercise of administrative decisionmaking fell within agency competence.

Cedars Golf argues that there is no injustice to appellants because "[p]rior to the subdivision approval, The Lots could only have been developed as 42 Townhouses, and the result of the subdivision approval is to limit construction to 13 single-family homes." *Brief of Respondent* at 22. As noted on page one above, the concern is single-lot density in the Phase II of the subdivision, not the *number* of residential units. *RP 19*, ln. 12-15.

Cedars Golf argues that appellants "request exactly the same remedy that they did before the Hearing Examiner and present the same arguments." *Brief of Respondent* at 23. To the contrary, relief sought in the LUPA proceeding was denial of a plat amendment, while the relief sought in the present proceeding is enforcement of the covenant. The fact that either type of relief would frustrate Cedar Golf's proposed project does not equivocate the two, it is merely the result of overlapping regulatory and civil jurisdiction.

Cedars Golf argues the appellants "have alleged in both actions an infringement of their right to enforcement of the CC&Rs with respect to [its] plan to subdivide the subject lots." *Brief of Respondent* at 26. To the contrary, appellants alleged in the LUPA proceeding that Cedars Golf failed to satisfy statutory requirements for plat amendment. Not until the present action did appellants allege a cause of action seeking covenant enforcement.

Cedars Golf argues "[t]he nature of the cause of action in both the current and prior proceeding was whether the CC&Rs prohibit the subdivision of the Lots." *Brief of Respondent* at 26. Actually, the nature of the LUPA proceeding was review of an application for plat amendment, while the nature of the present proceeding is covenant enforcement.

Although quoting the *res judicata* rule correctly (identify of "persons

for or against whom the claim is made"), Cedars Golf's analysis is limited to itself, the party *against* whom the claim is made, without consideration of the appellants, the party *for* whom the claim is made. *Brief of Respondent* at 27. Appellant Baker resides in Phase I, not Phase II of The Cedars. *CP 2*. He did not raise RCW 58.17.215 nor any covenant-related issues before the hearing examiner; rather, he commented upon environmental impacts. *CP 139*. He was not represented by legal counsel who represented the other appellants. *CP 101-05*. He did not participate in the LUPA appeal. *CP 151*.

Moreover, appellant Avolio's *quality* changed as the cause of action changed from land use appeal to covenant enforcement:

> Clearly, the identity of the parties was the same; their "quality" differed, however, as the causes of action changed from misrepresentation to breach of covenant of title. Hence, we hold the second action is not barred by res judicata as the concurrence of identity in three out of the four elements is missing.

Mellor v. Chamberlin, 100 Wash.2d 643, 646, 673 P.2d 610 (1983). The Court in *Mellor* noted that "the 'primary right' not to misrepresent a sale is distinguishable from the right to enforce a breach of a covenant of title." *Id.* In the present case, the public right to ensure regulatory compliance is distinguishable from the contractual right to enforce a private covenant.

Cedars Golf raises an issue of pertinence in the following argument:

"had the Superior Court determined that the Hearing Examiner's decision was outside of its jurisdiction or authority, it could have granted relief on that basis in the LUPA Appeal." *Respondent's Brief* at 27. Superior Courts sitting in LUPA capacity have authority to grant relief if "[t]he land use decision is outside the authority or jurisdiction of the body or officer making the decision." RCW 36.70C.130(1)(e). However, the fact that such relief exists does not prevent the appellants from enforcing the covenant where they satisfied exhaustion requirements under LUPA, and the hearing examiner lacked competence to interpret or enforce the covenant.

As noted by Cedars Golf, LUPA is "the exclusive means of judicial review of land use decisions," RCW 36.70C.030(1); however, the present case does not seek *review* of any "land use decision." The examiner's decision included a finding that "the plat alteration complies with RCW 58.17.215," and concluded that the proposal "should be approved, because it does or can comply with the applicable standards of the Battle Ground Municipal Code and the Revised Code of Washington." *CP 257.* That decision withstood LUPA appeal, and no ruling in the present proceeding could affect the finality of that decision.

Rather, the present proceeding concerns the enforcement of a private

covenant. "The elements which are necessary for finding an equitable restriction in the subdivision setting are:

> (1) a promise, in writing, which is enforceable between the original parties; (2) which touches and concerns the land or which the parties intend to bind successors; and (3) which is sought to be enforced by an original party or a successor, against an original party or successor in possession; (4) who has notice of the covenant.

Hollis v. Garwall, 137 Wash.2d 683, 691, 974 P.2d 836 (1999); citing Stoebuck, 52 Wash. L. Rev. at 909-10. In the present case, an enforceable writing is extant; however, the facts beg the issue "who were the original parties?" Covenants restricting use "touch and concerns the land," *Hollis*, 137 Wash 2d at 692; however, the issue is "which parcels of land?" The identity of original parties and successors is a pressing question. Notice of covenants is generally constructive; however, finding the 1973 Declaration in appellants' chains of title would go a long way to answer questions raised by the second element, "which land does the covenant touch and concern?;" and the third element, "who are original parties and successors?"

The LUPA proceeding could not render conclusions on the foregoing legal issues. Rather, the hearing examiner framed the issue as "[w]hether the proposed development will conflict with Conditions Covenants and Restrictions ("CC&Rs") applicable to the site." *CP 253*. However,

compliance with RCW 58.17.215 does *not* even begin to address legal criteria for covenant enforcement. A covenant may be unenforceable although consistent with proposed development, just as it may be enforceable although inconsistent. In either event, lack of findings addressing the elements of covenant enforcement renders the examiner's decision entirely without preclusive affect. Likewise, the Superior Court on LUPA appeal was limited to issues properly before the examiner.

Cedars Golf argues that "[a] party cannot properly seek review of an alleged error which the party invited." *Davis v. Glove Machine Mfg.*, 102 Wash.2d 68, 77, 684 P.2d 692 (1984). The cited case involved discretionary review of a decision in which testimony of petitioner's witness invited the error alleged. *Id.* Cedar's Golf argues that appellants "invited the Hearing Examiner and . . . Superior Court to address . . . issues related to the CC&R's." *Brief of Respondent* at 27. However, the present case involves no appeal of the LUPA proceeding; hence, the rule does not apply. Cedars Golf does not allege that the appellants invited any error in the present proceeding.

Judge Lewis seems to have based his decision upon the observation that examiner did not go off on "some lark," but accepted an invitation from "both sides . . . to make certain factual decisions." *RP 31*, at 5-11. The issue

raised is whether a landowner within a subdivision may enforce restrictive covenants after participating in a land use hearing and the ensuing LUPA Appeal, at which compliance with RCW 58.17.215 was argued and decided? In the present case, this question must be answered in the affirmative for the reasons discussed above; however, the same result is mandated in all cases.

Cases construing public policy concerns have seized upon the affect that preclusion may have in proceedings before the agency rendering the preclusive determination:

> In Williams, the court determined that public policy reasons weighed against application of collateral estoppel to bar a criminal prosecution for welfare fraud where the same conduct had been the subject of Department of Social and Health Services proceedings[, noting that the] application of collateral estoppel would result in the State effectively having to choose between prosecuting for criminal charges in the administrative forum, with attendant inefficiency and reallocation of resources, or forgoing the administrative hearing and recovery of financial losses because of the potential collateral estoppel effect of the administrative decision.

Christensen, 152 Wash.2d at 309-10; citing *Williams,* 132 Wash.2d at 258. Public participation is statutorily mandated under the *Growth Management Act* and the *Subdivision Act*:

> The notice of application shall . , . include the following in whatever sequence or format the local government deems appropriate: . . .

> (e) A statement of the public comment period, which shall be not less than fourteen nor more than thirty days following the date of notice of application, and statements of the right of any person to comment on the application, receive notice of and participate in any hearings, request a copy of the decision once made, and any appeal rights. . . .

RCW 36.70B.110(2).

> Upon receipt of an application for preliminary plat approval the administrative officer charged by ordinance with responsibility for administration of regulations pertaining to platting and subdivisions shall provide public notice and set a date for a public hearing.

RCW 58.17.090(1).

If collateral estoppel applies to administrative proceedings which determine the application of RCW 58.17.215, landowners will be forced to choose between arguing covenant interpretation before an examiner who lacks competence to grant enforcement, or foregoing their rights to comment upon plat amendments in order to preserve subsequent civil actions to enforce restrictive covenants. Either alternative is contrary to the purpose of facilitating public comment explicit in local project review standards adopted under the *Growth Management Act*:

> The legislature finds and declares the following: . . .
>
> (3) . . . regulatory burden has significantly added to the cost and time needed to obtain local and state land use permits and has made it difficult for the public to know how

> and when to provide timely comments on land use proposals that require multiple permits and have separate environmental review processes.

RCW 36.70B.010(3). Cedars Golf applied for subdivision and plat alteration, which required separate environmental review that became final prior to the examiner hearing. *CP 252-53*.

RESPONDENT'S ISSUE 2

Cedars Golf argues "[t]here is no evidence in the record to suggest that Cedar Pacific Properties [Phase II developer] ever became the assignee or successor in interest to Camelot Construction [original developer]." *Brief of Respondent* at 31. This is nonsequitur because the phrase "successor in interest" means "[o]ne who follows another in ownership or control of property." *Black's Law Dictionary*, 6th Ed., at 1431. The 1973 Declaration defines the term "Declarant" as inclusive of "successors and assigns [who] acquire more than one undeveloped Lot from the Declarant for the purpose of development," including the developers of successive phases. *CP 204*. Hence, the argument that only the original developer could "unilaterally annex Phase II within the first seven years of recording . . . the CC&Rs" is refuted by the 1973 Declaration. *Brief of Respondent* at 31.

Cedars Golf argues the 1973 Declaration provides that "[n]o lot as

platted shall be resubdivided into separate building sites," and "at the time the CC&Rs were recorded, the only platted numerical lots which existed were those in Cedars Phase I." *Brief of Respondent* at 31-32. This argument overlooks the infinitive form of the imperative case, which contemplates a continuing mandate, and includes lots subsequently platted.

Cedars Golf alleges that "the CC&R's have been repeatedly violated such that the law of equity prohibits their enforcement here." *Brief of Respondent* at 34. The doctrine of abandonment requires habitual and substantial violations, *Sandy Point v. Huber*, 26 Wash.App. 317, 319, 613 P.2d 160 (1980), which defeat the benefit to the dominant estate and the object and purpose of the challenged restriction:

> Before affirmative relief by way of cancellation or modification of a restrictive covenant is available, a material change in the character of the neighborhood must have occurred so as to "render perpetuation of the restriction of no substantial benefit to the dominant estate and to defeat the object or purpose of the restriction."

St. Luke's Evangelical Lutheran Church of Country Homes v. Hales, 13 Wash.App. 483, 485, 534 P.2d 1379 (1975); accord, *Mt. Baker v. Colcock*, 45 Wash.2d 467, 471, 275 P.2d 733 (1954).

Turning to the *Declaration of William W. Saunders, Jr.*, only one factual allegation could apply, in any way, to the abandonment analysis:

> In 1977, the Cedars-Phase III was platted with 29 lots. Lot 1 was identified for townhome constuction with an anticipated development of 26 units. Two years later, the same lot was then re-platted into 13 separate lots.

CP 321, ln. 14-16. The issue raised by this evidence is: Whether a single violation is "habitual and substantial" so as to defeat the object and purpose of the restriction upon "resubdivision?" Abandonment depends upon the number and extent of the violations. *White v. Wilhelm*, 34 Wash.App. 763, 769-70, 665 P.2d 407, *review denied*, 34 Wash.2d 1025 (1983). However, unattached phases, separated by golf course links, should be considered individually for purposes of abandonment because a material change in the character of a separate phase does not "render perpetuation of the restriction of no substantial benefit to the dominant estate, [so as to] defeat the object or purpose of the restriction." *St. Luke's,* 13 Wash.App. at 485.

Contrary to argument, the 1973 Declaration does not prohibit "multi-family construction," *Brief of Respondent* at 34; it provides that "[n]o lot as platted shall be resubdivided into separate building sites." *CP 209*. The term "Lot" is defined to include "any Towne House constructed on Towne House areas on the Properties." *CP 204*. Hence, the existence of "townhouse areas" does not evidence vacation of the prohibition against "resubdivision." *CP 272*. The appellants rely upon townhouses in certain designated areas.

ATTORNEY FEES

Cedars Golf requests attorney fees under RCW 4.84.370, arguing that the appellants "failure to appeal the prior judicial determination on *this* issue should not serve to protect them from the consequence of continuing to litigate (and lose) a land use decision." *Brief of Respondent* at 36. Cedars Golf fails to identify the issue previously adjudicated; however, the record reveals no cause of action seeking enforcement of the covenant joined with the LUPA appeal. Hence, Superior Court jurisdiction was limited by statute:

> A superior court hearing a LUPA petition acts in an appellate capacity and has only the jurisdiction conferred by law. . . . Under LUPA, the superior court review is limited to actions defined by LUPA as land use decisions.

Durland v. San Juan County, 182 Wash.2d 55, 64, 340 P.3d 191 (2014); citing RCW 36.70C.010, .040(1).

Moreover, the appellants do not seek reversal of a "land use decision," the meaning of which is discussed above. In *Brotherton v. Jefferson County*, declaratory judgment sought *reversal* of the County's "final determination on the enforcement of ordinances regulating the use of real property;" hence, "requested relief demonstrate[d] that they [were] ultimately challenging the County's land use decision." *Brotherton v. Jefferson County*, 160 Wash.App. 699, 704-05, 249 P.3d 666 (2011). The present case does not

seek *reversal* of the examiner decision; rather, the appellants seek "[j]udgment permanently enjoining the defendant and its successors or assigns from re-subdividing Lots 1 and 8." *CP 6*, ln. 5-6. Cedars Golf confuses *reversal* with enforcement of the 1973 Declaration. Just as the developer in *Halverson* had to possess signatures evidencing authority to subdivide, Cedars Golf must possess authority to proceed with the approved subdivision. The hearing examiner could not confer that authority any more than he could enforce the covenant because neither act is a land use decision as defined in RCW 36.70C.020(2). Land use regulations and private covenants are separate sources of authority.

Moreover, "parties are entitled to attorney fees [under RCW 4.84.370] only if a county, city, or town's decision is rendered in their favor and at least two courts affirm that decision." *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 413, 120 P.3d 56 (2005). In the present case, the land use decision was not within the Superior Court's jurisdiction any more than covenant enforcement was within examiner competence in the LUPA proceeding. Only one court has affirmed the decision of the Battle Ground hearing examiner; hence, statutory prerequisites for attorney fees remain unsatisfied.

The Supreme Court in *Habitat Watch* held "that even illegal decisions must be challenged in an appropriate manner." *Habitat Watch*, 155 Wash.2d at 413. But the present proceeding does not *challenge* the examiner's decision; legal or not, the regulatory approval will remain final regardless of covenant enforcement. Because regulatory and civil law overlap, Cedars Golf is forced to couch its argument in terms of the *result* that either regulation or covenant enforcement can stop "resubdivision." However, "affect upon the landowner" is not a criteria under RCW 4.84.370.

As to Cedars Golf's allegation regarding admissions at oral argument, we refer the Court to pages 8 and 9 above, and deny the allegation.

CONCLUSION

Grant of Cedars Golf's motion for summary judgment, and denial of the appellants' motion, should be reversed for reasons discussed above and in the *Brief of Appellants* previously filed.

RESPECTFULLY SUBMITTED this 5th day of February, 2016.

ERIKSON & ASSOCIATES, PLLC
Attorneys for the appellants

By: _____
Mark A. Erikson, WSBA #23106

RCW 2.08.010

Original jurisdiction.

The superior court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three hundred dollars, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce and for annulment of marriage, and for such special cases and proceedings as are not otherwise provided for; and shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court, and shall have the power of naturalization and to issue papers therefor. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition and writs of habeas corpus on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued on legal holidays and nonjudicial days.

[1955 c 38 § 3; 1890 p 342 § 5; RRS § 15.]

NOTES:

Jurisdiction of superior courts: State Constitution Art. 4 § 6 (Amendment 28).

A - 1

RCW 4.84.370

Appeal of land use decisions—Fees and costs.

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter **90.58** RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

[1995 c 347 § 718.]

NOTES:

Finding—Severability—Part headings and table of contents not law—1995 c 347: See notes following RCW **36.70A.470**.

A - 2

RCW 7.24.010

Authority of courts to render.

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

[1937 c 14 § 1; 1935 c 113 § 1; RRS § 784-1.]

A - 3

RCW 36.70B.010

Findings and declaration.

The legislature finds and declares the following:

(1) As the number of environmental laws and development regulations has increased for land uses and development, so has the number of required local land use permits, each with its own separate approval process.

(2) The increasing number of local and state land use permits and separate environmental review processes required by agencies has generated continuing potential for conflict, overlap, and duplication between the various permit and review processes.

(3) This regulatory burden has significantly added to the cost and time needed to obtain local and state land use permits and has made it difficult for the public to know how and when to provide timely comments on land use proposals that require multiple permits and have separate environmental review processes.

[1995 c 347 § 401.]

A - 4

RCW 36.70B.110

Notice of application—Required elements—Integration with other review procedures—Administrative appeals (as amended by 1997 c 396).

(1) Not later than April 1, 1996, a local government planning under RCW **36.70A.040** shall provide a notice of application to the public and the departments and agencies with jurisdiction as provided in this section. If a local government has made a threshold determination ((~~of significance~~)) under chapter **43.21C** RCW concurrently with the notice of application, the notice of application ((~~shall~~)) may be combined with the threshold determination ((~~of significance~~)) and the scoping notice for a determination of significance. Nothing in this section prevents a determination of significance and scoping notice from being issued prior to the notice of application.

(2) The notice of application shall be provided within fourteen days after the determination of completeness as provided in RCW **36.70B.070** and include the following in whatever sequence or format the local government deems appropriate:

(a) The date of application, the date of the notice of completion for the application, and the date of the notice of application;

(b) A description of the proposed project action and a list of the project permits included in the application and, if applicable, a list of any studies requested under RCW **36.70B.070** or **36.70B.090**;

(c) The identification of other permits not included in the application to the extent known by the local government;

(d) The identification of existing environmental documents that evaluate the proposed project, and, if not otherwise stated on the document providing the notice of application, such as a city land use bulletin, the location where the application and any studies can be reviewed;

(e) A statement of the public comment period, which shall be not less than fourteen nor more than thirty days following the date of notice of application, and statements of the right of any person to comment on the application, receive notice of and participate in any hearings, request a copy of the decision once made, and any appeal rights. A local government may accept public comments at any time prior to the closing of the record of an open record predecision hearing, if any, or, if no open record predecision hearing is provided, prior to the decision on the project permit;

(f) The date, time, place, and type of hearing, if applicable and scheduled at the date of notice of the application;

(g) A statement of the preliminary determination, if one has been made at the time of notice, of those development regulations that will be used for project mitigation and of consistency as provided in RCW **36.70B.040**; and

(h) Any other information determined appropriate by the local government.

(3) If an open record predecision hearing is required for the requested project permits, the notice of application shall be provided at least fifteen days prior to the open record hearing.

(4) A local government shall use reasonable methods to give the notice of application to the public and agencies with jurisdiction and may use its existing notice procedures. A local government may use different types of notice for different categories of project permits or types of project actions. If a local government by resolution or ordinance does not specify its method of public notice, the local government shall use the methods provided for in (a) and (b) of this subsection. Examples of reasonable methods to inform the public are:

(a) Posting the property for site-specific proposals;

(b) Publishing notice, including at least the project location, description, type of permit(s)

A-5

required, comment period dates, and location where the complete application may be reviewed, in the newspaper of general circulation in the general area where the proposal is located or in a local land use newsletter published by the local government;

(c) Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;

(d) Notifying the news media;

(e) Placing notices in appropriate regional or neighborhood newspapers or trade journals;

(f) Publishing notice in agency newsletters or sending notice to agency mailing lists, either general lists or lists for specific proposals or subject areas; and

(g) Mailing to neighboring property owners.

(5) A notice of application shall not be required for project permits that are categorically exempt under chapter **43.21C** RCW, unless a public comment period or an open record predecision hearing is required.

(6) A local government shall integrate the permit procedures in this section with environmental review under chapter **43.21C** RCW as follows:

(a) Except for a threshold determination ((~~of significance~~)), the local government may not issue ((~~its threshold determination, or issue~~)) a decision or a recommendation on a project permit until the expiration of the public comment period on the notice of application.

(b) If an open record predecision hearing is required and the local government's threshold determination requires public notice under chapter **43.21C** RCW, the local government shall issue its threshold determination at least fifteen days prior to the open record predecision hearing.

(c) Comments shall be as specific as possible.

(7) A local government may combine any hearing on a project permit with any hearing that may be held by another local, state, regional, federal, or other agency provided that the hearing is held within the geographic boundary of the local government. Hearings shall be combined if requested by an applicant, as long as the joint hearing can be held within the time periods specified in *RCW **36.70B.090** or the applicant agrees to the schedule in the event that additional time is needed in order to combine the hearings. All agencies of the state of Washington, including municipal corporations and counties participating in a combined hearing, are hereby authorized to issue joint hearing notices and develop a joint format, select a mutually acceptable hearing body or officer, and take such other actions as may be necessary to hold joint hearings consistent with each of their respective statutory obligations.

(8) All state and local agencies shall cooperate to the fullest extent possible with the local government in holding a joint hearing if requested to do so, as long as:

(a) The agency is not expressly prohibited by statute from doing so;

(b) Sufficient notice of the hearing is given to meet each of the agencies' adopted notice requirements as set forth in statute, ordinance, or rule; and

(c) The agency has received the necessary information about the proposed project from the applicant to hold its hearing at the same time as the local government hearing.

(9) A local government is not required to provide for administrative appeals. If provided, an administrative appeal of the project decision, combined with any environmental determinations, shall be filed within fourteen days after the notice of the decision or after other notice that the decision has been made and is appealable. The local government shall extend the appeal period for an additional seven days, if state or local rules adopted pursuant to chapter **43.21C** RCW allow public comment on a determination of nonsignificance issued as part of the appealable project permit decision.

(10) The applicant for a project permit is deemed to be a participant in any comment period,

A-6

open record hearing, or closed record appeal.

(11) Each local government planning under RCW **36.70A.040** shall adopt procedures for administrative interpretation of its development regulations.

[1997 c 396 § 1; 1995 c 347 § 415.]

NOTES:

***Reviser's note:** RCW **36.70B.090** expired June 30, 2000, pursuant to 1998 c 286 § 8.

RCW 36.70B.110

Notice of application—Required elements—Integration with other review procedures—Administrative appeals (as amended by 1997 c 429).

(1) Not later than April 1, 1996, a local government planning under RCW **36.70A.040** shall provide a notice of application to the public and the departments and agencies with jurisdiction as provided in this section. If a local government has made a determination of significance under chapter **43.21C** RCW concurrently with the notice of application, the notice of application shall be combined with the determination of significance and scoping notice. Nothing in this section prevents a determination of significance and scoping notice from being issued prior to the notice of application. Nothing in this section or this chapter prevents a lead agency, when it is a project proponent or is funding a project, from conducting its review under chapter **43.21C** RCW or from allowing appeals of procedural determinations prior to submitting a project permit application.

(2) The notice of application shall be provided within fourteen days after the determination of completeness as provided in RCW **36.70B.070** and, except as limited by the provisions of subsection (4)(b) of this section, shall include the following in whatever sequence or format the local government deems appropriate:

(a) The date of application, the date of the notice of completion for the application, and the date of the notice of application;

(b) A description of the proposed project action and a list of the project permits included in the application and, if applicable, a list of any studies requested under RCW **36.70B.070** or **36.70B.090**;

(c) The identification of other permits not included in the application to the extent known by the local government;

(d) The identification of existing environmental documents that evaluate the proposed project, and, if not otherwise stated on the document providing the notice of application, such as a city land use bulletin, the location where the application and any studies can be reviewed;

(e) A statement of the public comment period, which shall be not less than fourteen nor more than thirty days following the date of notice of application, and statements of the right of any person to comment on the application, receive notice of and participate in any hearings, request a copy of the decision once made, and any appeal rights. A local government may accept public comments at any time prior to the closing of the record of an open record predecision hearing, if any, or, if no open record predecision hearing is provided, prior to the decision on the project permit;

(f) The date, time, place, and type of hearing, if applicable and scheduled at the date of notice of the application;

(g) A statement of the preliminary determination, if one has been made at the time of notice, of those development regulations that will be used for project mitigation and of consistency as

A-7

provided in RCW ((~~36.70B.040~~)) 36.70B.030(2); and

(h) Any other information determined appropriate by the local government.

(3) If an open record predecision hearing is required for the requested project permits, the notice of application shall be provided at least fifteen days prior to the open record hearing.

(4) A local government shall use reasonable methods to give the notice of application to the public and agencies with jurisdiction and may use its existing notice procedures. A local government may use different types of notice for different categories of project permits or types of project actions. If a local government by resolution or ordinance does not specify its method of public notice, the local government shall use the methods provided for in (a) and (b) of this subsection. Examples of reasonable methods to inform the public are:

(a) Posting the property for site-specific proposals;

(b) Publishing notice, including at least the project location, description, type of permit(s) required, comment period dates, and location where the notice of application required by subsection (2) of this section and the complete application may be reviewed, in the newspaper of general circulation in the general area where the proposal is located or in a local land use newsletter published by the local government;

(c) Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;

(d) Notifying the news media;

(e) Placing notices in appropriate regional or neighborhood newspapers or trade journals;

(f) Publishing notice in agency newsletters or sending notice to agency mailing lists, either general lists or lists for specific proposals or subject areas; and

(g) Mailing to neighboring property owners.

(5) A notice of application shall not be required for project permits that are categorically exempt under chapter **43.21C** RCW, unless ((~~a public comment period or~~)) an open record predecision hearing is required or an open record appeal hearing is allowed on the project permit decision.

(6) A local government shall integrate the permit procedures in this section with its environmental review under chapter **43.21C** RCW as follows:

(a) Except for a determination of significance and except as otherwise expressly allowed in this section, the local government may not issue its threshold determination((~~, or issue a decision or a recommendation on a project permit~~)) until the expiration of the public comment period on the notice of application.

(b) If an open record predecision hearing is required ((~~and the local government's threshold determination requires public notice under chapter **43.21C** RCW~~)), the local government shall issue its threshold determination at least fifteen days prior to the open record predecision hearing.

(c) Comments shall be as specific as possible.

(d) A local government is not required to provide for administrative appeals of its threshold determination. If provided, an administrative appeal shall be filed within fourteen days after notice that the determination has been made and is appealable. Except as otherwise expressly provided in this section, the appeal hearing on a determination of nonsignificance shall be consolidated with any open record hearing on the project permit.

(7) At the request of the applicant, a local government may combine any hearing on a project permit with any hearing that may be held by another local, state, regional, federal, or other agency ((~~provided that~~)), if:

(a) The hearing is held within the geographic boundary of the local government((~~. Hearings shall be combined if requested by an applicant, as long as~~)); and

A-8

(b) The joint hearing can be held within the time periods specified in *RCW **36.70B.090** or the applicant agrees to the schedule in the event that additional time is needed in order to combine the hearings. All agencies of the state of Washington, including municipal corporations and counties participating in a combined hearing, are hereby authorized to issue joint hearing notices and develop a joint format, select a mutually acceptable hearing body or officer, and take such other actions as may be necessary to hold joint hearings consistent with each of their respective statutory obligations.

(8) All state and local agencies shall cooperate to the fullest extent possible with the local government in holding a joint hearing if requested to do so, as long as:

(a) The agency is not expressly prohibited by statute from doing so;

(b) Sufficient notice of the hearing is given to meet each of the agencies' adopted notice requirements as set forth in statute, ordinance, or rule; and

(c) The agency has received the necessary information about the proposed project from the applicant to hold its hearing at the same time as the local government hearing.

(9) A local government is not required to provide for administrative appeals. If provided, an administrative appeal of the project decision((~~, combined with~~)) and of any environmental determination((~~s~~)) issued at the same time as the project decision, shall be filed within fourteen days after the notice of the decision or after other notice that the decision has been made and is appealable. The local government shall extend the appeal period for an additional seven days, if state or local rules adopted pursuant to chapter **43.21C** RCW allow public comment on a determination of nonsignificance issued as part of the appealable project permit decision.

(10) The applicant for a project permit is deemed to be a participant in any comment period, open record hearing, or closed record appeal.

(11) Each local government planning under RCW **36.70A.040** shall adopt procedures for administrative interpretation of its development regulations.

[1997 c 429 § 48; 1995 c 347 § 415.]

NOTES:

Reviser's note: *(1) RCW **36.70B.090** expired June 30, 2000, pursuant to 1998 c 286 § 8.

(2) RCW **36.70B.110** was amended twice during the 1997 legislative session, each without reference to the other. For rule of construction concerning sections amended more than once during the same legislative session, see RCW **1.12.025**.

Severability—1997 c 429: See note following RCW **36.70A.3201**.

A - 9

RCW 36.70C.010

Purpose.

The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.

[1995 c 347 § 702.]

RCW 36.70C.020

Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Energy overlay zone" means a formal plan enacted by the county legislative authority that establishes suitable areas for siting renewable resource projects based on currently available resources and existing infrastructure with sensitivity to adverse environmental impact.

(2) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

Where a local jurisdiction allows or requires a motion for reconsideration to the highest level of authority making the determination, and a timely motion for reconsideration has been filed, the land use decision occurs on the date a decision is entered on the motion for reconsideration, and not the date of the original decision for which the motion for reconsideration was filed.

(3) "Local jurisdiction" means a county, city, or incorporated town.

(4) "Person" means an individual, partnership, corporation, association, public or private organization, or governmental entity or agency.

(5) "Renewable resources" has the same meaning provided in RCW **19.280.020**.

[2010 c 59 § 1; 2009 c 419 § 1; 1995 c 347 § 703.]

A - 11

RCW 36.70C.030

Chapter exclusive means of judicial review of land use decisions—Exceptions.

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(a) Judicial review of:

(i) Land use decisions made by bodies that are not part of a local jurisdiction;

(ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board or the growth management hearings board;

(b) Judicial review of applications for a writ of mandamus or prohibition; or

(c) Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.

(2) The superior court civil rules govern procedural matters under this chapter to the extent that the rules are consistent with this chapter.

[2010 1st sp.s. c 7 § 38; 2003 c 393 § 17; 1995 c 347 § 704.]

NOTES:

Effective date—2010 1st sp.s. c 26; 2010 1st sp.s. c 7: See note following RCW **43.03.027**.

A - 12

RCW 36.70C.040

Commencement of review—Land use petition—Procedure.

(1) Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court.

(2) 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 on the following persons who shall be parties to the review of the land use petition:

(a) The local jurisdiction, which for purposes of the petition shall be the jurisdiction's corporate entity and not an individual decision maker or department;

(b) Each of the following persons if the person is not the petitioner:

(i) Each person identified by name and address in the local jurisdiction's written decision as an applicant for the permit or approval at issue; and

(ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue;

(c) If no person is identified in a written decision as provided in (b) of this subsection, each person identified by name and address as a taxpayer for the property at issue in the records of the county assessor, based upon the description of the property in the application; and

(d) Each person named in the written decision who filed an appeal to a local jurisdiction quasi-judicial decision maker regarding the land use decision at issue, unless the person has abandoned the appeal or the person's claims were dismissed before the quasi-judicial decision was rendered. Persons who later intervened or joined in the appeal are not required to be made parties under this subsection.

(3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.

(4) For the purposes of this section, 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.

(5) Service on the local jurisdiction must be by delivery of a copy of the petition to the persons identified by or pursuant to RCW **4.28.080** to receive service of process. Service on other parties must be in accordance with the superior court civil rules or by first-class mail to:

(a) The address stated in the written decision of the local jurisdiction for each person made a party under subsection (2)(b) of this section;

(b) The address stated in the records of the county assessor for each person made a party under subsection (2)(c) of this section; and

(c) The address stated in the appeal to the quasi-judicial decision maker for each person made a party under subsection (2)(d) of this section.

(6) Service by mail is effective on the date of mailing and proof of service shall be by affidavit or declaration under penalty of perjury.

[1995 c 347 § 705.]

A - 13

RCW 36.70C.130

Standards for granting relief—Renewable resource projects within energy overlay zones.

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW **36.70C.120**. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

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

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

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

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

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

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

(2) In order to grant relief under this chapter, it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct. A grant of relief by itself may not be deemed to establish liability for monetary damages or compensation.

(3) Land use decisions made by a local jurisdiction concerning renewable resource projects within a county energy overlay zone are presumed to be reasonable if they are in compliance with the requirements and standards established by local ordinance for that zone. However, for land use decisions concerning wind power generation projects, either:

(a) The local ordinance for that zone is consistent with the department of fish and wildlife's wind power guidelines; or

(b) The local jurisdiction prepared an environmental impact statement under chapter **43.21C** RCW on the energy overlay zone; and

(i) The local ordinance for that zone requires project mitigation, as addressed in the environmental impact statement and consistent with local, state, and federal law;

(ii) The local ordinance for that zone requires site specific fish and wildlife and cultural resources analysis; and

(iii) The local jurisdiction has adopted an ordinance that addresses critical areas under chapter **36.70A** RCW.

(4) If a local jurisdiction has taken action and adopted local ordinances consistent with subsection (3)(b) of this section, then wind power generation projects permitted consistently with the energy overlay zone are deemed to have adequately addressed their environmental impacts as required under chapter **43.21C** RCW.

[2009 c 419 § 2; 1995 c 347 § 714.]

RCW 58.17.090

Notice of public hearing.

(1) Upon receipt of an application for preliminary plat approval the administrative officer charged by ordinance with responsibility for administration of regulations pertaining to platting and subdivisions shall provide public notice and set a date for a public hearing. Except as provided in RCW **36.70B.110**, at a minimum, notice of the hearing shall be given in the following manner:

(a) Notice shall be published not less than ten days prior to the hearing in a newspaper of general circulation within the county and a newspaper of general circulation in the area where the real property which is proposed to be subdivided is located; and

(b) Special notice of the hearing shall be given to adjacent landowners by any other reasonable method local authorities deem necessary. Adjacent landowners are the owners of real property, as shown by the records of the county assessor, located within three hundred feet of any portion of the boundary of the proposed subdivision. If the owner of the real property which is proposed to be subdivided owns another parcel or parcels of real property which lie adjacent to the real property proposed to be subdivided, notice under this subsection (1)(b) shall be given to owners of real property located within three hundred feet of any portion of the boundaries of such adjacently located parcels of real property owned by the owner of the real property proposed to be subdivided.

(2) All hearings shall be public. All hearing notices shall include a description of the location of the proposed subdivision. The description may be in the form of either a vicinity location sketch or a written description other than a legal description.

[1995 c 347 § 426; 1981 c 293 § 5; 1974 ex.s. c 134 § 4; 1969 ex.s. c 271 § 9.]

NOTES:

Finding—Severability—Part headings and table of contents not law—1995 c 347: See notes following RCW **36.70A.470**.

Severability—1981 c 293: See note following RCW **58.17.010**.

A - 15

RCW 58.17.165

Certificate giving description and statement of owners must accompany final plat—Dedication, certificate requirements if plat contains—Waiver.

Every final plat or short plat of a subdivision or short subdivision filed for record must contain a certificate giving a full and correct description of the lands divided as they appear on the plat or short plat, including a statement that the subdivision or short subdivision has been made with the free consent and in accordance with the desires of the owner or owners.

If the plat or short plat is subject to a dedication, the certificate or a separate written instrument shall contain the dedication of all streets and other areas to the public, and individual or individuals, religious society or societies or to any corporation, public or private as shown on the plat or short plat and a waiver of all claims for damages against any governmental authority which may be occasioned to the adjacent land by the established construction, drainage and maintenance of said road. Said certificate or instrument of dedication shall be signed and acknowledged before a notary public by all parties having any ownership interest in the lands subdivided and recorded as part of the final plat.

Every plat and short plat containing a dedication filed for record must be accompanied by a title report confirming that the title of the lands as described and shown on said plat is in the name of the owners signing the certificate or instrument of dedication.

An offer of dedication may include a waiver of right of direct access to any street from any property, and if the dedication is accepted, any such waiver is effective. Such waiver may be required by local authorities as a condition of approval. Roads not dedicated to the public must be clearly marked on the face of the plat. Any dedication, donation or grant as shown on the face of the plat shall be considered to all intents and purposes, as a quitclaim deed to the said donee or donees, grantee or grantees for his, her or their use for the purpose intended by the donors or grantors as aforesaid.

[1981 c 293 § 9; 1969 ex.s. c 271 § 30.]

NOTES:

Severability—1981 c 293: See note following RCW **58.17.010**.

A - 16

RCW 58.17.215

Alteration of subdivision—Procedure.

When any person is interested in the alteration of any subdivision or the altering of any portion thereof, except as provided in RCW **58.17.040**(6), that person shall submit an application to request the alteration to the legislative authority of the city, town, or county where the subdivision is located. The application shall contain the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered. If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof.

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

The legislative body shall determine the public use and interest in the proposed alteration and may deny or approve the application for alteration. If any land within the alteration is part of an assessment district, any outstanding assessments shall be equitably divided and levied against the remaining lots, parcels, or tracts, or be levied equitably on the lots resulting from the alteration. If any land within the alteration contains a dedication to the general use of persons residing within the subdivision, such land may be altered and divided equitably between the adjacent properties.

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

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

[1987 c 354 § 4.]

A - 17

2.10.080 Powers.

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A. Except as provided for in subsection B of this section, the examiner shall receive and examine available information, conduct public hearings and prepare a record thereof, and enter final decisions, subject to application, notice, public hearing and appeal procedures of BGMC 17.102, on the following matters:

1. Hearing and reporting on any proposal to amend a zoning ordinance or comprehensive plan map amendment proposals to change the land use and implementing zoning designation of specific parcels of land, including such annual reviews which are applied for and are not of general applicability;

2. Revisions or rescissions of agreements concomitant to rezones;

3. Preliminary subdivision plat applications;

4. The authority herein to decide variances in lieu of provisions for boards of adjustment under RCW 35A.63.110;

5. All other applications for permits or approvals, including appeals, under Titles 16,17 and 18 of this code which call for an appeal of an administrative decision or a hearing on a quasi-judicial decision.

B. Notwithstanding the provisions of subsection A of this section, the following matters shall be heard by the planning commission:

1. Rezone applications initiated by the city to implement a newly adopted or amended comprehensive land use plan which is of general applicability, until such time as the comprehensive plan designations and implementing zoning function are separated, and;

2. All legislative amendments to the development code (Titles 16, 17 and 18). (Ord. 98-020 § 1(A) (part), 1998: Ord. 98-019 § 1(A) (part), 1998)

A - 18

17.200.035Application types.

A. The city shall consolidate the development application and review in order to integrate the development permit and environmental review process, while avoiding duplication of the review processes.

B. All applications for development permits, design review approvals, variances and other city approvals under the development code shall be submitted on forms provided by the community development department. All applications shall be signed by the property owner, or accompanied by a letter of authorization signed by the property owner.

C. Land use applications occur in the following three types:

1. Type I (Administrative Quasi-Judicial). This application involves no or very little discretionary decision making in application of the applicable development ordinances, and has little to no significant impact to abutting property owners and/or the public in general. Examples include boundary line adjustments, building permits and home occupations.

2. Type II (Administrative Quasi-Judicial). This application type requires a higher degree of discretionary decision making in interpreting and applying the applicable development regulations, and has a greater degree of impact on abutting property owners and/or the general public. Examples include short plats, multifamily developments and commercial site plans abutting residential zones.

3. Type III (Hearing Quasi-Judicial and Legislative). This application type requires a high degree of discretionary decision making in interpreting and applying development regulations, and/or has a high degree of impact on property owners within the vicinity of the site and the public in general. Examples include subdivisions, conditional use permits (CUPs), code interpretations, rezones and planned unit developments (PUDs), or amendments to the comprehensive plan or plan map.

D. A complete classification of the land use application types is administratively maintained by the director. The city shall process each type of land use action in the manner prescribed in BGMC 17.200.060. (Ord. 04-024 § 53, 2004: Ord. 99-008 § 2(A) (part), 1999)

A - 19

17.200.040 Roles and responsibilities.

The regulation of land development is a cooperative activity including many different elected and appointed boards and city staff. The specific responsibilities of these bodies are set forth below.

A developer is expected to read and understand and be prepared to fulfill the obligations placed on the developer by the development code.

A. Planning Director. The planning director has the authority and is responsible for the administration of the development code. The planning director shall review and act on the following:

1. Administrative Interpretation. Upon request or as determined necessary, the planning director shall interpret the meaning or application of the provisions of such title as well as development agreements executed under RCW 36.70B.170and issue a written administrative interpretation within thirty days. Requests for interpretation shall be written and shall concisely identify the issue and desired interpretation. In issuing administrative interpretations, the planning director is authorized to accept deviations from design, dimensional, and aesthetic and buffering standards in the development code; provided, that any approved deviation results in a proposal that, in the judgment of the planning director, provides equivalent or superior design and/or protection to adjoining properties and is consistent with any development agreement related to the subject property.

2. Deviations. In reviewing and approving project permit applications, the planning director may approve administrative deviations from the standards in the BGMC; provided, that (a) any deviation is consistent with any development agreement related to the subject property; and (b) in the judgment of the planning director, any approved deviation would result in a project that is equivalent or superior to what would be required under the standards set forth in this chapter.

B. City Council. In addition to its legislative responsibility, the city council shall review and act on the following subjects, as set forth in this chapter:

1. Recommendations of the planning commission;

2. Any legislative action;

3. Decisions. The city council shall make its decision by motion, resolution or ordinance as appropriate.

C. Planning Commission. The planning commission shall conduct public hearings and make recommendations to city council on all legislative actions.

D. Hearings Examiner. The hearing examiner shall review and act on the following subjects, as set forth in Chapter2.10 BGMC and this chapter:

1. All Type III land use actions that are site-specific in nature, and Type I and II appeals.

2. Hearing and reporting on any proposals to change the comprehensive plan map land use and/or implementing zoning designation of specific parcels of land, including such annual reviews which are applied for and are not of general applicability. (Ord. 15-04 § 36 (part), 2015: Ord. 12-19 § 9, 2012; Ord. 04-024 § 54, 2004: Ord. 99-008 § 2(A) (part), 1999)

A - 20

17.200.140 Appeals.

A. Appeal Submittal. Any party with standing under subsection B of this section may submit a written appeal of any Type I, II or III decision to the planning director containing the following items listed below. The appeal must be received no later than fourteen calendar days after written notice of the decision is mailed.

1. The case number designated by the city and the name of the applicant;

2. The name and signature of each petitioner or their authorized representative and a statement showing that each petitioner has standing to file the appeal under this chapter. If multiple parties file a single petition for review, the petition shall designate one party as the contact representative for all contact with the planning director. All contact with the planning director regarding the appeal, including notice, shall be with the contact representative;

3. The specific aspect(s) of the decision or determination being appealed, and the specific reasons why each aspect is in error as a matter of fact or law;

4. A statement demonstrating that the specific issues raised on appeal were raised during the period in which the record was open;

5. The appeal fee as per Battle Ground fee schedule. The fee shall be refunded if the appellant requests a withdrawal of the appeal in writing at least fourteen calendar days before the scheduled appeal hearing date.

B. Standing to Appeal.

1. Type I Decision. Only the applicant and property owner have standing to appeal a Type I decision, unless otherwise specified in this title.

2. Type II Decision. The following parties have standing to appeal a Type II decision:

a. The applicant or owner of the subject property;

b. Any party eligible for written notice of a pending Type II administrative decision;

c. Any other party who demonstrates that they participated in the decision process through the submission of written testimony.

3. Type III Decision. The following parties have standing to appeal a Type III decision:

a. The applicant or owner of the subject property;

b. Any party who testified verbally or in writing at the public hearing;

c. Any other party, who demonstrates that they participated in the decision process through the submission of written testimony;

d. Any party who provides a written request for a copy of the notice of decision; and

e. City staff.

C. Appeal Review Process.

1. All complete appeals submitted which are eligible as specified in this chapter shall be scheduled for review at

A - 21

a public hearing such that a final decision can be rendered within ninety calendar days for appeals. Further extensions are permitted upon mutual agreement of the appellant, the applicant, and the planning director. If a final decision is not reached within this time, the planning director shall so notify the appellant and shall provide a reason for the delay and an estimated date of final decision issuance.

2. Notice of the appeal hearing shall be mailed to all parties listed in BGMC 17.200.120.

3. Appeal hearing review bodies as indicated in Table 17.200.140-1 below.

a. An appeal hearing before the hearing examiner shall be conducted according to the procedures set forth in BGMC17.200.120.

b. Hearing rules shall otherwise be as specified by the review body.

c. Notice of appeal decision shall be mailed to all parties listed under BGMC17.200.120.

Table 17.200.140-1

Appeal Bodies

Land Use Action	Review Authority If Appealed
Type I Applications	Hearing examiner; further appeal to superior court
Type II Applications	Hearing examiner; further appeal to superior court
Type III Applications	Further appeal to superior court

D. Subsequent Appeals.

1. Appeal decisions by any review body may be subsequently appealed to superior court within twenty-one calendar days after the date of decision, subject to compliance with appeal eligibility and notice provisions as specified by Chapter 36.70CRCW.

2. Appeal decisions by the hearing examiner or city council on shoreline substantial development permits, shoreline variance permits, and shoreline conditional use permits may be subsequently appealed to the State Shoreline Hearings Board pursuant to applicable law. (Ord. 15-04 § 36 (part), 2015: Ord. 04-024 § 58, 2004: Ord. 99-008 § 2(A) (part), 1999)

A - 22

ERIKSON & ASSOCIATES LAW

February 05, 2016 - 3:28 PM

Transmittal Letter

Document Uploaded: 4-480166-Reply Brief.pdf

Case Name: Avolio et al v Cedars Golf, LLC
Court of Appeals Case Number: 48016-6

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Kris Eklove - Email: kris@eriksonlaw.com

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aridenour@balljanik.com
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