CASE NO. 95623-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS CAUSE NO 75401-7-I

RMG WORLDWIDE, LLC, MICHAEL H. MOORE, ITS MANAGER,

Petitioners,

v.

PIERCE COUNTY,

Respondents,

PETITION FOR REVIEW TO THE SUPREME COURT BY RMG WORLDWIDE, LLC, AND MICHAEL H. MOORE, ITS MANAGER

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I. INTRODUCTION

To maintain the integrity of the Land Use Petition Act, Chapter 36.70C, Petitioners seek review of the decision *RMG Worldwide, LLC, Michael H. Moore, its Manager, v. Pierce County*, No. 75401-I ("Decision"). One of the main purposes of LUPA is to ensure adherence by local government to all applicable local regulations, laws, and zoning actions. *See* RCW 36.70C.130. This purpose was frustrated when the Court of Appeals erroneously refused to consider a Zoning Map, which constitutes a local land use law. The Zoning Map established RMG Worldwide's entitlement for a residential development at a special density.

To determine whether entitlements for residential development at specific densities had been approved via amendment to a special us permit (UP 9-90) the Court of Appeals should have considered a Zoning Map **(Appendix A-1)**.[1] The Map, the most basic of all proof, was not made available by Pierce County for the administrative hearing despite RMG Worldwide's public records request, so the Pierce County Examiner could not consider it at the time of the hearing. On review before the Superior Court, the Superior Court ordered the newly discovered Map be considered in RMG's appeal for "all purposes," including RMG's contention that it has

[1] AR 15-775.

a zoning entitlement. (Order, **Appendix A-2**). Pierce County sought no relief from this ruling.

The Court of Appeals erroneously ignored the Map and the Superior Court's ruling concerning it, reasoning that its admission had been "waived." (Decision, p. 14). The Court of Appeals did so even though RMG had requested all records and staff were obligated to bring to the hearing examiner's attention all applicable local laws on the entitlement question. RMG could not have knowingly waived the right to admit the Map, because Pierce County had wrongly withheld it.

The 1995 Pierce County Official Zoning Atlas or Map[2] shows the amended unclassified use permit as a zoning entitlement overlay[3] for the General Zone for the property RMG now owns. The Map existed due to a land use approval, because no legislative enactment occurred. At the time of the permit decisions in 1990-91, the applicable General Zoning would have allowed residential development with no density limitation. (AR 14-180, 14-181). The UP 9-90 reference on the Map demonstrates that the County approved a special category with a unique residential density, (AR 14-379),

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[2] Zoning maps are regulatory in nature — the purpose of which is to classify and regulate the types of land uses allowed. *See Norco Const., Inc. v. King County*, 97 Wn.2d 680, 690, 649 P.2d 103 (1982); *Snohomish County v. Thompson*, 19 Wn. App. 768, 769, 577 P.2d 627 (1978).

[3] *See* Richard Settle, *Washington Land Use and Environmental Law and Practice* § 2.12(f), at 71 (1983) (An overlay is an additional land use regulatory layer in addition to ordinary zoning that may serve a wide variety of purposes.).

a typical planned development district approval, exactly the form of decision RMG's predecessor had requested.

The Decision impermissibly conflicts with LUPA's requirement that all local laws be considered. Further, it permits government misbehavior to work a critical evidentiary waiver on an applicant. This Court should not allow the County to be rewarded for its bad behavior. The law should not consider RMG to have "waived" introduction of the Map, critical evidence of which it was not previously aware. (Decision, at p. 14). The evidence was material and directly supportive of RMG's claim

The error is not harmless despite the Court of Appeals opining in *dicta* that the Map could be interpreted as something other than a zoning decision. (Decision, p. 14). The County did not allege or argue that the Map was "something other" than an entitlement. The result improperly permitted a collateral attack on the action of Pierce County that established the Map.

This Court should review the ill-founded decision.

II. IDENTITY OF PETITIONERS

RMG Worldwide, LLC is a Nevada limited liability company registered to do business in the State of Washington. It owns the Classic Golf Course in Spanaway, Washington, which it seeks to convert to urban residential use, at least in part. RMG is owned and managed by PGA Tour golfer Ryan Moore and his family.

III. COURT OF APPEALS DECISION FOR WHICH REVIEW IS SOUGHT

The Court of Appeals, Division I, on December 18, 2017, issued an unpublished opinion that affirmed a King County Superior Court order denying RMG's Land Use Petition Act appeal. The Opinion terminating review is attached as **Appendix A-3** hereto. A motion to publish was granted on February 2, 2018, on the basis of a motion which alleged the LUPA appeal presented new precedent on important questions. **Appendix A-4. Appendix A-5.** RMG filed a Motion for Reconsideration, which was denied on February 2, 2018. **Appendix A-6** hereto.

IV. ISSUES PRESENTED FOR REVIEW

A. Did the Court of Appeals erroneously fail to consider the 1995 Zoning Map when it found waiver that could not have been knowing because Pierce County wrongfully withheld the evidence despite RMG's public records request and had a statutory obligation to provide the Map?

B. Is a zoning map part of the approved Official Zoning Atlas in a land use appeal, and necessarily a zoning decision?

C. Does the property rights doctrine require consideration and protection of (1) the private property rights associated with land use permit approvals granted to a landholder's predecessor and (2) a recorded covenant between the County and the predecessor in perpetuity concerning the subject property?

D. Did the Court of Appeals err in ruling that RMG's predecessor abandoned or replaced a Planned Development District (PDD)application with an application for a Unclassified Use Permit (UP)?

E. Did the Court of Appeals misapply and misconstrue the doctrine of finality when it ruled that, to the extent the County had not approved the PDD application, such application was no longer pending?

V. STATEMENT OF THE CASE

RMG's LUPA appeal involves two separate, discrete administrative hearings arising from its efforts to build out urban residential densities secured by its predecessor. RMG has all benefits and entitlements obtained by its predecessor. One appeal addresses whether a zoning entitlement was issued to the predecessor, and the other (in the alternative), whether the County must make a decision on a historic land use application (a PDD) if an entitlement had not been issued. The two appeals are consolidated.

In 1989, LeMay and Otaka, Inc. owned one piece of contiguous property in the Graham area of unincorporated Pierce County – 157-acres of undivided land zoned General it sought to develop for multiple uses, including residential and a golf course. The County urged use of a Planned Development District, a "PDD," as the method to secure entitlements to develop and use the property. (AR 15-236, -237) One of the many advantages of a PPD is that under the County Code at the time (and now) it

is flexible in that residential densities can vary, and once approved, it cannot be altered by future zoning. *See* Examiner's Ruling dated August 5, 2014, Finding No. 6, AR 15-789; AR 15-790.

On May 18, 1990, LeMay and Otaka ("the Original Applicant") submitted a single combined application ("the Application") (AR 14-333 to -336) and paid the appropriate fees to Pierce County.[4] The Application was titled "Classic Estates, a PDD." It included a PDD/Rezone, commercial designation, residential plat components (AR 15-151; AR 15-207), and a mixed-use project, including a golf course. (AR 14-259 to -260). The record shows that Original Applicant never changed its request. No alternative to the PDD has ever been submitted. (AR 15-13, AR 15-197, -198).

An unclassified use permit was neither requested or required by the County initially to construct the golf course. However, just prior to the golf course opening, the County decided that an unclassified use permit was required to operate the golf course. (Tr. 7/3/2014; AR 14-113 to -114; AR 14-116; AR 14-122 to -124; Tr. 6/10/2015, AR 15-201). LeMay was directed to obtain an unclassified use permit for the golf use only per PCC § 18.10.620 (AR 14-184 to -186), which it did on June 26, 1990, paying the

[4] The fees paid were separate fees for each component. (AR 15-151; AR 15-207) See *also* AR 562.

appropriate fee and filing a separate application. This action was not voluntary. (AR 14-338 to -341; AR 15-242).[5]

UP 9-90 was issued on October 2, 1990 to allow the golf course use, and it covered the entire 157-acre parcel.

On September 11, 1990, prior to issuance of UP 9-90, LeMay requested that the County's Department of Planning and Land Use Services ("PALS") continue processing ("reactivate") its combined application for development (not merely use) filed in May 1990, including its PDD, rezone and preliminary plat components. AR 14-277.[6]

On January 10, 1991, County Planner Grant Griffin advised LeMay that: "I will be processing the residential portion of this proposal as a Major Amendment to the already adopted and approved Classic Golf Course Unclassified Use Permit, UP 9-90." (AR 15-330)

The record shows that the County's rationale for using the major amendment procedure to approve the residential component of the UP 9-90 mixed-use project was to give it authority to enforce the conditions of approval for the golf course use (the first approved use) to the entire tract of land to maintain flexibility and control. (Tr. 7/3/2014, p.8:20-23; AR 14-

[5] LeMay was under duress because it had to open the golf course as soon as possible. (Tr. 7/3/2014, p.61:6-10; AR 14-128; Tr. 5/19/2015; Tr. 6/10/2015, AR 15-215).

[6] *See* **Appendix A-6** Barb LeMay letter dated September 11, 1990.

80). The County's "First Amendment" process was *sue generis*, as it is not available to use for a plat or other land use approval.

The "First Major Amendment" to UP 9-90 for the residential component and a lot for a water tower use was approved on March 5, 1991. (AR 14-386 – 14-416). The approved residential density is approximately four dwelling units per acre.

The Staff Report on the First Amendment dated February 4, 1991, advised the Examiner of his authority to grant "...Planned Development Districts or Potential Rezones...." The Staff Report makes all required findings for a PDD. At the time, as set out in former PCC § 18.10.610K (Appendix A-2), a PDD proposal had to show that (1) it was in "substantial conformance" with the Comprehensive Plan, (2) exceptions from the standards of the underlying district were warranted by the design and amenities incorporated in the development plan and program; (3) the proposal was in harmony with the surrounded area or its potential future use; (4) the ownership and means of preserving and maintaining open space was suitable; (5) the approval would result in a beneficial effect upon the area which cannot be achieved under other zoning districts; and (6) the development would be pursued in a conscientious and diligent manner.

Taking these in order, the Staff Report, p.3 (AR 14-232), provided to the Examiner finds consistency with the "Rural-Residential policies of

the area....". The Report, p.3, also finds consistency with the size of the lots "...in keeping with subdivisions found both to the north and south." The Report notes the ownership and that the conditions of the UP 9-90 approval "... will guide ownership over the entire project site to include the proposed subdivision." The Report, pp. 7-8 (AR 14-236, 14-237) notes that the proposal mitigates all significant adverse impacts. Beneficial effects other than harmony are noted by keeping the lots larger than allowed by applicable zoning, thereby maintaining current levels of services on the public roads serving the state (Report, p 4, AR 14-223

Between 1991 and 1999, the golf course and residential subdivision were completed. In 1995, new zoning was adopted by the County to comply with Growth Management Act requirements, to place new urban growth into "urban growth areas." The new zoning "downsized" rural land such as the Classic Golf course to one dwelling unit per five acres.

In 2004 and 2005, the golf course portion of the property was conveyed to RMG and the current ownership began. Over the years, RMG sought to have its property moved into an Urban Growth Area because of density and provision of urban services advantages, a point somehow the Court of Appeals found undermining because "inconsistent" with the assertion an entitlement had been made. (Decision, p. 20). When it became obvious that was not going to occur under current County policy, RMG

turned to its next best option, requesting approval of another "Major Amendment" to allow single family lots in some of the golf course. Halsan letter to Mr. Dennis Hanberg, Director, Planning & Land Services ("PALS"). (AR 14-314).

PALS refused to process the requested application unless it was "consistent with the current zoning density" prescribed by the Zoning Code and issued an Administrative Decision to that effect dated March 24, 2014. (AR 14-321 to -322).[7]

RMG appealed, contending its' predecessor had been granted a "zoning entitlement" via the First Amendment which could not be repealed by later zoning because of the nature and effect of a PDD. In a Report and Decision dated August 5, 2014 (and following a denial of a motion to reconsider dated September 22, 2014, Case No. AA5-14) the Examiner upheld PALS' administrative decision. (AR 14-32 to -64), "Decision I."

According to the Examiner's reconsideration decision, the Examiner determined that the planned development and zone reclassification component of the Original Application submitted by Moore's predecessor-in-interest – the rights to which are now assigned to Moore – remained

[7] Applying current zoning density requirements would dramatically reduce the density from an average lot size of one unit per 14,974 square feet (approved in the First Amendment to UP 9-90) to one unit per five acres. (AR 14-312; AR 14-379)

unresolved. *See* Decision On Reconsideration, September 22, 2014, p.3. (AR 14-3.)

RMG filed a timely LUPA Petition to appeal the Examiner's First Decision. (CP 1-52).

RMG then alternatively submitted a second request to PALS via a letter dated October 15, 2014, requesting that—consistent with the Examiner's view—the County finally issue a decision on the pending PDD/Rezone component of the Original Application, as previously requested by its predecessor-in-interest. (AR 15-371 to -374). On January 14, 2015, PALS issued an Administrative Decision determining that the 1990 Rezone/PDD application for the Classic Golf Course "... is no longer viable." (AR 15-295 to -369)

RMG appealed the second administrative decision. (AR 15-292 to -300). In this hearing, the County produced the Zoning Map, but the question was now the viability of an application—not entitlements. The Hearing Examiner upheld the Administrative Decision that the PDD/Rezone component of the Original Application was no longer viable, Case No. AA3-15,"Decision II". (AR 15-1 to -14). Moore filed a second LUPA petition. (CP 469-557)

VI. REASONS FOR GRANTING THE PETITION

Time does not diminish property rights. The Court of Appeals mistakenly focused on the passage of time when it should have enforced the long-standing rights held by RMG.

1. RAP 13.4(b)(1)(2)(Conflict With Decisions)

Numerous decisions of this Court and the Court of Appeals address waiver. All hold that a waiver is an intentional relinquishment or abandonment of a known right or privilege. *See, e.g Schuster v. Prestige Senior Management, LLC*, 193 Wn.App. 616, 633, 376 P.3d 412 (2016); *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). (. waiver is the intentional and voluntary relinquishment of a known right ... ***It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage.***") (emphasis added).

The County had an affirmative obligation to provide a report to the Examiner in the Entitlement Appeal setting out all applicable laws and regulations to the Examiner in Case No AA5-125, the Entitlement Appeal. *See* PCC Section 1.22.100A, which states:

> The Planning Department shall also make a specific recommendation to approve, deny, modify, or conditionally approve the subject application based upon the contents of the application, the Planning Department's staff's findings, the applicable comprehensive plan, and all other applicable plans or regulations adopted by the Council or Federal or State law.

Without knowledge of the Map, it was impossible for RMG to raise the issue in prior proceedings. As a matter of law, RMG did not – and could not – intentionally relinquish the right to raise or rely on the Map to support its argument that the County already approved the PDD when it amended the UP.

Pierce County's published zoning map is an official statement regarding zoning ordinances that regulates the use of public and private land. *See Responsible Urban Growth Group v. City of Kent*, 123 Wn.2d 376, 388, 868 P.2d 861 (1994). The 1995 Zoning Map, being contemporaneous with the County's 1990 and 1991 decisions, indicates that, at that time, County officials believed that the entire property became zoned as a result of the UP 9-90 with a unique residential density. *See* pp 19-20, Halsan Declaration. (*See also* AR 14-379)

The Map is a fact, not a legal issue, of which courts must take notice (as did the superior court) and upon which ruling must be based. Planning Staff represented in the entitlement appeal that UP 9-90 as amended was not a zoning entitlement and there was no County proof to the contrary. The Map shows that such representations are patently false. In this regard, the Court of Appeal observation that the "zoning changed" (Decision, pp 14-15) is a starting, not ending, point. Under the law, the Court of Appeals should have actually considered the effect of the Zoning Map because it

demonstrates the creation of a special permit approval, a PDD in effect, if not by name. Instead, the County tried to put the focus on "what we say, not what we did." It succeeded in obfuscating the importance of the Zoning Map to the entitlement issue.

2. RAP 13.4(b) (3)(Significant Constitutional Questions)

The issue regarding what property rights inhere to RMG are of substantial importance and constitutional dimension. This case provides this Court with opportunity to clarify that covenants between property owners and governments are more than permit conditions, but arise to vested property rights. Covenants are an ever more common tool for land use decision-making in this State. This case also provides the opportunity to distinguish and clarify the fundamental difference between vested property rights and the vested rights doctrine, a point totally missed by the Court of Appeals.

The County and LeMay agreed in a Memorandum Agreement and Covenant to Run With the Land dated May 15, 1991, that UP 9-90 grants the Original Applicant the right to use or develop the property in the approved manner. (AR 14-243; AR 15-317). This created an equitable servitude.

The Court of Appeals saw the covenant as nothing more than conditions, all binding the predecessor, with no special rights in return.

(Decision, p. 16, N.5). It misconstrued the legal effect of the Covenant and Zoning Entitlement. RMG's argument is that its predecessor obtained protected property rights via the permit approvals and the Memorandum Agreement, which rights cannot now be taken away. *See*, among other cites, AR 14-166 (covenant); AR 14-167, -168, -170 (entitlement); AR 14-198, -200 (entitlement). The Court of Appeals failed to address this argument, focusing instead on whether the PDD/rezone application could have become "vested" at the outset. Decision, at p. 21-22.

The residential development conditions in the 1990-91 decisions are part of the "bundle of sticks" that LeMay was granted by amendment to the special use permit and by creation of the equitable servitude. *Crisp v. Vanlaeken*, 130 Wn. App. 320, 323, 122 P.3d 296 (2005); *Crescent Harbor Water Co. v. Lyseng*, 51 Wn. App. 337, 339 n. 3, 753 P.2d 555 (1988); *see also* Stephen Phillabaum, Enforceability of Land Use Servitudes Benefiting Local Government in Washington, 3 Univ. Puget Sound L. Rev. 216, 216-or18 (1979).

The Court of Appeals failed to address this argument. It impermissibly evaluated RMG's "apples" vested property rights argument against the "oranges" vested rights doctrine, which is entirely inapplicable here. Rezoning of the subject property as evidenced by the 1995 Zoning

Map is a vested property right that cannot be taken away without due process and just compensation.

The vested rights doctrine includes both procedural protections, as well as substantive protections that entitle a permit holder or its successor to develop their land free from changes to zoning laws enacted after issuance of a permit or other entitlement. *See Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 179-80, 322 P.3d 1219 (2014); *see also Lee & Eastes, Inc. v. The Public Service Commission*, 52 Wn.2d 701, 704, 328 P.2d 700 (1958) ("In this respect, a permit, once acquired and exercised, becomes a property right, subject to being divested for cause").

3. RAP13.4(b)(4) (Questions of Substantial Public Interest)

The limits on how far a reviewing court should go in making analysis of matters not raised by one or more litigants in the context of land use decision-making is of substantial public importance. In this case, it involves constitutional rights, because the right to develop land is a fundamental right. The Court of Appeal was constrained to not help out Pierce County, but should have remanded the matter back to the Examiner to flesh out the record as to the Map since it was wrongfully withheld by Staff. In this regard, property rights do not come from government, but in fact must be *protected as against government. E.g., Pierce v. King County*,

62 Wn.2d 324, 328 P.2d 628 (1963). As the Supreme Court in *Dennis v. Moses*, 18 Wash. 537, 571, 52 P. 333 (1898) ruled many years ago:

> In considering the sweeping consequences of this act, it would seem to be a propitious time for a recurrence to fundamental principles. Const. art. 1,§ 32. Civil liberty is defined by Blackstone to be "no other than natural liberty, so far restrained by human laws [and no further] as is necessary and expedient for the general advantage of the public." Book 1, p. 125. Judge Cooley, in speaking of constitutional declarations, mentions "those declaratory of the fundamental rights of the citizen, as that all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness; ***that the right to property is before and higher than any constitutional sanction***" (Cooley, Const. Lim. [5th Ed.] p. 45); and that, "in considering state constitutions, we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. ***

(emphasis added).

The Decision postulates without foundation that the Map had no significance regarding the intended zoning designation, musing:

> Second, even if the 1995 map was properly before us, there is no evidence that the notation UP9-90 was intended to be a zoning designation or an overlay. It could just as easily have been the County's notation that the County had approved an unclassified use permit on the parcel. Without evidence or testimony establishing the County's intent with the annotation, we are left to guess. Mere theory or speculation cannot support a finding. Johnson v. Aluminum Precision Prods., 135 Wn. App. 204, 208-09, 143 P.3d 876 (2006).

Decision, p.14. This language is not based upon argument made by the County.[8] The Court of Appeals simply speculates concerning the County's "intentions," in a way that is contrary to the County's actual practices, as confirmed by a former County Planner, Carl Halsan, who explained:

> On September 2, 2015, I asked the Cartography staff of PALS to find the old zoning atlas page for the 1/4 section of containing the Classic site. I knew from my time working for PALS that the Cartography Lab was the keeper of the Official Zoning Atlas township books which contained a separate map for each 1/4 section on 18" x 18" bond paper. The Zoning Atlas contains all land use entitlements by permit decision or ordinance.
>
> When I reviewed the 1/4 section map on September 9, 2015, I was expecting to see either hand written "Z/PDD14-90" or "UP9-90" or both. I say this because in my mind the Rezone/PDD component was still pending in my opinion if an entitlement had not been issued, and that component with the UP. What I saw was that there were no hand written notations at all, but the formal cartographer's lettering of "UP9-90", with a shaded border indicating that UP 9-90 applied to the entire 1/4 section (the NE pf 12-18-03) and dated "1/11/95." Based upon my experience as a County Planner, this means that (1) the County treated UP 9-90 as a zoning entitlement (because in the Zoning Atlas) and (2) that it applies to the entire 160 acres, not just to the Fairway Estates subdivision.

[8] Generally, appellate courts restrict review to those issues that are raised, briefed, and argued by the parties. *State v. Sims*, 171 Wn.2d 436, 452 (2011); *see also* RAP 12.1(a). Where it is "necessary to reach a proper decision," the court may raise new issues. *Sims*, 171 Wn.2d at 452. The Court's authority to raise new issues implicates due process, which requires that the parties are given notice and a meaningful opportunity to be heard on the new issues before they are finally decided. *See Matthews v. Eldridge*, 424 U.S. 319 (1976); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 San Diego L. Rev. 1253, 1291-92 (2002).

Declaration of Carl Halsan In Support of Request to Take Official Notice, dated November 25, 2015, ¶¶ 19-20.

The Court of Appeals published its decision based on a motion that its opinion ".... addresses an issue of law that has received little attention: whether an application can be deemed abandoned when there is no local ordinance imposing a specific burden on an applicant to make progress on an application with the consequence of inactivity being abandonment." (Motion A-4)- This Court should have the last word on this important question of general interest to land owners and developers, applicants and decision-makers.

While RMG's predecessor went along with the County's decision to handle the request for future development by using an amendment to the unclassified use permit to decide its consolidated application, and filed no appeal, no one at the County advised LeMay that this process meant abandoning its PDD/Rezone request or because an appealable decision was made. As noted, the County was using a unique process making it up as it went. If that was the case, the County had to return the special PDD application fees and could never have changed its Zoning Map nor acted on the plat development because a UP was not an available method to approve a residential sub-division. More fundamentally, the doctrine of finality

applied by the Court of Appeal (Decision, pp 17-18) has never been applied to applications, only final appealable decisions designated as such by involved local government. RCW Chapter 36.70B. cited by the Court of Appeals was not adopted until 1995.

VII. CONCLUSION

For the reasons stated, the petition should be granted.

RESPECTFULLY SUBMITTED this 2nd day of March, 2018.

By _____

Dennis D. Reynolds, WSBA #04762
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Counsel for RMG Worldwide, LLC, Michael H. Moore, its Manager

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2018, I caused the document to which this certificate is attached to be hand-delivered for filing:

Clerk of Court
Court of Appeals, Division I
600 University St,
Seattle, WA 98101
(206) 464-7750

I further certify that on this date, I caused a copy of the document to which this certificate is attached to be delivered to the following via e-mail and Priority U.S. mail as follows:

Cort O'Connor, WSBA #23439 Pierce County Prosecuting Attorney's Office 955 Tacoma Avenue South, #301 Tacoma, WA 98402-2160 (253) 798-6501, tel / (253) 798-6713, fax *Coconno@co.pierce.wa.us* *jander1@co.pierce.wa.us* *Attorneys for Respondent Pierce County*	☐ *Legal Messenger* ☐ *Hand Delivered* ☐ *Facsimile* ☑ *First Class Mail* ☐ *Express Mail, Next Day* ☑ *Email* ☐ *COA Online Portal*

Declared under penalty of perjury under the laws of the State of Washington at Bainbridge Island, Washington this 2nd day of March, 2018.

Jon Brenner
Paralegal

RMG Worldwide – Petition for Review

Appendix A-1

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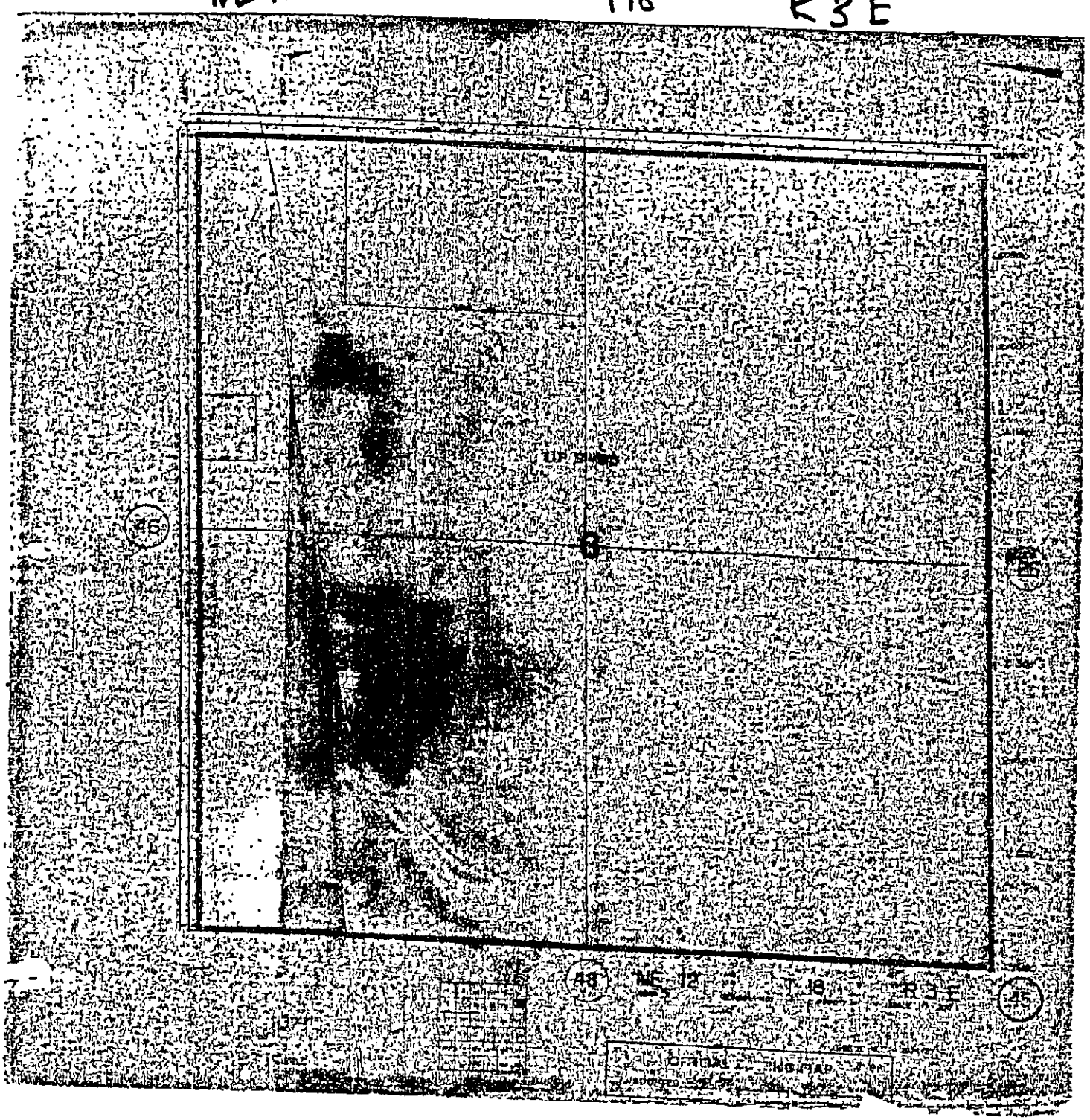

Hearing Examiner _____
Case No.: _____
Exhibit No.: 16

15-775 A

RMG Worldwide – Petition for Review

Appendix A-2

THE HONORABLE BRUCE E. HELLER, DEPT. 52

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

RMG WORLDWIDE LLC, MICHAEL H. MOORE, its Manager, Petitioner, v. PIERCE COUNTY, Respondent.	No. 14-2-27755-5 KNT *(Consolidated with 15-2-20810-1 KNT)* **ORDER GRANTING PETITIONER'S REQUEST TO TAKE OFFICIAL NOTICE AND DENYING RESPONDENT'S MOTION TO STRIKE** Hearing: Friday, January 29, 2016, 11:00 a.m.

This matter came before the Court on Petitioner RMG Worldwide, LLC, Michael H. Moore, its Manager's Request to Take Official Notice of a 1995 Pierce County Zoning Map, and on Respondent Pierce County's Motion to Strike the submitted map. The Court having considered the Parties' briefing and the Declaration of Carl Halsan in Support of Request to Take Official Notice (with attachments) dated November 25, 2015, the Declaration of Jill Guernsey (with attachments) dated January 29, 2016, and the Declaration of Jennifer Jaye Pelesky dated January 28, 2016, and having taken oral argument (and receiving the agreement of counsel for both parties made in open court that the 1995 Zoning Map is part of the Administrative Record submitted to the Court in King County Cause No. 15-2-20810-1 KNT (Administrative Record at pp.15-775, Exhibit 10A before the Hearing Examiner in Case

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No. AA3-15), but not in King County Cause No. 14-2-27755-5 KNT), and having considered the records and files herein, and being fully advised, hereby ORDERS, ADJUDGES and DECREES that:

1. Petitioner RMG Worldwide, LLC, Michael H. Moore, its Manager's Request to Take Official Notice of the 1995 Pierce County Zoning Map found in the County's Zoning Atlas is GRANTED to the extent required to make the map evidence in King County Cause No. 14-2-27755-5 KNT.

2. The 1995 Pierce County Zoning Map is considered part of the record in this consolidated appeal for all purposes, and may be included in the parties' briefs and arguments on the merits in this consolidated appeal.

3. Respondent Pierce County's Motion to Strike is DENIED.

4. The Court declines to rule at this time on the County's motion to strike arguments relating to waiver, and allows the County to raise such arguments in the briefs and arguments on the merits.

DONE ~~IN OPEN COURT~~ this 8 day of March, 2016.

KING COUNTY SUPERIOR COURT

The Honorable Bruce E. Heller, Dept. 52

Presented by:

Dennis D. Reynolds, WSBA #04762
Attorneys for Petitioner

Approved as to form:

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RMG Worldwide – Petition for Review

Appendix A-3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RMG WORLDWIDE LLC, MICHAEL H. MOORE, its Manager, Appellant, v. PIERCE COUNTY, Respondent.	)	No. 75401-7-I DIVISION ONE UNPUBLISHED OPINION FILED: December 18, 2017

MANN, J. — RMG Worldwide LLC (RMG) appeals two land use decisions of the Pierce County hearing examiner. In the first decision, the examiner found that RMG could not subdivide its existing golf course for residential development under the General Use zoning that was in effect in 1990, and that RMG must instead submit applications consistent with the current development regulations. In the second decision, the examiner held that RMG could not revive and proceed under a 1990 application for a Planned Development District (PDD)/Rezone approval because the PDD/Rezone application was abandoned. RMG appealed both decisions to the superior court under the Land Use Petition Act (LUPA), chapter 36.70C RCW. The superior court affirmed both decisions of the hearing examiner. We also affirm.

FACTS

The Property

This case concerns a 157 acre parcel of property located in the southeast quadrant of the intersection of 208th Street East and 46th Avenue East in the Graham area of unincorporated Pierce County. In the mid-1980s, the property owners, Harold LeMay Enterprises, Inc. and Otaka, Inc. (collectively LeMay), began exploring the possibility of developing a golf course on the land and consulted with experts and the County. Following its consultations, LeMay decided to improve a portion of the property with a golf course, single family residential dwellings, and a small commercial area. The County advised LeMay that it could construct the golf course by obtaining a grading and filling permit. At the time, the property was zoned General Use, a Pierce County zoning classification which allowed multiple and varied uses. In February 1989, the County issued a grading and filling permit for construction of a golf course on the central portion of the property, approximately 125 acres of the 157 acre parcel. LeMay then began construction of the golf course.

Development of the Property

On May 18, 1990, LeMay filed an application for the "Classic Estates, a PDD."[1] The application requested a PDD, a rezone, and a preliminary subdivision. The detailed description of the request was for "Creation of 96 single family lots, an 18-hole championship public golf course and commercial reserve on a 157.6 acre parcel of

[1] Under the Pierce County Code (PCC) 18.10.610 (A), a Planned Development District or PDD is "intended to be a flexible zoning concept. . . . The uses within the PDD depend on the uses in the underlying zone or the Potential Zone. The residential densities within the PDD may vary depending upon how the land is developed with general aesthetics, natural areas, and open space being an incentive."

vacant land. Property will be served by public water, private roads and individual on-site septic systems." The application identified that 120.6 acres would be left in open-space with 30 acres left in natural vegetation.

Shortly after LeMay submitted the PDD application, the Pierce County Department of Planning and Natural Resource Management (Department) contacted LeMay's agent and advised him that, under the General Use zone, a golf course was listed as an "unclassified use" and would need an unclassified use permit (UP) before it could operate. The Department subsequently met with representatives from LeMay to discuss options for proceeding. The meeting was summarized in a June 26, 1990, letter from Robert Hansen, the Department's principal planner:

> I wish to summarize our meeting last Tuesday in regard to the Classic Golf Course and what was necessary in order for the course to open.
>
> I first presented you last year an[d] at this meeting with two options. The course's construction could open with the approval of either a Planned Development District (PDD) or with an Unclassified Use Permit (UP), both requiring a public hearing before a Hearing Examiner. A PDD was suggested if uses other than the golf course were to be proposed. However, a PDD was likely to take more time to complete since more factors will be examined in a multiple use project. Therefore, it was determined by your group to have an Unclassified Use Permit requesting only the golf course with land set aside for future development. It was understood that a Major Amendment to the Unclassified Use Permit could be requested in the future and would be necessary if further land development is to take place.
>
> It was my determination that the earliest the matter could be brought before the Hearing Examiner is Tuesday, August 2, 1990, if a site plan, application and filing fees were filed by Tuesday, June 25, 1990. . . . Decision upon the Unclassified User Permit for the golf course would occur within two to four weeks depending upon the schedule of the Hearing Examiner and we will emphasize to the Examiner that we would like a decision on this matter as soon as possible.[2]

[2] (Emphasis added.)

That same day, June 26, 1990, Lemay submitted an application for a UP permit for the golf course. The application requested "an Unclassified Use Permit be issued to allow construction of an 18-hole golf course with clubhouse, parking and related facilities . . . Portions of the site along the west boundary and at the northeast corner will be retained for future development."

Consistent with the Department's letter to LeMay, on August 2, 1990, a public hearing was held before the Pierce County hearing examiner to consider the UP application. On October 2, 1990, the hearing examiner issued a decision approving the UP for the golf course (UP9-90). The UP9-90 decision was not appealed. On June 20, 1991, LeMay recorded a memorandum of agreement and covenant setting forth the conditions and requirements for the operation and maintenance of the golf course approved by UP9-90.

On September 11, 1990, prior to the hearing examiner's decision, LeMay submitted a letter formally requesting to "reactivate" the Classic Estates preliminary plat/PDD. The Department responded on January 10, 1991, by notifying LeMay's project engineer that it would treat the request for the 96 lot residential subdivision as a major amendment to the UP:

> As we discussed in our January 10, 1991, telephone conversation, I will be processing the residential portion of this proposal as a Major Amendment to the already adopted and approved Classic Golf Course Unclassified Use Permit, UP9-90. In this way, the potential for the establishment of a water tower to provide potable and fire fighting flows for the residential subdivision and the golf course building can be addressed.

On February 14, 1991, the Department issued a staff report for the "Preliminary Plat: Classic Estates Unclassified Use Permit: UP9-90, Classic Golf Course (Major

Amendment)." The proposal was described by staff as a request for "a major amendment to a previously approved Unclassified Use Permit to establish a 96 lot single-family residential subdivision and a single 8 ft. high water tower." The staff report set out the pertinent policies and regulations that the hearing examiner was required to address, including the existing comprehensive plan, zoning code, and the required findings and determinations necessary for approval under the Pierce County Subdivision Code.

After a public hearing, on March 5, 1991, the hearing examiner issued a report and decision on March 5, 1991 (1991 decision). After reviewing the testimony and proposal, the examiner concluded that the "proposal does not adversely affect the neighbors or the neighborhood and the appropriate provisions by the regulatory requirements and the conditions hereof shall provide for public health, safety and general welfare for the surrounding neighborhood." The decision approved a major amendment to UP9-90 allowing for the establishment of "a 96 lot single-family residential subdivision and a single 8 foot high water tower adjacent to the Classic Golf Course." The decision required submission of a final subdivision plat within 3 years with a provision for a one year extension. The hearing examiner's decision approving the major amendment was not appealed.

After the hearing examiner granted one-year extensions of the deadline for submitting a final subdivision plat in 1994, 1995, and 1996, on May 18, 1998, the

hearing examiner approved the final plat of the 96 lot subdivision adjacent to the golf course.[3]

In 1993, LeMay subsequently applied for and received a large lot subdivision that divided the 157 acres parcel into three lots. Lot 1, in the northeast corner of the original parcel, contains 6.25 acres and is improved with 11 single family residential lots and an area set aside and zoned for commercial use. Lot 2 contains 124.83 acres and supports an 18-hole golf course, practice driving range, parking spaces, and a clubhouse. Lot 3 extends along the west property boundary, contains 26.51 acres, and is improved with 85 single family residential units.

Meanwhile, the legislature adopted the Growth Management Act (GMA), chapter 36.70A RCW in 1990. The County adopted its first GMA comprehensive plan in 1994. The comprehensive plan placed LeMay's property outside the County's urban growth area (UGA). The County then changed the zoning on the property from General Use to Rural Reserve. The Rural Reserve zoning classification is a rural (i.e., non-urban) zoning classification that limits residential lot sizes to one residential dwelling unit per five acres. The County's rezoning of the property from General to Rural Reserve was not challenged.

Recent Attempt to Develop the Golf Course Parcel

RMG purchased Lot 2, the 120 acres golf course parcel, in 2005 and continued to operate it as a golf course. Between 2005 and 2013, RMG unsuccessfully attempted to have Pierce County amend the comprehensive plan to place the golf course parcel

[3] In the May 1995 decision granting a one-year extension, the hearing examiner noted the effect of the County's new GMA comprehensive plan: "[t]he Comprehensive Plan places the site in Rural Reserve designation. . . .The applicant's plat is of a substantially greater density than allowed by the plan."

and the subdivision within the County's UGA, and change the zoning from Rural Reserve to Moderate Density Single Family—an urban zoning classification. Following the most recent attempt in 2013, the County advised RMG that it would be many years before the parcel would be placed within the UGA. The golf course parcel zoning remains outside of the UGA and zoned Rural Reserve.

On February 13, 2014, RMG's agent submitted a proposal to the Department seeking another major amendment to UP9-90 allowing RMG to develop the golf course property as a new residential subdivision. RMG's letter recognized that LeMay's original 1990 PDD/Rezone application for the entire 157 acre property had been converted to an application for a UP: "[t]he County (over LeMay's objection) processed the PDD/preliminary plat application as an unclassified use permit." The letter requested the Department to process a major amendment to UP9-90 "under the zoning in effect at the time when UP9-90 was approved."

On March 24, 2014, the Department responded by issuing an administrative determination concluding that in order to convert the golf course parcel into a residential subdivision, RMG would need to file a new application for a major amendment to the UP and a new application for a subdivision. The administrative determination informed RMG that the new subdivision would need to be consistent with the current zoning density prescribed by the current zoning code, Rural Reserve, rather than General Use zoning that was in effect in 1990.

On April 3, 2014, RMG appealed the Department's administrative determination to the Pierce County hearing examiner; again arguing that redevelopment of the golf course into a residential subdivision should be reviewed under the 1990 zoning. After a

public hearing, on August 5, 2014, the examiner denied RMG's appeal (2014 decision).

The examiner's findings and conclusions included:

- The Department's June 26, 1990, letter gave LeMay two options to complete and open the golf course: (a) proceed with the PDD/Rezone or (b) apply for an unclassified use permit in order to open the golf course, reserving the remainder of the property for future development.
- LeMay elected to proceed with the unclassified use permit and submitted an application on June 26, 1990.
- LeMay received approval for the unclassified use permit UP9-90 to develop the golf course on October 2, 1990.
- LeMay subsequently received approval for a major modification to UP9-90 allowing for preliminary plat approval for a 96 lot residential subdivision on adjacent to the golf course.
- LeMay constructed both the golf course and adjacent residential subdivision within UP9-90.
- LeMay then applied for and received a large lot subdivision separating the golf course parcel (parcel 2) from the residential parcels (parcels 1 and 3).
- RMG acquired the golf course parcel in 2005 and has operated it as a golf course since then.
- RMG unsuccessfully attempted to have the golf course property brought within the county's urban growth area and rezoned for to allow urban residential density.
- Approval of UP9-90 did not rezone the property nor did it establish a density for future residential development.
- To establish a single family subdivision RMG must apply for an amendment to UP9-90 and a preliminary plat that meets current zoning regulation.

After unsuccessfully seeking reconsideration, on September 22, 2014, RMG filed a timely petition for judicial review under LUPA. The parties agreed to stay the 2014 LUPA petition.

On October 15, 2014, RMG sought, in the alternative, to "pursue completion of the pending rezone and PDD applications submitted in May of 1990." On January 14, 2015, the Department responded with a second administrative determination finding that the 1990 PDD/Rezone application had been abandoned.

RMG also appealed the second administrative determination to the hearing examiner. After a hearing, on August 6, 2015, the examiner denied RMG's appeal, finding the original 1990 PDD/Rezone application had been abandoned (2015 decision). The examiner's findings and conclusions included:

- When LeMay applied for the unclassified use permit on June 26, 1990, it abandoned the previous application for the PDD/Rezone.
- All subsequent activities of Pierce County, LeMay, and LeMay's successors, including RMG, were consistent with the decision to apply for the unclassified use permit and abandon the PDD/Rezone.
- The Department's staff report for the 1990 hearing on the unclassified use permit noted the change in the permit application from a PDD/Rezone to an unclassified use permit.
- LeMay's agent, Moore, confirmed in his 1990 hearing testimony that the application had changed to an unclassified use permit.
- In March 1991, the hearing examiner approved a major amendment to the UP9-90 approving a 96 lot residential subdivision for a portion of the property.
- In 1998, the hearing examiner approved the final plat for the 96 lot residential subdivision portion of the property.
- Pierce County zoning maps were never amended to show a zone change or PDD approval.
- After purchase, RMG attempted to have the golf course property moved into the urban growth area and rezoned for urban development.

- Seeking approval of a PDD/Rezone application after 25 years is inconsistent with timely processing and approval of land use application, the doctrine of finality, and the 21-day appeal period under LUPA.

RMG timely filed a second LUPA petition. The parties agreed to consolidate the two LUPA petitions in the King County Superior Court. After a consolidated hearing on the merits, on May 19, 2016, the superior court denied RMG's petitions for review. RMG appeals.

ANALYSIS

Standard of Review

LUPA provides the exclusive means for judicial review of a land use decision. Phoenix Dev., Inc. v. City of Woodinville, 171 Wn.2d 820, 828, 256 P.3d 1150 (2011). In reviewing a land use decision, this court stands in the same position as the superior court and reviews the administrative record before the hearing examiner. Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 751, 49 P.3d 867 (2002).

For an appellant to overturn a land use decision under LUPA, the appellant carries the burden of proving one or more of six standards of relief set out in RCW 36.70C.130(1). Abbey Rd. Grp., LLC v. City of Bonney Lake, 167 Wn.2d 242, 249, 218 P.3d 180 (2009). RMG pursues relief under LUPA standards (a), (b), (c), (d), and (f), which state:

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

RCW 36.70C.130(1).

Standards (a), (b), and (f) present questions of law that we review de novo. We give due deference to the local government's construction of the law within its expertise. Abbey Rd., 167 Wn.2d at 250. Standard (c) concerns a factual determination that we review for substantial evidence. "Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted." Abbey Rd., 167 Wn.2d at 250. We view the facts and inferences in a light most favorable to the party that prevailed in the highest fact-finding forum. In this case, the County prevailed before the hearing examiner. Abbey Rd., 167 Wn.2d at 250. A finding is clearly erroneous under subsection (d) when, although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

1990 Unclassified Use Permit

At the outset, it is necessary to distinguish between LeMay's February 1990 application for a PDD and rezone—the Classic Estates PDD, and its June 26, 1990, application for a UP to construct an 18 hole golf course, clubhouse, and related facilities—UP9-90.

A PDD, often referred to in other jurisdictions as a planned unit development (PUD), or a planned residential development (PRD), is a regulatory technique which

excuses a developer from otherwise applicable zoning regulations in exchange for submitting to detailed, tailored regulations. City of Gig Harbor v. N. Pac. Design, Inc., 149 Wn. App. 159, 169, n.9, 201 P.3d 1096 (2009). Under the 1990 Pierce County Code, a PDD is "intended to be a flexible zoning concept." The uses within the PDD depend on the uses in the underlying zone or the "potential zone" if a rezone is also requested. "The residential densities within the PDD, however, may vary depending upon how the land is developed with general aesthetics, natural areas, and open space being an incentive." If the applicant seeks to include a use that is not allowed in the existing code, they may simultaneously apply for a rezone. An approval of a PDD or PDD/Rezone is considered an amendment to the zoning map. PCC 18.10.610 (J).

A UP in contrast does not rezone or amend the zoning map. A UP is designed to address uses that may or may not be appropriate in a particular zone due to their variability in size, number of people involved, traffic, and immediate impact. A UP simply approves a particular land use on a particular parcel or parcels. As Division Two of this court explained in 1990,

> The Pierce County Code authorizes the examiner to consider applications for unclassified use permits in general use zones, and to grant them for proposed uses that are consistent with the purpose and intent of the Comprehensive Plan, land use management programs, and the spirit and intent of the Code, and for uses that are not "unreasonably incompatible" with the uses permitted in the surrounding areas.

Maranatha Min., Inc. v. Pierce County, 59 Wn. App. 795, 801, 801 P.2d 985 (1990). In 1990, the Pierce County Code identified golf courses as a type of use that requires a UP.

Here, it is undisputed that LeMay applied first for the Classic Estate PDD, which proposed the "creation of 96 single family lots, an 18-hole championship public golf course and commercial reserve area on a 157.6 acre parcel of vacant land." The application included a concurrent request for a rezone. Then, after the County suggested that LeMay could speed up the opening of its golf course by opting instead to submit an application for a UP, LeMay promptly complied. On the same day the County notified LeMay of its two options, LeMay submitted an application for UP9-90 "to allow construction of an 18-hole golf course with clubhouse, parking & related facilities" while retaining "portions of the site along the west boundary & at the northeast corner" for future development.

Consistent with LeMay's choice to proceed under the UP process, the hearing examiner reviewed and approved UP9-90. Importantly, the hearing examiner's report and decision approving UP9-90 makes no mention of LeMay's earlier application for a PDD or for residential housing. Instead, finding that construction of a public golf course was compatible with the surrounding residential uses and beneficial to the public, UP9-90 approved only the "continued construction of an 18-golf course with clubhouse on a 157.6 acre lot located south of 208th St. and east of 46th Ave. E. in Pierce County."

The 1991 Major Amendment

RMG first challenges the hearing examiner's 2014 decision determining that the County did not approve the original 1990 PDD/Rezone, and that any future subdivision of the golf course parcel must comply with current Rural Reserve zoning requirements. While RMG agrees that an "unclassified use permit cannot provide a zoning entitlement," it nonetheless argues that the County's subsequent approval of the 1991

major amendment allowing the 96 lot subdivision, effectively rezoned the entire original 157 acre property, including the golf course parcel, giving RMG an entitlement to develop the golf course parcel at the same density as the 96 lot subdivision.

RMG argues first that a map excerpt from Pierce County's 1995 zoning access showing an annotation of "UP9-90" along with "G" for General zoning provides "hard evidence" that UP9-90 rezoned the property. RMG's reliance on the map excerpt is misplaced for at least three reasons. First, the 1995 zoning map was not introduced before the hearing examiner during RMG's appeal of the 2014 decision determining whether the property had been rezoned. Nor did RMG argue below that the property was subject to an overlay designation. "Failure to raise issues during the course of an administrative hearing precludes consideration of such issues on review." Westside Bus. Park v. Pierce County, 100 Wn. App. 599, 608, n.5, 5 P.3d 713 (2000); Griffin v. Dep't of Soc. & Health Servs., 91 Wn.2d 616, 631, 590 P.2d 816 (1979). Thus, the 1995 zoning map is not properly before us.

Second, even if the 1995 map was properly before us, there is no evidence that the notation UP9-90 was intended to be a zoning designation or an overlay. It could just as easily have been the County's notation that the County had approved an unclassified use permit on the parcel. Without evidence or testimony establishing the County's intent with the annotation, we are left to guess. Mere theory or speculation cannot support a finding. Johnson v. Aluminum Precision Prods., 135 Wn. App. 204, 208-09, 143 P.3d 876 (2006).

Finally, and perhaps most importantly, even if the 1995 map was properly before us, RMG does not dispute that the property, including the golf course on Lot 2, was

rezoned after the County adopted its GMA comprehensive plan to rural reserve. The County's current zoning map identifies Lot 2 as zoned Rsv5—Rural Residential. Thus, even if RMG is correct and UP9-90 rezoned the property, the property was later rezoned.

RMG argues second that the County's process approving the 1991 major amendment and 96 lot subdivision was effectively a decision approving the original PDD and rezoning the entire 156 acre parcel to allow for development under the old General zoning. This argument also fails.

While RMG acknowledges that neither the staff report nor hearing examiner's 1991 decision approving the preliminary plat mention or discuss the PDD/Rezone application, it asserts that because the 1991 decision included findings necessary for approval of a PDD, the hearing examiner must have approved a PDD and rezoned the property. RMG ignores, however, that not only do neither the staff report nor the 1991 decision reference a PDD/Rezone application, but both documents specifically identify the proposal as an application "to establish a 96 lot single-family residential subdivision and single 8 foot high water tower."

RMG also ignores that the staff report set forth the inquiries and necessary findings for approval of a preliminary plat under the County's subdivision code and then identified each of the regulatory requirements necessary to address areas such as circulation, access, fire protection, storm drainage, water supply, and sewage. The hearing examiner then inquired into and found that the proposed preliminary plat would not significantly impact the environment and that, consistent with the County's subdivision division code, that "appropriate provisions by the regulatory requirements

and the conditions hereof shall provide for public health, safety and general welfare for the surrounding neighborhood." On its face, the hearing examiner's 1991 decision approved a 96 lot preliminary subdivision plat.[4] There is no basis to support RMG's assertion that the 1991 decision approved a PDD or rezoned the entire 157 acre parcel to the densities approved in the subdivision.

The hearing examiner's findings in the 2014 decision, that the 1991 decision approving the major amendment to allow the 96 lot subdivision did not approve either a PDD or rezone, are supported by substantial evidence. RCW 36.70C.130(1)(c). Further, the hearing examiner's conclusions in the 2014 decision, that RMG may apply to amend UP9-90 for the golf course parcel and seek preliminary plat approval based on the current rural reserve zoning requirements, was not an erroneous interpretation of the law. RCW 36.70C.130(1)(b).[5]

PDD/Rezone Application

RMG next challenges the hearing examiner's 2015 decision determining that RMG had abandoned the original 1990 PDD/Rezone application. RMG argues that there is no evidence that the application was abandoned and that the ruling on abandonment is an error of law. We disagree for two reasons.

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[4] To the extent RMG is challenging the 1991 decision for failing to make sufficient findings or conclusion, it is too late. The well-settled doctrine of finality in Washington requires that challenges to a land use decision be raised quickly—not 23 years later. See Skamania County v. Gorge Comm'n, 144 Wn.2d 30, 49, 26 P.3d 241 (2001); Durland v. San Juan County, 182 Wn.2d 55, 60, 340 P.3d 191 (2014).

[5] RMG also argues that because the County required the UP9-90 conditions to be recorded as a covenant that it is entitled to an equitable servitude creating a zoning entitlement. The recorded covenant, however, contained the hearing examiner's conditions of approval for the golf course only and nothing about the right to residential densities that run with the land. The recorded covenant does not create a zoning entitlement.

A. The 2015 Decision is Supported by Substantial Evidence and is not Legally Erroneous.

First, the hearing examiner's 2015 decision that the 1990 PDD/Rezone application was abandoned is based on substantial evidence and was not an erroneous application of the law. RCW 36.70C.130(1)(b) and (c); Abbey Rd., 167 Wn.2d at 249-50.

Both RMG and the County agree that no Washington court has directly concluded when or how a land use application may expire or be abandoned. But, as the County argues, Washington does apply the doctrine of finality as a means to encourage expeditious challenges to land use decisions. See Skamania County v. Gorge Comm'n, 144 Wn.2d 30, 49, 26 P.3d 241 (2001); Chelan County v. Nykreim, 146 Wn.2d 904, 931-32, 52 P.3d 1 (2002); Durland v. San Juan County, 182 Wn.2d 55, 60, 340 P.3d 191 (2014). As our Supreme Court explained in Durland, "[t]his court has faced numerous challenges to statutory time limits for appealing land use decisions and has repeatedly concluded that the rules must provide certainty, predictability, and finality for land owners and the government." Durland, 182 Wn.2d at 60. The hearing examiner applied this rule, concluding,

> postponing the exercise of the permit from 1990 to 2014 detrimentally impacts the public health and safety and the County's ability to implement its Comprehensive Plan and development regulations pursuant to the Growth Management Act. Such process also violates the finality in land use matters required by our Washington Supreme Court in cases such as Chelan County v. Nykreim, et al., 146 Wn. 2d 904 (2002), and by our State Legislature in its enactment of the Land Use Petition Act (RCW 36.70C) that provides a 21 day statute of limitations to challenge a land

> use decision. Predecessor needed to challenge the County's actions in 1990 if it disagreed with such.[6]

Here, the Pierce County Code requires all reviewing departments to "complete an initial review within 30 days from the application filing date." PCC 18.60.020. Under PCC 18.100.010, "the Director or Examiner shall issue a notice of final decision on a permit within 120 days, of County review time, after the Department accepts a complete application as provided in PCC 18.40.020." Finally, under RCW 36.70B.070, a local government must provide a written determination within 28 days. If, as RMG suggests, the property owners did not intend to withdraw the application, then the time to request action on the application would have been at the conclusion of these time limits. The "property owner is responsible for monitoring the time limitations and review deadlines for the application. The County shall not be responsible for maintaining a valid application." PCC 18.160.050(F). After giving due deference to the hearing examiner's construction of the law, the examiner's conclusion that an application can expire or be abandoned is not an erroneous application of the law. RCW 36.70C.130(1)(b); Abbey Rd., 167 Wn.2d at 249-50.

Further, the hearing examiner's findings that RMG and the previous owners intended to abandon this application is supported by substantial evidence. First, after LeMay submitted its PDD application in 1990, its agents met with the Department and were notified of two options. LeMay chose the quicker option, and promptly applied for an unclassified use permit for the golf course alone instead of a PDD. As LeMay's agent, Moore, testified in 1990,

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[6] Administrative Record (AR) at 15-12.

> We intended to do a PDD on the whole property, which would have included, at this hearing, the subdivision, the golf course, and an area set aside for commercial use in the future . . . retail, neighborhood commercial or something. We then, through the encouragement of planning, changed into simply a UP on the golf course portion now. The subdivision and any other uses will be addressed at a later time. We did talk about doing the whole 157 +/- acres; we intended to do the whole project at once. We now modified; we're simply doing the golf course today. We will be submitting at some point in the future a site plan for the subdivision and other uses.[7]

Second, in 1991, LeMay requested that the County "revive" the PDD application. In response, the County stated they would use a major amendment to the UP instead. Neither LeMay, nor any of the other property owners, contested or appealed that decision.

Third, from 1991 to 2014, the owners failed to request any information or pursue any action in furtherance of the PDD application. In 1995, Moore again stated the intent to abandon the PDD application, when he testified at a hearing that "[w]hen his golf course was in process, the planner then said he couldn't do it under a PDD, so he pulled the commercial and residential use out and submitted a UP for the golf course." Although Moore stated he was unhappy with the decision to pursue a UP instead of a PDD, he acknowledges his intent to do so.

Fourth, as the hearing examiner recognized in the 2015 decision, if RMG believed that the 1990 PDD/Rezone application was still pending, why did it pursue a legislative change to move the golf course into the UGA and rezone the property for urban densities? The documentation submitted by RMG in conjunction with its 2011 and 2013 legislative requests to be included in the UGA establish that RMG knew that

[7] (Emphasis added.)

the golf course was zoned Rural Reserve and that a rezone would be necessary to develop the land at higher densities.

Finally, RMG argues that this court should apply the requirements for abandonment when dealing with a nonconforming use, a standard that deals with the taking of a vested property right. Under Van Sant v. City of Everett, 69 Wn. App. 641, 647-48, 849 P.2d 1276 (1993), a City alleging abandonment of a use must show "(a) an intention to abandon; and (b) an overt act, or failure to act, which carries the implication that the owner does not claim or retain any interest in the right to the nonconforming use." Both have been shown in this case.

RMG's overt acts attempting repeatedly to pursue a legislative reclassification of the golf course into the UGA and rezone the property for urban densities, certainly support the implication that it recognized that the PDD/Rezone application had been abandoned. Further, RMG's predecessor, LeMay, demonstrated its abandonment of the PDD/Rezone application when it took full advantage of UP9-90 to develop and open the golf course, and then separately applied for and developed the 96 lot subdivision under a major amendment to UP9-90. LeMay chose to develop the property under the UP rather than rely on its original PDD/Rezone application.

Not only is there substantial evidence to support the hearing examiner's findings regarding LeMay and RMG's abandonment of the PDD/Rezone application, but LeMay and RMG's actions also demonstrate that both entities knew that the PDD/Rezone application was abandoned.

B. The PDD/Rezone Application Was Not Vested

Second, even if the hearing examiner erred in concluding that an application could expire or be abandoned, RMG's argument still fails. RMG's argument is that its PDD/Rezone application vested and that "[t]he County cannot legally 'take away' a vested application that it has deemed complete simply by demanding an additional permit approval not originally required." Contrary to RMG's assertion, its PDD/Rezone application did not vest.

Washington's vested rights doctrine originated at common law and uses a "date certain" standard that entitles developers to have land development proposals processed under the "regulation in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations." Abbey Rd., 167 Wn.2d at 250. "By promoting a date certain vesting point, our doctrine ensures that 'new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law.'" Abbey Rd., 167 Wn.2d at 251 (quoting Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 637, 733 P.2d 182 (1987)).

As our Supreme Court explained,

> [d]evelopment interests can often come at a cost to public interest. The practical effect of recognizing a vested right is to potentially sanction a new nonconforming use. "A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws." If a vested right is too easily granted, the public interest could be subverted.

Abbey Rd., 167 Wn.2d at 251 (quoting Erickson & Assocs., Inc. v. McLerran, 123 Wn.2d 864, 873-74, 872 P.2d 1090 (1994)).

While Washington's vested rights doctrine originated at common law, "the vested rights doctrine is now statutory." Town of Woodway v. Snohomish County, 180 Wn.2d 165 173, 322 P.3d 1219 (2014); Potala Vill. v. City of Kirkland, 183 Wn. App. 191, 194, 334 P.3d 1143 (2014). As such, the vested rights doctrine extends only to complete applications for building permits (RCW 19.27.095(1)); subdivisions (RCW 58.17.033(1); and development agreements (RCW 36.70B.180). Town of Woodway, 180 Wn.2d at 173. Here, because applications for a PDD or rezone are not vested by statute, the vested rights doctrine does not apply. Thus, even if the original PDD/Rezone application had not been abandoned, the application would still be subject to the current Rural Reserve zoning and not the pre-GMA General zone.

Attorney Fees

The County requests that it be awarded its reasonable attorney fees and costs on appeal. RCW 4.84.370 provides that reasonable attorney fees and costs "shall be awarded" to the prevailing party on appeal where the prevailing party also prevailed before the local government and in superior court. Because the County prevailed before the hearing examiner and the superior court, it is entitled to an award of its reasonable attorney fees and costs for defending this appeal. Durland, 182 Wn.2d at 77-80.

Affirmed.

WE CONCUR:

RMG Worldwide – Petition for Review

Appendix A-4

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

RMG WORLDWIDE, LLC, MICHAEL H. MOORE, its manager, Appellant, v. PIERCE COUNTY, Respondents.	NO. 75401-7-1 MOTION TO PUBLISH

I. IDENTITY AND INTEREST OF THE MOVING PARTIES

The law firm of Bricklin and Newman, the law firm of Aramburu and Eustis, and The Center for Justice are the moving parties.

The law firm of Bricklin and Newman and the law firm of Aramburu and Eustis are Seattle-based law firms, each with an emphasis on environmental and land use law. The law firms have had no prior involvement in this case. As frequent litigators in the land use field, the

firms and their many land use clients have an interest in the development of the case law related to land use cases.

The Center for Justice ("Center") is a not-for-profit legal services organization based in Spokane, Washington. The Center has no prior involvement in this case. The Center frequently represents neighborhoods and local residents on matters involving the application of local land use laws, including zoning codes. Accordingly, the Center and its clients have an interest in the development of case law related to land use matters.

II. STATEMENT OF RELIEF SOUGHT

Publication of the Unpublished Opinion entered herein on December 18, 2017.

III. FACTS RELEVANT TO MOTION

The opinion in this case addresses an issue of law that has received little attention: whether an application can be deemed abandoned when there is no local ordinance imposing a specific burden on an applicant to make progress on an application with the consequence of inactivity being abandonment. Some jurisdictions have such explicit abandonment ordinances. *See, e.g.,* Snohomish County Code §30.70.140; Kitsap County Code §21.04.200.F. In this case, though, Pierce County apparently did not have such an express requirement. Yet the Court correctly looked to other provisions of state and local law (and case law) to conclude that the local

hearing examiner correctly determined that the applicant's failure to pursue the application was an abandonment of the application. Unpublished Opinion at 18.

IV. GROUNDS FOR RELIEF AND ARGUMENT

RAP 12.3 (e) specifies the factors to be addressed in a motion to publish. Two of the factors listed in that rule weigh in favor of publishing the opinion in this case.

Clarifying an Established Principle of Law. To our knowledge, the precise issue resolved in the opinion has not been addressed by a prior reported decision. While the opinion certainly is consistent with other case law about the finality of land use decisions, *see, e.g.,* Opinion at 17 (citing cases), none of those cases have decided the precise issue presented by the facts of this case.

Matter of general public interest. At least within the land use realm, the issue decided is of general interest. Many land use applications lay fallow for years, only to be resurrected when economic or other circumstances change. Whether such applications can be revived and, importantly, claim to be vested to the laws of an earlier day, is of great import to the land owner, the neighbors, the community, and the local government that may have adopted new regulations in the interim. Unless these stale applications are deemed abandoned, there is a significant risk

that modern regulations will be side-stepped. While legitimate investor-backed expectations that are diligently pursued may be worthy of protection in some instances, there is no public policy served by allowing dormant applications to be revived as a way of circumventing current regulatory requirements.

> A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.

Erickson & Associates, Inc. v. McLerran, 123 Wn.2d 864, 873–74, 872 P.2d 1090, 1096 (1994). *See also,* Kitsap County Code § 21.04.150.E (vested rights terminate upon expiration of application).

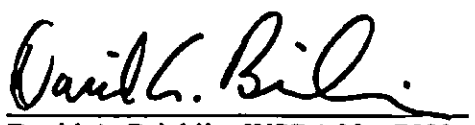
V. CONCLUSION

For these foregoing reasons, the Court should publish the opinion.

Dated this 5th day of January, 2018.

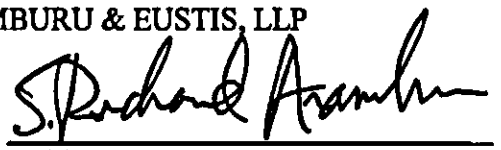
Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: 

David A. Bricklin, WSBA No. 7583

ARAMBURU & EUSTIS, LLP

By: 

J. Richard Aramburu, WSBA No. 466

By: 

Jeffrey M. Eustis, WSBA No. 9262

THE CENTER FOR JUSTICE

By: 

Rick Eichstaedt, WSBA No. 36487

BRICKLIN & NEWMAN, LLP

January 05, 2018 - 9:36 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	75401-7
Appellate Court Case Title:	RMG Worldwide LLC., et ano, Appellant vs. Pierce County, Respondent
Superior Court Case Number:	14-2-27755-5

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RMG Worldwide – Petition for Review

Appendix A-5

FILED
2/2/2018
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RMG WORLDWIDE LLC, MICHAEL H. MOORE, its Manager, Appellant, v. PIERCE COUNTY, Respondent.	No. 75401-7-I DIVISION ONE ORDER GRANTING MOTION TO PUBLISH

The non-party law firms of Bricklin and Newman, Aramburu and Eustis, and the Center for Justice filed a motion to publish the court's opinion filed on December 18, 2017. Appellant and respondent do not object to the motion to publish.

After review, it is hereby

ORDERED that the opinion should be published. The opinion shall be published and printed in the Washington Appellate Reports.

FOR THE COURT:

Mann, J.

RMG Worldwide – Petition for Review

Appendix A-6

No. 75401-7-I

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

RMG WORLDWIDE, LLC, MICHAEL H. MOORE,
its Manager,

Appellant,

v.

PIERCE COUNTY,

Respondents.

RMG WORLDWIDE, LLC, MICHAEL H. MOORE, ITS MANAGER'S, MOTION FOR RECONSIDERATION

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IDENTITY OF MOVING PARTY AND RELIEF REQUESTED

Petitioner RMG Worldwide, LLC, and Michael H. Moore, Its Manager, ("Moore") respectfully move this Court to reconsider its December 18, 2017 decision in *RMG Worldwide, LLC, Michael H. Moore, its Manager, v. Pierce County*, No. 75401-7-I (the "Decision") (attached as **Appendix A-1**). To maintain the integrity of the Land Use Petition Act, Chapter 36.70C, this Court should grant reconsideration to give effect to one of the main purposes of LUPA to ensure adherence by local government to all applicable local regulations, laws, and zoning actions. *See* RCW 36.70C130. Unless corrected on reconsideration, the Court's decision impermissibly results in a carved-out exception to LUPA that eviscerates the Act's requirements.

The primary error of law and fact is the Court's failure to consider the 1995 Zoning Map which confirms that the County made a decision to secure General Zoning on the subject property in the early 1990s such that Moore has the right to request redevelopment of the golf course at its pre-GMA residential density. All other errors of the Court detailed below flow from this core decision that has infected the reasoning in the Decision and undermined vested private property rights granted to Moore's predecessor, which rights run with the land.

First, the Court failed to consider an order of the superior court concerning the County's 1995 Zoning Map, which ruling was not appealed by Pierce County. The 1995 Zoning Map is a fact, not a legal argument or "issue," and as such cannot be waived. Such fact supports Moore's argument concerning the existence of a PDD entitlement. It was error for this Court to disregard the superior court's ruling concerning the purposes for which the map may be considered, particularly where the ruling was not appealed by the County. That Moore did not introduce the Zoning Map in its appeal of the 2014 decision is not dispositive under the superior court's ruling, and considering the fact that the County made a conscious decision to withhold that fact from the Examiner, contrary to procedural rules, which constitutes an error in procedure requiring reversal under RCW 36.70C.130(1)(a).

The superior court's ruling dated March 8, 2016 (attached as **Appendix A-2**),[1] determined that a 1995 Zoning Map should be considered for "all purposes" in the consolidated appeal. That administrative appeal asserts a zoning entitlement was made by the County when approving a major amendment to Unclassified Use Permit UP 9-90. This fact affirmatively refutes the Court's determinations that LeMay's PDD application was abandoned in favor of a UP application.

[1] CP 451-452

Consideration of the Zoning Map shows that it had, in fact, been amended as a result of the County's 1991 decision. But this Court failed to mention or apply the referenced order, thereby erroneously failing to consider the Zoning Map.

The 1995 Zoning Map confirms that the land use approval issued by the County in 1990 via amendment of UP 9-90 constituted a PDD, regardless of the label employed by the County. This is because it established, among other things, a special residential density of one dwelling unit per 14,974 square feet. Tellingly, the County does not argue that the zoning designation on the 1995 map, referencing UP 9-90, was in error. This constitutes an admission by the County, particularly in light of the fact it withheld the map from the Examiner to hide that a change of zoning was effectuated by approval of the UP as a PDD.

Second, by ignoring the entitlement granted to Moore's predecessor by the County in 1990, the Court fundamentally misunderstood Moore's vested rights argument, which requires consideration of the property rights granted by the County to LeMay, which run with the land. These rights are inherent in the 1990 UP 9-90 major amendment and the 1991 Memorandum of Agreement between the County and LeMay, pursuant to which portions of the subject property were permitted to be redeveloped in the future. Moreover, there is no

legal basis on which the Court may use the doctrine of finality to cancel a pending application, if the determination that a PDD was not approved is sustainable.

Finally, the Court failed to address the fact that the County created a new residential lot of 11,900 square feet after enactment in 1995 of its "large lot" Growth Management Act rural zoning in its ruling. This fact refutes the County's position that the property's zoning had not been "secured" as General Zoning by approval of UP 9-90 and its major amendment, via what was in actuality a PDD approval.

I. STATEMENT OF ISSUES

A. Did the Court err in failing to consider the 1995 Zoning Map in the Entitlement Appeal?

B. Did the Court further err by creating, on its own accord, a new argument for Pierce County that the Zoning Map could be interpreted as something other than a zoning decision?[2]

C. When this Court acknowledges that the record is not developed as to the legal effect of the Zoning Map, is the proper result to vacate the decision in the Entitlement Appeal and remand to the Pierce County Hearing Examiner for additional consideration?

D. Did the Court misapply and misconstrue the vested rights

[2] The Zoning Map is part of the Record (AR 15-775) and annexed as **Appendix A-3.**

doctrine by failing to consider and protect the private property rights associated with land use permit approvals granted to Moore's predecessor and/or the agreement between the County and LeMay concerning the subject property?

E. Did the Court err in ruling that Moore's predecessor abandoned or replaced the PDD application with an application for a UP?

F. Did the Court misapply and misconstrue the doctrine of finality to rule that, to the extent the County had not approved the PDD application, such application was no longer pending?

G. Is the Court's ruling that UP 9-90 and its major amendment did not create zoning entitlements on the subject property that insulated it from GMA rezoning in 1995 contrary to the fact that the County thereafter approved an 11, 900 square foot lot on the property?

II. STANDARD OF REVIEW

Rule 12.4 authorizes the Court to grant reconsideration upon a showing that the decision overlooked and/or misapprehended points of law or fact. Moore seeks reconsideration of the Court's decision on this basis, as set forth above. Moore also requests reconsideration on the basis that this Court decided the appeal on grounds that were not raised in the Parties' briefs.

III. GROUNDS FOR RELIEF SOUGHT

This Court stands between citizens and their government to do justice. In this case, the County failed to submit the 1995 Zoning Map to the Hearing Examiner until a hearing on a second appeal relating to whether or not decision had been made on a Planned Development District/Rezone application. Without explaining the absence of the map from the record or its failure to bring it to the Examiner's attention at an earlier date, the County argued that a decision had been made, but that such decision could not be considered in the Entitlement Appeal.

This Court cannot allow the County to be rewarded for its bad behavior. There is no way in which Moore could "waive" an argument based on the existence of the map of which it was not even aware. (Slip Opinion at p. 14). A waiver is an intentional relinquishment or abandonment of a known right or privilege. *Schuster v. Prestige Senior Management, LLC*, 193 Wn.App. 616, 633, 376 P.3d 412 (2016) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 238-39, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). Without knowledge of the map, it was impossible for Moore to raise the issue in prior proceedings. As a matter of law, Moore did not – and could not – intentionally relinquish the right

to raise or rely on the map to support its argument that the County actually approved the PDD via the major amendment to the UP.

The map is a fact, not a legal issue, of which this Court must take notice and upon which the Court's ruling must be based. The County had an affirmative obligation to provide a report to the Examiner in the Entitlement Appeal setting out all applicable laws and regulations to the Examiner in Case No AA5-125, the Entitlement Appeal. *See* PCC Section 1.22.100A, which states:

> When a land use matter involving an application has been set for public hearing, the Planning Department shall coordinate and assemble the comments and recommendations of other County departments, Land Use Advisory Commissions, and governmental agencies having an interest in the subject application and shall prepare a report to include a summary of the facts involved and the Planning Department's findings and recommendations. The Planning Department shall include, as an exhibit in its staff report, the recommendations of the Land Use Advisory Commissions and the minutes of the applicable Land Use Advisory Commission meeting which documents the basis for the Advisory Commission's recommendation. The Planning Department shall also make a specific recommendation to approve, deny, modify, or conditionally approve the subject application based upon the contents of the application, the Planning Department's staff's findings, the applicable comprehensive plan, and all other applicable plans or regulations adopted by the Council or Federal or State law.

Planning Staff represented in that appeal that UP 9-90 was not a zoning entitlement and there was no County proof to the contrary. The map shows that such representations are patently false.

The superior court decided to not allow the County to have it both ways. The lower court made two rulings as to the record on appeal: (1) allowing use of the Zoning Map in the Entitlement Appeal based upon a request to take official notice; and (2) allowing introduction of a declaration from a former county official, Order dated May 13, 2016.[3] The second ruling was later vacated by Order dated June 2, 2016.[4]

In oral argument, in response to questions, it appeared this Court was confused and believed that the Zoning Map ruling was later vacated by the superior court. If so, that presumption is incorrect. The 1995 Zoning Map is part of the record and must be considered. It supports a ruling that, not only was the PDD application not withdrawn or changed, it was approved under a misapplied "UP" label by the County because General zoning on the subject parcel is reflected on the map.[5] *See Responsible Urban Growth Group v. City of Kent*, 123 Wn.2d 376, 388, 868 P.2d 861 (1994); *Norco Constr., Inc. v. King County*, 97 Wn.2d 680,

[3] CP 451-452
[4] CP 457
[5] All submitted applications and supporting maps and materials reference "Classic Estates, a PDD." AR 15-107/108; AR 15-462, Tellingly, the PDD application fees were never returned, either.

690 649 P.3d 103 (1982) (zoning maps are regulatory in nature in that they classify and regulate the types of land uses allowed). This is further supported by the fact that the County later crated a non-GMA density residential lot and imposed covenants that run with the land.[6]

The superior court's March 8, 2017, Order included a denial of the County's motion to strike arguments in the Entitlement Appeal based upon the 1995 Zoning Map. The County did not appeal. An order not appealed becomes the law of the case. *E.g., Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (citing 15 LEWIS H. Orland & Karl B. Tegland, Washington Practice: Judgments § 380, at 55-56 (4th ed. 1986)) (The law of the case doctrine stands for the proposition that, once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation).

The Slip Opinion states:

> Second, even if the 1995 map was properly before us, there is no evidence that the notation UP9-90 was intended to be a zoning designation or an overlay. It could just as easily have been the County's notation that the County had approved an unclassified use permit on the parcel. Without evidence or testimony establishing the County's

[6] The County and LeMay agreed in a Memorandum Agreement and Covenant to Run With the Land dated May 15, 1991, that UP 9-90 grants applicant the right to use or develop the property in the approved manner. (AR 14-243; AR 15-317). This created an equitable servitude. In this regard, the UP must be considered as a special zoning residential density entitlement because that is the only way for the County to list UP 9-90 on its official Zoning Map.

> intent with the annotation, we are left to guess. Mere theory or speculation cannot support a finding. Johnson v. Aluminum Precision Prods., 135 Wn. App. 204, 208-09, 143 P.3d 876 (2006).

Decision, p.14. This language is not based upon argument made by the County.[7] More fundamentally, it is based on improper speculation by the Court concerning the County's "intentions," which does not square with actual practice, as confirmed by a former County Planner, Carl Halsan:

> On September 2, 2015, I asked the Cartography staff of PALS to find the old zoning atlas page for the 1/4 section of containing the Classic site. I knew from my time working for PALS that the Cartography Lab was the keeper of the Official Zoning Atlas township books which contained a separate map for each 1/4 section on 18" x 18" bond paper. The Zoning Atlas contains all land use entitlements by permit decision or ordinance. During my employment, Current Planning staff would hand write pending case numbers on the appropriate map sheet with a Sharpie pen. Once an application or ordinance was approved, the Cartography staff would use formal lettering to alter the map so that staff would know that a given property's zoning had been changed so that all future permit submittals would be reviewed for

[7] Generally, appellate courts restrict review to those issues that are raised, briefed, and argued by the parties. *State v. Sims*, 171 Wn.2d 436, 452 (2011); *see also* RAP 12.1(a). Where it is "necessary to reach a proper decision," the court may raise new issues. *Sims*, 171 Wn.2d at 452. The Court's authority to raise new issues implicates due process, which requires that the parties are given notice and a meaningful opportunity to be heard on the new issues before they are finally decided. *See Matthews v. Eldridge*, 424 U.S. 319 (1976); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 San Diego L. Rev. 1253, 1291-92 (2002). When a court decides new issues without providing the parties notice and an opportunity to be heard—as in this case—due process is satisfied by giving serious consideration to arguments raised in a motion for reconsideration. Miller, 39 San Diego L. Rev. at 1296 (citing cases).

> approval only after reviewing the appropriate case file.
>
> When I reviewed the 1/4 section map on September 9, 2015, I was expecting to see either hand written "Z/PDD14-90" or "UP9-90" or both. I say this because in my mind the Rezone/PDD component was still pending in my opinion if an entitlement had not been issued, and that component with the UP. What I saw was that there were no hand written notations at all, but the formal cartographer's lettering of "UP9-90", with a shaded border indicating that UP 9-90 applied to the entire 1/4 section (the NE pf 12-18-03) and dated "1/11/95." Based upon my experience as a County Planner, this means that (1) the County treated UP 9-90 as a zoning entitlement (because in the Zoning Atlas) and (2) that it applies to the entire 160 acres, not just to the Fairway Estates subdivision.

Declaration of Carl Halsan In Support of Request to Take Official Notice, dated November 25, 2015, ¶¶ 19-20.

The observation at pp. 14-15 of the Slip Opinion that the subject property was later rezoned is a starting point for the analysis, not an end point. The 1991 amendment ("First Amendment") was a "Major Amendment" and was made pursuant to a request for a Planned Development District/Rezone submitted by Moore's predecessor. A PDD/Rezone was an allowed land use option at the time and shielded property from later zoning enactments. *See* Historic Code, PCC § 18.10.390 (AR 14-180 to 183). The permitting process, however characterized, resulted in a change to the Pierce County Zoning Map. The

only way to change the map was via-a- vis granting of a land use approval with the effect of an entitlement because no legislative enactment was promulgated. Thus, a PDD was effectuated since the Zoning Map must be considered in the Entitlement Appeal, as the Superior Court ruled.

Moreover, the County's own decisions after its GMA comprehensive plan was adopted shows its continued recognition of the General zoning of the subject property when it approved a new residential lot of 11.900 square feet, clearly in excess of the rural reserve lots size limitations. For all these reasons, the Court should have reversed the decisions on appeal and ruled that Moore has the right to apply for a Third Major Amendment to plat the golf course into residential lots at the density approved by the County in 1990-91, and as reflected in the Memorandum of Agreement that constitutes an equitable servitude. Under the doctrine of finality, the Court cannot allow the County to collaterally attack its permitting decisions years later. *Chelan County v. Nykreim*, 146 Wn.2d 904, 931, 52 P.3d 1 (2002); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410-11, 120 P.3d 56 (2002); *Wenatchee Sportsman Ass'n v. Chelan County*, 141 Wn.2d 169 4 P.3d 123 (2000).

The 1995 map clearly shows UP 9-90 is deemed a zoning entitlement, explicitly mentioning it by number, and applying that classification along with a "General Zoning" designation to the Classic

Golf Course now owned by Moore. At the time of the permit decisions in 1990-91, the applicable General Zoning would have allowed residential development with no density limitation. (AR 14-180, 14-181). Moore continues to enjoy the rights granted in 1990-91.

The UP 9-90 reference on the Zoning Map demonstrates that the County approved a special category with a unique residential density rezone of .67 units per acre. (AR 14-379). The unique residential density established by UP 9-90 (and the key amendment thereto) vested the Classic property against later enacted down-zoning made to a rural area under the Growth Management Act ("GMA") because treated as a PDD. (AR 14-180, 14-181).

The decision to pursue an unclassified use permit was only to open the golf course; its development proceeded as a PDD,[8] and it was this development that was subject to the First Amendment. The Court is wrong where it states (Slip Opinion, p.20) the golf course was "developed" pursuant to UP 9-90.

The Court is also wrong that if the map constitutes a zoning entitlement, the zoning could still nonetheless be changed by the County. (Slip Opinion, pp 21-22). Again, the Zoning Map could only contain such designation if a PDD was considered approved. The purpose and

[8] TR July 3, 2014; AR 14-113 to 114; AR 14-116; AR 14-122 to 124; TR June 10, 2015; AR 15-201.

effect of the PDD/Rezone project component is explained by the Examiner in his First Decision:

> PDD approval would bind the parcel for development in accordance with a site plan approved by a hearing examiner. As set forth in PCZC 18.10.600(U):
>
> > **U. Parties Bound by PDD District. Once the preliminary development plan is approved by the Examiner, all persons and parties, their successors, and heirs who own or have any interest in the real property within the proposed PDD, are bound by the Examiner's action [approving a preliminary development plan].**
>
> * * *

Examiner's Ruling dated August 5, 2014 (*Moore I*), Finding No. 6, AR 15-789; AR 15-790. (Emphasis supplied).

Turning back to the vested rights issue, the Court misapplies the doctrine. Moore's argument is that its predecessor obtained protected property rights via the permit approvals and the Memorandum Agreement, which rights cannot now be taken away. *See*, among other cites, AR 14-166 (covenant); AR 14-167, -168, -170 (entitlement); AR 14-198, -200 (entitlement). The Court fails to address this argument, focusing instead on whether the PDD/rezone application could have become "vested" at the outset. Slip Op. at p. 21-22.

The basis for Moore's argument that the golf course property may be developed at pre-GMA densities is found in the rights that its predecessor secured in the early 1990s. The residential development conditions in the 1990-91 decisions are part of the "bundle of sticks" that LeMay was granted by amendment to the special use permit and by creation of the equitable servitude. *Crisp v. Vanlaeken*, 130 Wn. App. 320, 323, 122 P.3d 296 (2005); *Crescent Harbor Water Co. v. Lyseng*, 51 Wn. App. 337, 339 n. 3, 753 P.2d 555 (1988); *see also* Stephen Phillabaum, Enforceability of Land Use Servitudes Benefiting Local Government in Washington, 3 Univ. Puget Sound L. Rev. 216, 216-18 (1979). Moore acquired this property interest when it purchased the subject property.

The Court failed to address this argument and instead focused on law relating to the "goal post" established with respect to certain land use applications that secure the standards under which the application may be processed. It evaluated Moore's "apples" vested property rights argument against the "oranges" vested rights doctrine, which is entirely inapplicable here. Rezoning of the subject property as evidenced by the 1995 Zoning Map is a vested property right that cannot be taken away without due process and just compensation. Neither has been given to Moore or its predecessor.

There is no factual or legal basis to sustain a ruling that the subject property cannot be developed consistent with the density approved in the early 1990s, evidenced by the 1995 Zoning Map and further confirmed by the County's own decision to approval a pre-GMA density residential lot after enactment of its GMA development regulations. The vested rights doctrine includes both procedural protections, as well as substantive protections that entitle a permit holder or its successor to develop their land free from changes to zoning laws enacted after issuance of a permit or other entitlement. *See Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 179-80, 322 P.3d 1219 (2014); *see also Lee & Eastes, Inc. v. The Public Service Commission*, 52 Wn.2d 701, 704, 328 P.2d 700 (1958) ("In this respect, a permit, once acquired and exercised, becomes a property right, subject to being divested for cause"). This Court failed to address the substantive protections of the vested rights doctrine in its ruling, which must be corrected on reconsideration. It further failed to address the fact that Moore enjoys the benefits of an equitable servitude, which rights never expire and cannot be disavowed by the County. *See Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888, 897, 337 P.3d 1076 (2014); *Lake Limerick Country Club, supra*, 120 Wn. App. at 252; *see* AR 14-165-66.

IV. CONCLUSION

For the foregoing reasons, Moore respectfully requests that this Court reconsider its December 18, 2017, decision in *RMG Worldwide, LLC, Michael H. Moore, its Manager, v., Pierce County*, No. 75401-7-I.

RESPECTFULLY SUBMITTED this 5th day of January, 2018.

By _____

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Counsel for Appellant RMG Worldwide, LLC, Michael H. Moore, its Manager

CERTIFICATE OF SERVICE AND MAILING

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I further certify that the original of the foregoing was timely filed on January 5, 2018 pursuant to RAP 18.6(c), as follows:

Washington State Court of Appeals, Division I
One Union Square
600 Union Street
Seattle, WA 98101-4170
Via Court's Online Portal

I further certify that I caused a true and correct copy of the foregoing to be served this date, in the manner indicated, to the parties listed below:

Cort O'Connor, WSBA #23439 Pierce County Prosecuting Attorney's Office 955 Tacoma Avenue South, #301 Tacoma, WA 98402-2160 (253) 798-6501, tel / (253) 798-6713, fax *Coconno@co.pierce.wa.us* *Jander1@co.pierce.wa.us* *Attorneys for Respondent Pierce County*	☐ *Legal Messenger* ☐ *Hand Delivered* ☐ *Facsimile* ☐ *First Class Mail* ☐ *Express Mail, Next Day* ☑ *Email* ☑ *COA Online Portal*

DATED at Bainbridge Island, Washington, this 5th day of January, 2018.

Jon Brenner, Paralegal

Moore – Motion for Reconsideration

Appendix A-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RMG WORLDWIDE LLC, MICHAEL H. MOORE, its Manager,	)	No. 75401-7-I
Appellant,	)	
v.	)	DIVISION ONE
PIERCE COUNTY,	)	UNPUBLISHED OPINION
Respondent.	)	FILED: December 18, 2017

MANN, J. — RMG Worldwide LLC (RMG) appeals two land use decisions of the Pierce County hearing examiner. In the first decision, the examiner found that RMG could not subdivide its existing golf course for residential development under the General Use zoning that was in effect in 1990, and that RMG must instead submit applications consistent with the current development regulations. In the second decision, the examiner held that RMG could not revive and proceed under a 1990 application for a Planned Development District (PDD)/Rezone approval because the PDD/Rezone application was abandoned. RMG appealed both decisions to the superior court under the Land Use Petition Act (LUPA), chapter 36.70C RCW. The superior court affirmed both decisions of the hearing examiner. We also affirm.

FACTS

The Property

This case concerns a 157 acre parcel of property located in the southeast quadrant of the intersection of 208th Street East and 46th Avenue East in the Graham area of unincorporated Pierce County. In the mid-1980s, the property owners, Harold LeMay Enterprises, Inc. and Otaka, Inc. (collectively LeMay), began exploring the possibility of developing a golf course on the land and consulted with experts and the County. Following its consultations, LeMay decided to improve a portion of the property with a golf course, single family residential dwellings, and a small commercial area. The County advised LeMay that it could construct the golf course by obtaining a grading and filling permit. At the time, the property was zoned General Use, a Pierce County zoning classification which allowed multiple and varied uses. In February 1989, the County issued a grading and filling permit for construction of a golf course on the central portion of the property, approximately 125 acres of the 157 acre parcel. LeMay then began construction of the golf course.

Development of the Property

On May 18, 1990, LeMay filed an application for the "Classic Estates, a PDD."[1] The application requested a PDD, a rezone, and a preliminary subdivision. The detailed description of the request was for "Creation of 96 single family lots, an 18-hole championship public golf course and commercial reserve on a 157.6 acre parcel of

[1] Under the Pierce County Code (PCC) 18.10.610 (A), a Planned Development District or PDD is "intended to be a flexible zoning concept. . . . The uses within the PDD depend on the uses in the underlying zone or the Potential Zone. The residential densities within the PDD may vary depending upon how the land is developed with general aesthetics, natural areas, and open space being an incentive."

vacant land. Property will be served by public water, private roads and individual on-site septic systems." The application identified that 120.6 acres would be left in open-space with 30 acres left in natural vegetation.

Shortly after LeMay submitted the PDD application, the Pierce County Department of Planning and Natural Resource Management (Department) contacted LeMay's agent and advised him that, under the General Use zone, a golf course was listed as an "unclassified use" and would need an unclassified use permit (UP) before it could operate. The Department subsequently met with representatives from LeMay to discuss options for proceeding. The meeting was summarized in a June 26, 1990, letter from Robert Hansen, the Department's principal planner:

> I wish to summarize our meeting last Tuesday in regard to the Classic Golf Course and what was necessary in order for the course to open.
>
> I first presented you last year an[d] at this meeting with two options. The course's construction could open with the approval of either a Planned Development District (PDD) or with an Unclassified Use Permit (UP), both requiring a public hearing before a Hearing Examiner. A PDD was suggested if uses other than the golf course were to be proposed. However, a PDD was likely to take more time to complete since more factors will be examined in a multiple use project. Therefore, it was determined by your group to have an Unclassified Use Permit requesting only the golf course with land set aside for future development. It was understood that a Major Amendment to the Unclassified Use Permit could be requested in the future and would be necessary if further land development is to take place.
>
> It was my determination that the earliest the matter could be brought before the Hearing Examiner is Tuesday, August 2, 1990, if a site plan, application and filing fees were filed by Tuesday, June 25, 1990. . . . Decision upon the Unclassified User Permit for the golf course would occur within two to four weeks depending upon the schedule of the Hearing Examiner and we will emphasize to the Examiner that we would like a decision on this matter as soon as possible.[2]

[2] (Emphasis added.)

That same day, June 26, 1990, Lemay submitted an application for a UP permit for the golf course. The application requested "an Unclassified Use Permit be issued to allow construction of an 18-hole golf course with clubhouse, parking and related facilities . . . Portions of the site along the west boundary and at the northeast corner will be retained for future development."

Consistent with the Department's letter to LeMay, on August 2, 1990, a public hearing was held before the Pierce County hearing examiner to consider the UP application. On October 2, 1990, the hearing examiner issued a decision approving the UP for the golf course (UP9-90). The UP9-90 decision was not appealed. On June 20, 1991, LeMay recorded a memorandum of agreement and covenant setting forth the conditions and requirements for the operation and maintenance of the golf course approved by UP9-90.

On September 11, 1990, prior to the hearing examiner's decision, LeMay submitted a letter formally requesting to "reactivate" the Classic Estates preliminary plat/PDD. The Department responded on January 10, 1991, by notifying LeMay's project engineer that it would treat the request for the 96 lot residential subdivision as a major amendment to the UP:

> As we discussed in our January 10, 1991, telephone conversation, I will be processing the residential portion of this proposal as a Major Amendment to the already adopted and approved Classic Golf Course Unclassified Use Permit, UP9-90. In this way, the potential for the establishment of a water tower to provide potable and fire fighting flows for the residential subdivision and the golf course building can be addressed.

On February 14, 1991, the Department issued a staff report for the "Preliminary Plat: Classic Estates Unclassified Use Permit: UP9-90, Classic Golf Course (Major

Amendment)." The proposal was described by staff as a request for "a major amendment to a previously approved Unclassified Use Permit to establish a 96 lot single-family residential subdivision and a single 8 ft. high water tower." The staff report set out the pertinent policies and regulations that the hearing examiner was required to address, including the existing comprehensive plan, zoning code, and the required findings and determinations necessary for approval under the Pierce County Subdivision Code.

After a public hearing, on March 5, 1991, the hearing examiner issued a report and decision on March 5, 1991 (1991 decision). After reviewing the testimony and proposal, the examiner concluded that the "proposal does not adversely affect the neighbors or the neighborhood and the appropriate provisions by the regulatory requirements and the conditions hereof shall provide for public health, safety and general welfare for the surrounding neighborhood." The decision approved a major amendment to UP9-90 allowing for the establishment of "a 96 lot single-family residential subdivision and a single 8 foot high water tower adjacent to the Classic Golf Course." The decision required submission of a final subdivision plat within 3 years with a provision for a one year extension. The hearing examiner's decision approving the major amendment was not appealed.

After the hearing examiner granted one-year extensions of the deadline for submitting a final subdivision plat in 1994, 1995, and 1996, on May 18, 1998, the

hearing examiner approved the final plat of the 96 lot subdivision adjacent to the golf course.[3]

In 1993, LeMay subsequently applied for and received a large lot subdivision that divided the 157 acres parcel into three lots. Lot 1, in the northeast corner of the original parcel, contains 6.25 acres and is improved with 11 single family residential lots and an area set aside and zoned for commercial use. Lot 2 contains 124.83 acres and supports an 18-hole golf course, practice driving range, parking spaces, and a clubhouse. Lot 3 extends along the west property boundary, contains 26.51 acres, and is improved with 85 single family residential units.

Meanwhile, the legislature adopted the Growth Management Act (GMA), chapter 36.70A RCW in 1990. The County adopted its first GMA comprehensive plan in 1994. The comprehensive plan placed LeMay's property outside the County's urban growth area (UGA). The County then changed the zoning on the property from General Use to Rural Reserve. The Rural Reserve zoning classification is a rural (i.e., non-urban) zoning classification that limits residential lot sizes to one residential dwelling unit per five acres. The County's rezoning of the property from General to Rural Reserve was not challenged.

Recent Attempt to Develop the Golf Course Parcel

RMG purchased Lot 2, the 120 acres golf course parcel, in 2005 and continued to operate it as a golf course. Between 2005 and 2013, RMG unsuccessfully attempted to have Pierce County amend the comprehensive plan to place the golf course parcel

[3] In the May 1995 decision granting a one-year extension, the hearing examiner noted the effect of the County's new GMA comprehensive plan: "[t]he Comprehensive Plan places the site in Rural Reserve designation. . . .The applicant's plat is of a substantially greater density than allowed by the plan."

and the subdivision within the County's UGA, and change the zoning from Rural Reserve to Moderate Density Single Family—an urban zoning classification. Following the most recent attempt in 2013, the County advised RMG that it would be many years before the parcel would be placed within the UGA. The golf course parcel zoning remains outside of the UGA and zoned Rural Reserve.

On February 13, 2014, RMG's agent submitted a proposal to the Department seeking another major amendment to UP9-90 allowing RMG to develop the golf course property as a new residential subdivision. RMG's letter recognized that LeMay's original 1990 PDD/Rezone application for the entire 157 acre property had been converted to an application for a UP: "[t]he County (over LeMay's objection) processed the PDD/preliminary plat application as an unclassified use permit." The letter requested the Department to process a major amendment to UP9-90 "under the zoning in effect at the time when UP9-90 was approved."

On March 24, 2014, the Department responded by issuing an administrative determination concluding that in order to convert the golf course parcel into a residential subdivision, RMG would need to file a new application for a major amendment to the UP and a new application for a subdivision. The administrative determination informed RMG that the new subdivision would need to be consistent with the current zoning density prescribed by the current zoning code, Rural Reserve, rather than General Use zoning that was in effect in 1990.

On April 3, 2014, RMG appealed the Department's administrative determination to the Pierce County hearing examiner; again arguing that redevelopment of the golf course into a residential subdivision should be reviewed under the 1990 zoning. After a

public hearing, on August 5, 2014, the examiner denied RMG's appeal (2014 decision).

The examiner's findings and conclusions included:

- The Department's June 26, 1990, letter gave LeMay two options to complete and open the golf course: (a) proceed with the PDD/Rezone or (b) apply for an unclassified use permit in order to open the golf course, reserving the remainder of the property for future development.
- LeMay elected to proceed with the unclassified use permit and submitted an application on June 26, 1990.
- LeMay received approval for the unclassified use permit UP9-90 to develop the golf course on October 2, 1990.
- LeMay subsequently received approval for a major modification to UP9-90 allowing for preliminary plat approval for a 96 lot residential subdivision on adjacent to the golf course.
- LeMay constructed both the golf course and adjacent residential subdivision within UP9-90.
- LeMay then applied for and received a large lot subdivision separating the golf course parcel (parcel 2) from the residential parcels (parcels 1 and 3).
- RMG acquired the golf course parcel in 2005 and has operated it as a golf course since then.
- RMG unsuccessfully attempted to have the golf course property brought within the county's urban growth area and rezoned for to allow urban residential density.
- Approval of UP9-90 did not rezone the property nor did it establish a density for future residential development.
- To establish a single family subdivision RMG must apply for an amendment to UP9-90 and a preliminary plat that meets current zoning regulation.

After unsuccessfully seeking reconsideration, on September 22, 2014, RMG filed a timely petition for judicial review under LUPA. The parties agreed to stay the 2014 LUPA petition.

On October 15, 2014, RMG sought, in the alternative, to "pursue completion of the pending rezone and PDD applications submitted in May of 1990." On January 14, 2015, the Department responded with a second administrative determination finding that the 1990 PDD/Rezone application had been abandoned.

RMG also appealed the second administrative determination to the hearing examiner. After a hearing, on August 6, 2015, the examiner denied RMG's appeal, finding the original 1990 PDD/Rezone application had been abandoned (2015 decision). The examiner's findings and conclusions included:

- When LeMay applied for the unclassified use permit on June 26, 1990, it abandoned the previous application for the PDD/Rezone.
- All subsequent activities of Pierce County, LeMay, and LeMay's successors, including RMG, were consistent with the decision to apply for the unclassified use permit and abandon the PDD/Rezone.
- The Department's staff report for the 1990 hearing on the unclassified use permit noted the change in the permit application from a PDD/Rezone to an unclassified use permit.
- LeMay's agent, Moore, confirmed in his 1990 hearing testimony that the application had changed to an unclassified use permit.
- In March 1991, the hearing examiner approved a major amendment to the UP9-90 approving a 96 lot residential subdivision for a portion of the property.
- In 1998, the hearing examiner approved the final plat for the 96 lot residential subdivision portion of the property.
- Pierce County zoning maps were never amended to show a zone change or PDD approval.
- After purchase, RMG attempted to have the golf course property moved into the urban growth area and rezoned for urban development.

- Seeking approval of a PDD/Rezone application after 25 years is inconsistent with timely processing and approval of land use application, the doctrine of finality, and the 21-day appeal period under LUPA.

RMG timely filed a second LUPA petition. The parties agreed to consolidate the two LUPA petitions in the King County Superior Court. After a consolidated hearing on the merits, on May 19, 2016, the superior court denied RMG's petitions for review. RMG appeals.

ANALYSIS

Standard of Review

LUPA provides the exclusive means for judicial review of a land use decision. Phoenix Dev., Inc. v. City of Woodinville, 171 Wn.2d 820, 828, 256 P.3d 1150 (2011). In reviewing a land use decision, this court stands in the same position as the superior court and reviews the administrative record before the hearing examiner. Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 751, 49 P.3d 867 (2002).

For an appellant to overturn a land use decision under LUPA, the appellant carries the burden of proving one or more of six standards of relief set out in RCW 36.70C.130(1). Abbey Rd. Grp., LLC v. City of Bonney Lake, 167 Wn.2d 242, 249, 218 P.3d 180 (2009). RMG pursues relief under LUPA standards (a), (b), (c), (d), and (f), which state:

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

RCW 36.70C.130(1).

Standards (a), (b), and (f) present questions of law that we review de novo. We give due deference to the local government's construction of the law within its expertise. Abbey Rd., 167 Wn.2d at 250. Standard (c) concerns a factual determination that we review for substantial evidence. "Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted." Abbey Rd., 167 Wn.2d at 250. We view the facts and inferences in a light most favorable to the party that prevailed in the highest fact-finding forum. In this case, the County prevailed before the hearing examiner. Abbey Rd., 167 Wn.2d at 250. A finding is clearly erroneous under subsection (d) when, although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

1990 Unclassified Use Permit

At the outset, it is necessary to distinguish between LeMay's February 1990 application for a PDD and rezone—the Classic Estates PDD, and its June 26, 1990, application for a UP to construct an 18 hole golf course, clubhouse, and related facilities—UP9-90.

A PDD, often referred to in other jurisdictions as a planned unit development (PUD), or a planned residential development (PRD), is a regulatory technique which

excuses a developer from otherwise applicable zoning regulations in exchange for submitting to detailed, tailored regulations. City of Gig Harbor v. N. Pac. Design, Inc., 149 Wn. App. 159, 169, n.9, 201 P.3d 1096 (2009). Under the 1990 Pierce County Code, a PDD is "intended to be a flexible zoning concept." The uses within the PDD depend on the uses in the underlying zone or the "potential zone" if a rezone is also requested. "The residential densities within the PDD, however, may vary depending upon how the land is developed with general aesthetics, natural areas, and open space being an incentive." If the applicant seeks to include a use that is not allowed in the existing code, they may simultaneously apply for a rezone. An approval of a PDD or PDD/Rezone is considered an amendment to the zoning map. PCC 18.10.610 (J).

A UP in contrast does not rezone or amend the zoning map. A UP is designed to address uses that may or may not be appropriate in a particular zone due to their variability in size, number of people involved, traffic, and immediate impact. A UP simply approves a particular land use on a particular parcel or parcels. As Division Two of this court explained in 1990,

> The Pierce County Code authorizes the examiner to consider applications for unclassified use permits in general use zones, and to grant them for proposed uses that are consistent with the purpose and intent of the Comprehensive Plan, land use management programs, and the spirit and intent of the Code, and for uses that are not "unreasonably incompatible" with the uses permitted in the surrounding areas.

Maranatha Min., Inc. v. Pierce County, 59 Wn. App. 795, 801, 801 P.2d 985 (1990). In 1990, the Pierce County Code identified golf courses as a type of use that requires a UP.

Here, it is undisputed that LeMay applied first for the Classic Estate PDD, which proposed the "creation of 96 single family lots, an 18-hole championship public golf course and commercial reserve area on a 157.6 acre parcel of vacant land." The application included a concurrent request for a rezone. Then, after the County suggested that LeMay could speed up the opening of its golf course by opting instead to submit an application for a UP, LeMay promptly complied. On the same day the County notified LeMay of its two options, LeMay submitted an application for UP9-90 "to allow construction of an 18-hole golf course with clubhouse, parking & related facilities" while retaining "portions of the site along the west boundary & at the northeast corner" for future development.

Consistent with LeMay's choice to proceed under the UP process, the hearing examiner reviewed and approved UP9-90. Importantly, the hearing examiner's report and decision approving UP9-90 makes no mention of LeMay's earlier application for a PDD or for residential housing. Instead, finding that construction of a public golf course was compatible with the surrounding residential uses and beneficial to the public, UP9-90 approved only the "continued construction of an 18-golf course with clubhouse on a 157.6 acre lot located south of 208th St. and east of 46th Ave. E. in Pierce County."

The 1991 Major Amendment

RMG first challenges the hearing examiner's 2014 decision determining that the County did not approve the original 1990 PDD/Rezone, and that any future subdivision of the golf course parcel must comply with current Rural Reserve zoning requirements. While RMG agrees that an "unclassified use permit cannot provide a zoning entitlement," it nonetheless argues that the County's subsequent approval of the 1991

major amendment allowing the 96 lot subdivision, effectively rezoned the entire original 157 acre property, including the golf course parcel, giving RMG an entitlement to develop the golf course parcel at the same density as the 96 lot subdivision.

RMG argues first that a map excerpt from Pierce County's 1995 zoning access showing an annotation of "UP9-90" along with "G" for General zoning provides "hard evidence" that UP9-90 rezoned the property. RMG's reliance on the map excerpt is misplaced for at least three reasons. First, the 1995 zoning map was not introduced before the hearing examiner during RMG's appeal of the 2014 decision determining whether the property had been rezoned. Nor did RMG argue below that the property was subject to an overlay designation. "Failure to raise issues during the course of an administrative hearing precludes consideration of such issues on review." Westside Bus. Park v. Pierce County, 100 Wn. App. 599, 608, n.5, 5 P.3d 713 (2000); Griffin v. Dep't of Soc. & Health Servs., 91 Wn.2d 616, 631, 590 P.2d 816 (1979). Thus, the 1995 zoning map is not properly before us.

Second, even if the 1995 map was properly before us, there is no evidence that the notation UP9-90 was intended to be a zoning designation or an overlay. It could just as easily have been the County's notation that the County had approved an unclassified use permit on the parcel. Without evidence or testimony establishing the County's intent with the annotation, we are left to guess. Mere theory or speculation cannot support a finding. Johnson v. Aluminum Precision Prods., 135 Wn. App. 204, 208-09, 143 P.3d 876 (2006).

Finally, and perhaps most importantly, even if the 1995 map was properly before us, RMG does not dispute that the property, including the golf course on Lot 2, was

rezoned after the County adopted its GMA comprehensive plan to rural reserve. The County's current zoning map identifies Lot 2 as zoned Rsv5—Rural Residential. Thus, even if RMG is correct and UP9-90 rezoned the property, the property was later rezoned.

RMG argues second that the County's process approving the 1991 major amendment and 96 lot subdivision was effectively a decision approving the original PDD and rezoning the entire 156 acre parcel to allow for development under the old General zoning. This argument also fails.

While RMG acknowledges that neither the staff report nor hearing examiner's 1991 decision approving the preliminary plat mention or discuss the PDD/Rezone application, it asserts that because the 1991 decision included findings necessary for approval of a PDD, the hearing examiner must have approved a PDD and rezoned the property. RMG ignores, however, that not only do neither the staff report nor the 1991 decision reference a PDD/Rezone application, but both documents specifically identify the proposal as an application "to establish a 96 lot single-family residential subdivision and single 8 foot high water tower."

RMG also ignores that the staff report set forth the inquiries and necessary findings for approval of a preliminary plat under the County's subdivision code and then identified each of the regulatory requirements necessary to address areas such as circulation, access, fire protection, storm drainage, water supply, and sewage. The hearing examiner then inquired into and found that the proposed preliminary plat would not significantly impact the environment and that, consistent with the County's subdivision division code, that "appropriate provisions by the regulatory requirements

and the conditions hereof shall provide for public health, safety and general welfare for the surrounding neighborhood." On its face, the hearing examiner's 1991 decision approved a 96 lot preliminary subdivision plat.[4] There is no basis to support RMG's assertion that the 1991 decision approved a PDD or rezoned the entire 157 acre parcel to the densities approved in the subdivision.

The hearing examiner's findings in the 2014 decision, that the 1991 decision approving the major amendment to allow the 96 lot subdivision did not approve either a PDD or rezone, are supported by substantial evidence. RCW 36.70C.130(1)(c). Further, the hearing examiner's conclusions in the 2014 decision, that RMG may apply to amend UP9-90 for the golf course parcel and seek preliminary plat approval based on the current rural reserve zoning requirements, was not an erroneous interpretation of the law. RCW 36.70C.130(1)(b).[5]

PDD/Rezone Application

RMG next challenges the hearing examiner's 2015 decision determining that RMG had abandoned the original 1990 PDD/Rezone application. RMG argues that there is no evidence that the application was abandoned and that the ruling on abandonment is an error of law. We disagree for two reasons.

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[4] To the extent RMG is challenging the 1991 decision for failing to make sufficient findings or conclusion, it is too late. The well-settled doctrine of finality in Washington requires that challenges to a land use decision be raised quickly—not 23 years later. See Skamania County v. Gorge Comm'n, 144 Wn.2d 30, 49, 26 P.3d 241 (2001); Durland v. San Juan County, 182 Wn.2d 55, 60, 340 P.3d 191 (2014).

[5] RMG also argues that because the County required the UP9-90 conditions to be recorded as a covenant that it is entitled to an equitable servitude creating a zoning entitlement. The recorded covenant, however, contained the hearing examiner's conditions of approval for the golf course only and nothing about the right to residential densities that run with the land. The recorded covenant does not create a zoning entitlement.

A. The 2015 Decision is Supported by Substantial Evidence and is not Legally Erroneous.

First, the hearing examiner's 2015 decision that the 1990 PDD/Rezone application was abandoned is based on substantial evidence and was not an erroneous application of the law. RCW 36.70C.130(1)(b) and (c); Abbey Rd., 167 Wn.2d at 249-50.

Both RMG and the County agree that no Washington court has directly concluded when or how a land use application may expire or be abandoned. But, as the County argues, Washington does apply the doctrine of finality as a means to encourage expeditious challenges to land use decisions. See Skamania County v. Gorge Comm'n, 144 Wn.2d 30, 49, 26 P.3d 241 (2001); Chelan County v. Nykreim, 146 Wn.2d 904, 931-32, 52 P.3d 1 (2002); Durland v. San Juan County, 182 Wn.2d 55, 60, 340 P.3d 191 (2014). As our Supreme Court explained in Durland, "[t]his court has faced numerous challenges to statutory time limits for appealing land use decisions and has repeatedly concluded that the rules must provide certainty, predictability, and finality for land owners and the government." Durland, 182 Wn.2d at 60. The hearing examiner applied this rule, concluding,

> postponing the exercise of the permit from 1990 to 2014 detrimentally impacts the public health and safety and the County's ability to implement its Comprehensive Plan and development regulations pursuant to the Growth Management Act. Such process also violates the finality in land use matters required by our Washington Supreme Court in cases such as Chelan County v. Nykreim, et al., 146 Wn. 2d 904 (2002), and by our State Legislature in its enactment of the Land Use Petition Act (RCW 36.70C) that provides a 21 day statute of limitations to challenge a land

use decision. Predecessor needed to challenge the County's actions in 1990 if it disagreed with such.[5]

Here, the Pierce County Code requires all reviewing departments to "complete an initial review within 30 days from the application filing date." PCC 18.60.020. Under PCC 18.100.010, "the Director or Examiner shall issue a notice of final decision on a permit within 120 days, of County review time, after the Department accepts a complete application as provided in PCC 18.40.020." Finally, under RCW 36.70B.070, a local government must provide a written determination within 28 days. If, as RMG suggests, the property owners did not intend to withdraw the application, then the time to request action on the application would have been at the conclusion of these time limits. The "property owner is responsible for monitoring the time limitations and review deadlines for the application. The County shall not be responsible for maintaining a valid application." PCC 18.160.050(F). After giving due deference to the hearing examiner's construction of the law, the examiner's conclusion that an application can expire or be abandoned is not an erroneous application of the law. RCW 36.70C.130(1)(b); Abbey Rd., 167 Wn.2d at 249-50.

Further, the hearing examiner's findings that RMG and the previous owners intended to abandon this application is supported by substantial evidence. First, after LeMay submitted its PDD application in 1990, its agents met with the Department and were notified of two options. LeMay chose the quicker option, and promptly applied for an unclassified use permit for the golf course alone instead of a PDD. As LeMay's agent, Moore, testified in 1990,

[5] Administrative Record (AR) at 15-12.

> We intended to do a PDD on the whole property, which would have included, at this hearing, the subdivision, the golf course, and an area set aside for commercial use in the future . . . retail, neighborhood commercial or something. We then, through the encouragement of planning, changed into simply a UP on the golf course portion now. The subdivision and any other uses will be addressed at a later time. We did talk about doing the whole 157 +/- acres; we intended to do the whole project at once. We now modified; we're simply doing the golf course today. We will be submitting at some point in the future a site plan for the subdivision and other uses.[7]

Second, in 1991, LeMay requested that the County "revive" the PDD application. In response, the County stated they would use a major amendment to the UP instead. Neither LeMay, nor any of the other property owners, contested or appealed that decision.

Third, from 1991 to 2014, the owners failed to request any information or pursue any action in furtherance of the PDD application. In 1995, Moore again stated the intent to abandon the PDD application, when he testified at a hearing that "[w]hen his golf course was in process, the planner then said he couldn't do it under a PDD, so he pulled the commercial and residential use out and submitted a UP for the golf course." Although Moore stated he was unhappy with the decision to pursue a UP instead of a PDD, he acknowledges his intent to do so.

Fourth, as the hearing examiner recognized in the 2015 decision, if RMG believed that the 1990 PDD/Rezone application was still pending, why did it pursue a legislative change to move the golf course into the UGA and rezone the property for urban densities? The documentation submitted by RMG in conjunction with its 2011 and 2013 legislative requests to be included in the UGA establish that RMG knew that

[7] (Emphasis added.)

the golf course was zoned Rural Reserve and that a rezone would be necessary to develop the land at higher densities.

Finally, RMG argues that this court should apply the requirements for abandonment when dealing with a nonconforming use, a standard that deals with the taking of a vested property right. Under Van Sant v. City of Everett, 69 Wn. App. 641, 647-48, 849 P.2d 1276 (1993), a City alleging abandonment of a use must show "(a) an intention to abandon; and (b) an overt act, or failure to act, which carries the implication that the owner does not claim or retain any interest in the right to the nonconforming use." Both have been shown in this case.

RMG's overt acts attempting repeatedly to pursue a legislative reclassification of the golf course into the UGA and rezone the property for urban densities, certainly support the implication that it recognized that the PDD/Rezone application had been abandoned. Further, RMG's predecessor, LeMay, demonstrated its abandonment of the PDD/Rezone application when it took full advantage of UP9-90 to develop and open the golf course, and then separately applied for and developed the 96 lot subdivision under a major amendment to UP9-90. LeMay chose to develop the property under the UP rather than rely on its original PDD/Rezone application.

Not only is there substantial evidence to support the hearing examiner's findings regarding LeMay and RMG's abandonment of the PDD/Rezone application, but LeMay and RMG's actions also demonstrate that both entities knew that the PDD/Rezone application was abandoned.

B. The PDD/Rezone Application Was Not Vested

Second, even if the hearing examiner erred in concluding that an application could expire or be abandoned, RMG's argument still fails. RMG's argument is that its PDD/Rezone application vested and that "[t]he County cannot legally 'take away' a vested application that it has deemed complete simply by demanding an additional permit approval not originally required." Contrary to RMG's assertion, its PDD/Rezone application did not vest.

Washington's vested rights doctrine originated at common law and uses a "date certain" standard that entitles developers to have land development proposals processed under the "regulation in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations." Abbey Rd., 167 Wn.2d at 250. "By promoting a date certain vesting point, our doctrine ensures that 'new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law.'" Abbey Rd., 167 Wn.2d at 251 (quoting Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 637, 733 P.2d 182 (1987)).

As our Supreme Court explained,

> [d]evelopment interests can often come at a cost to public interest. The practical effect of recognizing a vested right is to potentially sanction a new nonconforming use. "A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws." If a vested right is too easily granted, the public interest could be subverted.

Abbey Rd., 167 Wn.2d at 251 (quoting Erickson & Assocs., Inc. v. McLerran, 123 Wn.2d 864, 873-74, 872 P.2d 1090 (1994)).

While Washington's vested rights doctrine originated at common law, "the vested rights doctrine is now statutory." Town of Woodway v. Snohomish County, 180 Wn.2d 165 173, 322 P.3d 1219 (2014); Potala Vill. v. City of Kirkland, 183 Wn. App. 191, 194, 334 P.3d 1143 (2014). As such, the vested rights doctrine extends only to complete applications for building permits (RCW 19.27.095(1)); subdivisions (RCW 58.17.033(1); and development agreements (RCW 36.70B.180). Town of Woodway, 180 Wn.2d at 173. Here, because applications for a PDD or rezone are not vested by statute, the vested rights doctrine does not apply. Thus, even if the original PDD/Rezone application had not been abandoned, the application would still be subject to the current Rural Reserve zoning and not the pre-GMA General zone.

Attorney Fees

The County requests that it be awarded its reasonable attorney fees and costs on appeal. RCW 4.84.370 provides that reasonable attorney fees and costs "shall be awarded" to the prevailing party on appeal where the prevailing party also prevailed before the local government and in superior court. Because the County prevailed before the hearing examiner and the superior court, it is entitled to an award of its reasonable attorney fees and costs for defending this appeal. Durland, 182 Wn.2d at 77-80.

Affirmed.

WE CONCUR:

Appendix A-2

THE HONORABLE BRUCE E. HELLER, DEPT. 52

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

RMG WORLDWIDE LLC, MICHAEL H. MOORE, its Manager, Petitioner, v. PIERCE COUNTY, Respondent.	No. 14-2-27755-5 KNT *(Consolidated with 15-2-20810-1 KNT)* **ORDER GRANTING PETITIONER'S REQUEST TO TAKE OFFICIAL NOTICE AND DENYING RESPONDENT'S MOTION TO STRIKE** Hearing: Friday, January 29, 2016, 11:00 a.m.

This matter came before the Court on Petitioner RMG Worldwide, LLC, Michael H. Moore, its Manager's Request to Take Official Notice of a 1995 Pierce County Zoning Map, and on Respondent Pierce County's Motion to Strike the submitted map. The Court having considered the Parties' briefing and the Declaration of Carl Halsan in Support of Request to Take Official Notice (with attachments) dated November 25, 2015, the Declaration of Jill Guernsey (with attachments) dated January 29, 2016, and the Declaration of Jennifer Jaye Pelesky dated January 28, 2016, and having taken oral argument (and receiving the agreement of counsel for both parties made in open court that the 1995 Zoning Map is part of the Administrative Record submitted to the Court in King County Cause No. 15-2-20810-1 KNT (Administrative Record at pp.15-775, Exhibit 10A before the Hearing Examiner in Case

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No. AA3-15), but not in King County Cause No. 14-2-27755-5 KNT), and having considered the records and files herein, and being fully advised, hereby ORDERS, ADJUDGES and DECREES that:

1. Petitioner RMG Worldwide, LLC, Michael H. Moore, its Manager's Request to Take Official Notice of the 1995 Pierce County Zoning Map found in the County's Zoning Atlas is GRANTED to the extent required to make the map evidence in King County Cause No. 14-2-27755-5 KNT.

2. The 1995 Pierce County Zoning Map is considered part of the record in this consolidated appeal for all purposes, and may be included in the parties' briefs and arguments on the merits in this consolidated appeal.

3. Respondent Pierce County's Motion to Strike is DENIED.

4. The Court declines to rule at this time on the County's motion to strike arguments relating to waiver, and allows the County to raise such arguments in the briefs and arguments on the merits.

DONE ~~IN OPEN COURT~~ this 7 day of March, 2016.

KING COUNTY SUPERIOR COURT

The Honorable Bruce E. Heller, Dept. 52

Presented by:

Dennis D. Reynolds, WSBA #04762
Attorneys for Petitioner

Approved as to form:

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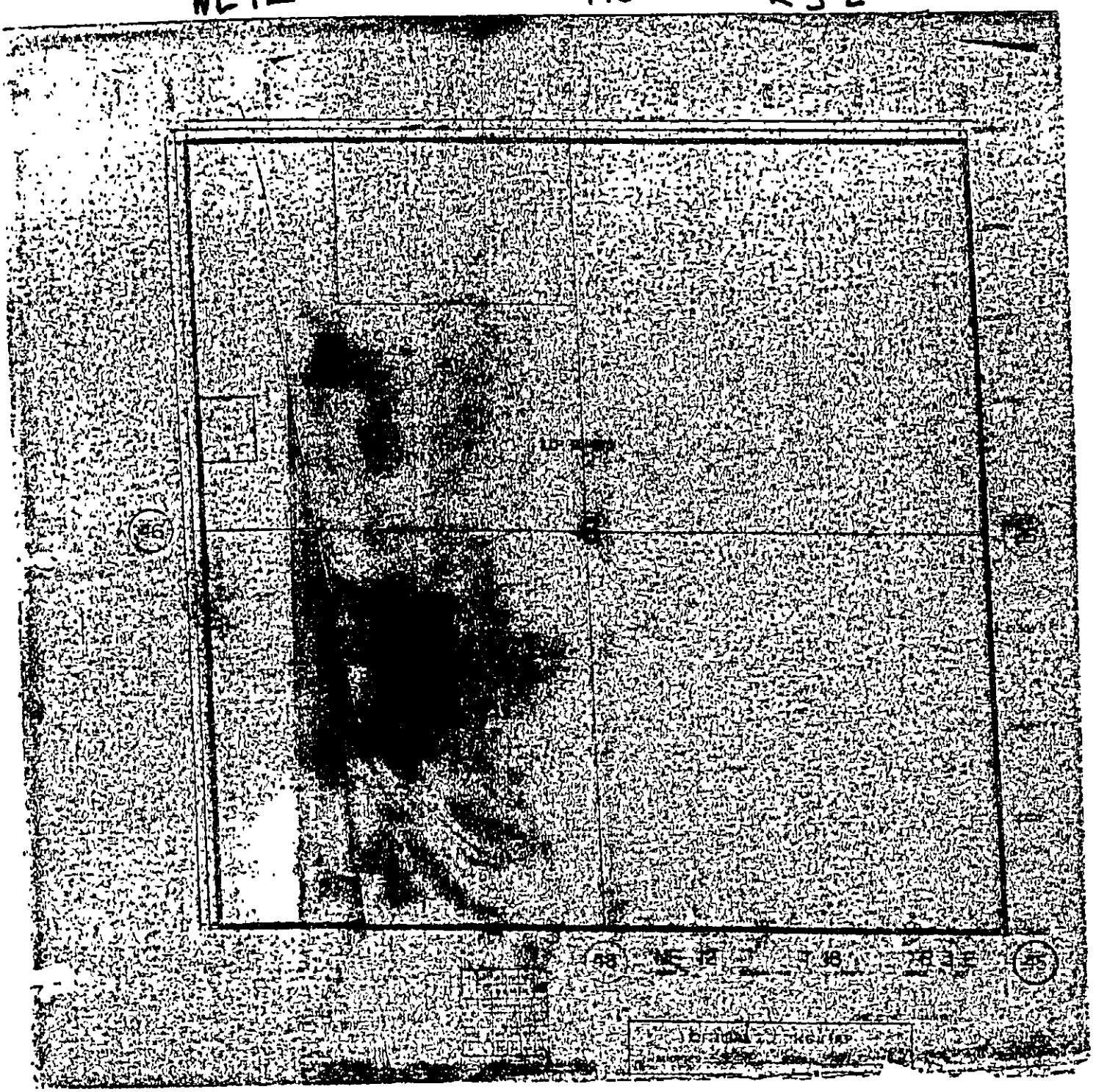
Appendix A-3

NE 12 T18 R3E



Hearing Examiner _____
Case No.: _____
Exhibit No.: 10

15-775 A

RMG Worldwide – Petition for Review

Appendix A-7

HAROLD LeMAY ENTERPRISES, INC.
13502 PACIFIC AVENUE
P.O. BOX 44459 — TACOMA, WA 98444-0459
Phone 537-8687

September 11, 1990

PLANNING AND NATURAL RESOURCE MANAGEMENT
SEP 11 1990
PIERCE COUNTY

Mr. Grant Griffin
Pierce County Planning & Natural
Resource Management Department
2401 South 35th St.
Tacoma, Washington 98409-7490

Subject: "Classic Estates" preliminary plat/PDD, Application in the NE 1/4, Sec 12, T 18N, R 3E, W.M.

Dear Mr. Griffin:

Please accept this letter as a formal request to reactivate the above referenced project application.

As you are aware, this proposal was put "on hold" pending the outcome of the unclassified use permit applications for the golf course and clubhouse. However, we feel it is in our best interest to move forward on this project at this time rather than wait until spring of next year.

All review fees have been paid on this project, verification of which is attached.

Sincerely,

Barb LeMay
Executive assistant

cc Larson & Associates
Michael Moore, Project Mgr.

14-277