

65279-6

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ORIGINAL

No. 65279-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

F.G. ASSOCIATES,

Appellants,

v.

GRAHAM NEIGHBORHOOD ASSOCIATION, a Washington non-profit
corporation; RAY STRUB; GEORGE WEARN; JAMES L. HALMO; and
PIERCE COUNTY,

Respondents.

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APPELLANTS F.G. ASSOCIATES' REPLY BRIEF

GORDON THOMAS HONEYWELL LLP
William T. Lynn
Margaret Y. Archer
Attorneys for Appellants F.G. Associates

Suite 2100
1201 Pacific Avenue
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500

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I. **F.G. ASSOCIATES SUBMITTED A COMPLETE, FULLY VESTED APPLICATION ON APRIL 25, 1996**

If one looks beyond the inflammatory hyperbole laced throughout respondents' brief, it becomes clear that the asserted bases for their claim that F.G. Associates' April 25, 1996 application was incomplete are limited to two reasons: (1) F.G. Associates (F.G.) was required to make a small supplemental application fee payment (\$150) after it initially paid \$440 at the County's direction; and (2) the F.G. consultant's answers to the questions posed on the Environmental Checklist were, in respondents' view, substantively inadequate. Their challenges are not supported by either the applicable Pierce County regulations or the record.

A. **The Standards For "Completeness" Are Set By Local Code, Not Respondents' Desired Subjective Standards. The Applicable Local Ordinance Does Not Support Respondents' Challenge.**

"[T]he definition of a 'completed application' is entirely in the hands of local governments." *Friends of the Law v. King County*, 123 Wn.2d 518, 525, n.3, 869 P.3d 1056 (1994); RCW 58.17.033(2). Despite the unambiguous direction in RCW 58.17.033, respondents spend remarkably little time discussing the actual ordinance governing the County's filing procedure. Rather than tie their challenges to specific language in the County's code, respondents instead devote substantial pages to their own independent assessment of F.G.'s

application content. Regardless, challenges to completeness must be based upon requirements clearly presented as prerequisites to vesting. “Vesting procedures which are ‘vague and discretionary’ cannot be used to deny an applicant vested rights.” *Id.* at 525.

In April 1996, the County’s subdivision “filing procedure” was set forth in Chapter 16.06 of PCC Title 16, Subdivisions and Platting. The chapter is not a “completeness ordinance” as described by respondents, nor does it contain “plain language” expressly intended for assessing completeness as respondents claim. (Brief at 25.) To the contrary, the terms “completed application” or “fully completed application” are nowhere to be found in the County’s subdivision regulations. The terms certainly are not defined as contemplated by RCW 58.17.033. (See, Chapter 16.06 PCC attached as Appendix A.) Rather, Chapter 16.06 PCC provides only a limited and perfunctory description of the County’s “filing procedure:”

A preliminary plat of a proposed subdivision and/or dedication of land located in the unincorporated areas of Pierce County shall be submitted for approval by the Examiner by filing with the Pierce County Planning Department, an application, paying the application fee, filing sixteen (16) copies and one (1) reproducible copy of the proposed preliminary plat, submitting a list of adjacent land owners as specified herein, submitting an approved Environmental Worksheet and when appropriate, an application for a zone amendment. Said application for zone amendment may be considered with the application for preliminary plat approval.

PCC 16.06.020. The ordinance describes only a list of documents to be filed before an application is presented to the Examiner for review, nothing more. The absence of more stringent filing requirements is significant to this Court's analysis of the completeness issue here.

Relevant to respondents' arguments, the County's filing procedure did not identify any required content or level of detail that must be included in the submitted forms. It likewise did not state that an application cannot be deemed complete until the forms, including the SEPA checklist, are qualitatively reviewed.¹ The "filing" provision provides that the applicant shall pay an application fee when the application is submitted (which F.G. did on April 25, 1996). (AR 270.) It does not, however, state that a later discovery (and correction) of a fee calculation error will cause the original application to be rendered incomplete for vesting purpose. Respondents cannot infer more demanding requirements for vesting than are stated in the ordinance.

This is precisely the circumstance addressed in *Friends of the Law*, where the Court found King County's prior ordinance "highly ambiguous" because it did not expressly define the term "fully

¹ Even if the ordinance did require a substantive review of the checklist, in the absence of stated objective standards, such a requirement might be deemed too "vague and discretionary" to be utilized to deny an applicant vested rights. To satisfy due process requirements, any content review would need to be pursuant to defined, objective standards. *Friends of the Law*, 123 Wn.2d at 525.

completed.” 123 Wn.2d at 524. Like here, ambiguity was compounded by the fact that the permitting agency’s regular and normal practices – practices upon which local applicants’ routinely and reasonably relied – were not wholly consistent with the subdivision ordinances. Faced with that circumstance, the Court found that an application submitted in compliance with the King County’s normal practices prevailed as complete and vested. *Id.* at 525.

Here, sworn testimony was presented by Terry Belieu, a Senior Land Planner with 20 years experience in the Planning and Land Services Department (PALS). (7-23-09 hearing, RP at 5.) Belieu testified that PALS’ normal and routine practice was to accept applications as complete without evaluating the substance of the documents themselves, confirming only that the requisite number of documents were included with the application. (*Id.*, RP 3-4, 6-7, 20-21; see also AR 455.) Moreover, the County’s normal practices were consistent with the plain language of the filing ordinance in effect in 1996, which did no more than list documents and forms that must be included with the plat application. The Examiner’s finding that the April 1996 application as complete was consistent with the 1996 ordinance

and the County's normal application intake practices.²

B. Whether The F.G. Application Was Complete Is A Fact Intensive Question. The Record Supports The Examiner's Finding That The Application Was Complete on April 25, 1996.

1. The issue of completeness is not a purely legal question.

Although respondents dedicate the majority of their brief to arguing their view of the facts, they state: "Whether an application is complete is a question of law." (Brief at 9.) Respondents misapply *Friends of the Law*, 123 Wn.2d at 523 to support their position.

That Court was faced with competing arguments regarding the meaning and affect of RCW 58.17.033. *Id.* at 524-26. The Court opened its decision accurately describing the appeal to "involve[] interpretation of RCW 58.17.033, which extended the common law vested rights doctrine to preliminary plats." *Id.* at 520. The appeal "involve[d] the Council's determination of the meaning of the 'fully completed application' doctrine of RCW 58.17.033." *Id.* Based on that characterization, the Court concluded the issue presented "a pure

² Respondents like to refer to the footnote 3 of *Friends of the Law* where the Court states that RCW 58.17.033 purports to takes a "zero tolerance" approach to completeness. They ignore, however, the important caveat also articulated by the Court. The so-called "zero tolerance" for non-compliance with later enacted local ordinances that define the requirements of a completed application only applies if the ordinances exist. *Id.* at 525. The *Friends of the Law* Court refused to precondition vesting upon strict compliance with code provisions that were not unambiguously intended to define a complete plat application for purposes of determining a landowners' vested rights. *Id.* at 525. This Court should reject respondents' invitation to read more stringent requirements into PCC 16.06.020 than are expressly stated, especially since the ordinance does not purport to define a

question of law” and “review of the Council’s interpretation of the statute [would] proceed de novo.” *Id.*

Friends of the Law cannot, however, be construed to hold that all cases involving a determination of completeness will present only pure questions of law. Application of RCW 58.17.033, as interpreted by the *Friends of the Law*, will depend upon resolution of factual disputes regarding the application itself, the applicant’s actions, the review process utilized by the permitting agency and the agency’s conduct. See also *Lauer*, 2010 WL 3490234 (reviewing the Examiner’s findings regarding completeness for support by the substantial evidence in the record). Such is the case here.

2. The record supports the Examiner’s finding that F.G.’s application was complete on April 25, 1996.

There is ample evidence in the record to support the Examiner’s finding that F.G.’s April 1996 application was complete. (AR 38 at Finding 10.) In addition to Belieu’s sworn testimony (which was never rebutted), the documentary evidence supports the finding. Perhaps the most compelling document corroborating the review process described by Belieu is the PALS form that was completed by another PALS staff member who received F.G.’s application on April 25, 1996.

“fully completed application” as later enacted ordinances do. Compare PCC 16.06.020 to PCC 18.25.030; 18.40.020; 18F.10.050.

(AR 455.) This form, entitled "Materials Required To Be Submitted With Application," provides a checklist for the staff person to complete in conjunction with review of the application package. The form was completed and signed by the PALS staff member on April 25, 1996. Consistent with Belieu's testimony, staff filled in the number of copies provided for each required document. The form specifically provides a column to identify documents "missing" from the package. Absolutely no notations were made in the "missing" column. When all were accounted for, she accepted the application as complete.

The form completed by the PALS staff noted that a fee schedule was generated. The record establishes that F.G. paid the application fee charged on April 25, 1996 (\$440) and a computer generated receipt was issued for that payment. (AR 270.) Thus, in addition to collecting the requisite number of required forms, PALS collected the application fee. The staff-completed checklist (AR 455) and the payment receipt (AR 270) establish that all of the "requirements" identified in PCC 16.06.020 were met on April 26, 1996.

Perhaps recognizing that the 1995 filing ordinance does not support their claim that a small fee underpayment will render an application incomplete, respondents attempt to infer that F.G. caused the County's calculation error. Respondents assert: "F.G. Associates

provided information to Pierce County staff on April 23, 1996 indicating that it was a five lot plat.” (Brief at 22.) There is no evidence in the record to support this bare assertion. To the contrary, the evidence is that the County, not the applicant, exclusively determines the fee that will be charged. (7-23-09, RP at 8-10.) F.G. paid the fee as requested by the County. (*Id.*; AR 270.)

Moreover, the following documents submitted with the April 25, 1996 application collectively contained no less than seven statements that the proposed plat will be comprised of six lots:

- Site plan / plat map (See AR 285, 179, 168)
- Master Application for Land Use Actions (AR 120-21)
- Formal Plat Subdivision Review Application (AR 281)
- Professional Soils Analysis (AR 114)
- Certificate of Water Availability (AR 144)

To counter this overwhelming evidence that F.G. repeatedly and consistently represented the project as a six-lot commercial plat, respondents point to only two documents containing a reference to five lots. At the top of the “Master Application for Land Use Action” form, there is a handwritten notation stating “Pre. Plat For 5 lots in RAC Class on 20 acres.” (AR 120.) This notation is in a handwriting different from that seen on the remainder of the form and different from the handwriting on the several other forms submitted that day.

No one could testify that an F.G. representative wrote the notation. (7-23-09, RP at 36, 47.) The only other document noting five lots is the computer receipt generated by the County. (AR 270.) These documents do not support the speculative notion that F.G. caused the County to charge the incorrect fee. It was certainly within the Examiner's discretion to reject the inference.

Respondents next try to undercut the Examiner's completeness finding by asserting he relied on a position PALS only adopted after a staff change "after the turn of the century." (See Brief at 6, 29.) Challenging the veracity of Senior Planner Belieu's testimony, respondents allege that he "rewrote history." (*Id.* at 6.) Again, credibility is assessed by the Examiner, who actually listened to and observed the witnesses, not the reviewing appellate court. More importantly, respondents misrepresent the record.

Though PALS once questioned whether the April application vested with F.G. the right to certain higher intensity commercial uses (AR 168-69), PALS' position was rejected by the Examiner following a formal appeal and public hearing in 1998. (AR 178-86.) In the ten-plus years that followed, the County appropriately processed F.G.'s application consistent with the 1998 Decision that confirmed and fixed the uses allowed under the April 1996 application.

Significantly, even in the 1998 adversarial process, the County never took the position that the small fee underpayment rendered the application incomplete such that F.G.'s rights could not vest as of April 26, 1996. County staff included the small underpayment in its descriptions of the application history, but always confirmed that F.G.'s rights nonetheless vested on April 25, 1996. (AR 168-69, 284-89, 179-80.) This position was unequivocally confirmed at the conclusion of the August 19, 1998 Staff Report to the Examiner, where PALS stated: "The preliminary plat is being reviewed under the regulations in effect at the time of application on April 25, 1996." (AR 289.) The Examiner, of course, confirmed that the F.G. application was complete on April 25, 1996. (AR 184, Finding 6.)

Respondents' exaggerate the importance of a perfunctory letter sent on May 28, 1996 stating the application was received on May 23, 1996. (AR 620.) The isolated statement made on a ministerial letter did not enunciate a fixed and formal PALS' position on the application's vesting date. The 1998 Staff Report, on the other hand, demonstrates formally that PALS did not consider the fee underpayment to have negatively impacted F.G.'s vested rights. In any event, the Examiner weighed the evidence and found the April 1996 application to be complete. His finding is supported by the substantial

evidence in the record and was not appealed.

C. Recent Case Law Confirms That, Regardless Of Its Contents, The April 25, 1996 Application Is Complete As Of Matter Law Pursuant To RCW 36.70B.070(4)(a).

Though respondents unilaterally claim “inadequacies” in F.G.’s application package, there is no evidence in the record that the County presented F.G. with any written communication advising that the April 25, 1996 application was incomplete. The absence of such written notification of incompleteness is significant.

State law provides that an application will be deemed complete by operation of law absent timely written notice to the contrary:

An application shall be deemed complete under this section if the local government does not provide a written determination to the applicant that the application is incomplete as provided in subsection (1)(b) of this section. (Emphasis added.)

RCW 36.70B.070(4)(a). Subsection 1(b) requires the permitting agency, within 28 days of receipt of an application, to mail or provide a written determination that the application is incomplete and state what is necessary to make the application complete. Nothing short of this written notification can prevent a project application from automatically attaining the status of “complete.”

The County did not provide F.G. with any written notification of incompleteness in the 28 days following receipt of the April 25, 1996

application. After the 28 days expired (on May 23, 1996), the application was complete as a matter of law. Any challenge to the status is now foreclosed.

Respondents attempt to dismiss F.G.'s argument by stating that it demonstrates a "profound misunderstanding of the basics of land use law" and it would be unfair to respondents. (Brief at 15-16.) A decision issued just this month by Division II of the Court of Appeals belies respondents' characterization. Relying on the 28-day notification requirement of RCW 36.70B.070(4)(a), that court rejected a challenge to the vested status of a building permit application. *Lauer v. Pierce County*, __ Wn. App. __, __ P.3d __, 2010 WL 3490234 (September 8, 2010).

In *Lauer*, the appellant challenged an Examiner decision approving a variance authorizing construction within a Type 5 stream buffer. The applicant submitted a building permit application in 2004, but failed to state on the site plan that a depicted drainage course was a regulated stream and likewise failed to identify the code-required buffer. Thus, the application contained inaccurate, or at the very least, incomplete information. The application did not include a variance request to allow construction within the stream buffer. *Id.* at *6.

After construction commenced, the County issued a stop work

order prohibiting further construction without an approved variance. Years later, following an unsuccessful appeal of the stop work order, the applicant submitted a variance application. By that time, however, the County had adopted a new ordinance with stricter variance criteria. Despite that the 2004 application contained incorrect and incomplete information, the Examiner found the application to be vested under the prior less restrictive variance regulation. *Id.* at *1.

Division II affirmed the Examiner's decision, holding that the application was, as a matter of law, complete pursuant to RCW 36.70B.070(4)(a). In reaching its decision, Division II embraced the "plain language" of RCW 36.70B.070(4)(a). Thereafter the court held:

[W]here a local government in receipt of a building permit application does not provide written notice to the applicant within 28 days that the application is incomplete, the application is deemed complete as a matter of law.

Id. at *7. Since there was "no indication in the record that the County ever provided such notice to [the applicant]," Division II concluded that, "as a matter of law, [the applicant's] 2004 building permit application was complete and vested their rights to application of regulations in effect at the time." *Id.* The *Lauer* court effectively held that the absence of a timely written notification of incompleteness will automatically render a project application complete and immune from

later attack by any party.

Division II's decision is consistent with the obvious purpose of RCW 36.70B.070, which is to fix the rules to be applied to a specific project proposal early in the permit review process. Respondents, on the other hand, advocate a process of prolonged uncertainty. It would effectively defer the final completeness determination until the very end of the extended, resource-intensive permit review process, making every project application subject to later judicial review of each answer to each question in the application form and checklist. Respondents' position is without support in the law or prudent policy.

D. Respondents' Appeal Is An Untimely Collateral Attack On The 1998 Examiner Decision Which Confirmed The Complete Status Of F.G.'s Application And Determined The Allowable Commercial Uses Under The Vested Application.

1. The 1998 decision addressed the vested status of the F.G. application and the allowable commercial uses.

Trying to avoid the impact of the Decision, respondents state, inaccurately: "The only issue confronted by the Hearing Examiner in 1998 was whether the County erred in denying the conditional use permit application. (Brief at 11.) However, F.G. never requested a conditional use permit and the County never denied one. Rather, the 1998 appeal focused exclusively on the scope of commercial uses

allowed under the complete application that F.G. submitted on April 25, 1996.

By way of background, when F.G. submitted its application in April, the zoning authorized “commercial centers” in the RAC zone. The permitting requirements varied depending on the size of commercial center proposed. Commercial centers containing a variety of stores with a total floor area less than 80,000 square feet were permitted outright in the RAC zone. Commercial centers with a total floor area more than 80,000 but less than 200,000 square feet were permitted in the RAC with a conditional use permit. (AR 183.) Following the zoning change on May 1, 1996, commercial centers of any size were prohibited in the RAC zone, though other commercial uses continued to be authorized in the RAC. (AR 287, 169.)

F.G. disclosed in its April 25, 1996 application that it intends to construct commercial uses on the six-lot plat. (AR 168-69; see also AR 114, 142, 144.) The application did not, however, specify the size of each building and no conditional use permit was requested. (*Id.*) In December, F.G. more fully described the intended commercial uses, which description included planned total floor area for the site that exceeded 80,000 square feet. (*Id.*)

PALS thereafter challenged F.G.’s right to construct the

commercial centers proposed. PALS stated F.G. could construct a commercial center under the April 1996 application, but the maximum floor area for the entire 19.71-acre site was limited to 80,000 square feet. They claimed a larger commercial center was not allowed because the application did not include a conditional use permit request and did not adequately disclose the intensity of commercial uses intended. (AR 168-69.) F.G. disagreed and argued that the County incorrectly applied the 80,000 square foot limit to the site as a whole, rather than to each of the six plat lots. F.G. also asserted that PALS position denied F.G. its vested rights as set forth in RCW 58.17.033 and *Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997).³ (AR 173.)

Resolution of this dispute was necessary before the review process could continue since the authorized uses necessarily drives that review. To obtain certainty regarding the commercial uses allowed under the application, F.G. requested the County to state its position in a formal Administrative Decision, which the County did on June 16, 1998. (AR 168-69.) The Administrative Decision affirmatively stated that it was appealable and any appeal “would be heard by the Pierce

³ F.G.'s general disclosure of commercial uses was consistent with the general disclosure in *Noble Manor* and sufficient to vest the plat as to all commercial uses authorized under the RAC as of April 25, 1996.

County Hearing Examiner in a public hearing forum.” (AR 169.) F.G. timely appealed the Decision. (AR 166-67, 173.)

The issue of the commercial uses allowed under the April 1996 application was squarely before the Examiner and central to the appeal. Despite PALS complaint that F.G. did not disclose on its initial checklist the intensity of the intended commercial uses (AR 179-80), the Examiner found:

[O]n May 1, 1996, the Pierce County Council adopted changes to the comprehensive plan and zoning regulations which eliminated commercial centers from the RAC. The appellant [F.G.] was aware of the pending zoning change and on April 25, 1996 submitted a completed application for a six lot preliminary plat. Said plat proposed six lots varying from size form .95 to 7.6 acres, but specified no uses other than ‘commercial.’” (AR 184, Finding 6, emphasis added.)

After determining the date of completeness and, correspondingly, the zoning code to be applied to the F.G. application, the Examiner determined the uses allowed for the plat. The Examiner concluded:

The zoning code in effect on April 25, 1996, authorizes the appellant to place commercial centers of up to 80,000 square feet on each of the six plat lots. (AR 196.)

The status of the F.G.’s application was before and decided by the Examiner in 1998. The final Decision set the type and intensity of commercial development allowed for the F.G. plat.

2. Respondents could have, but failed, to participate in the 1998 appeal or appeal the now final 1998 Decision.

Respondents claim they did not have notice of the 1998 appeal and public hearing. Both the Staff Report and the Examiner's decision, however, expressly stated that the public was, in fact, given notice. (AR 285, 183, Finding 3.) Even had respondents not received notice, this collateral attack of the 1998 final decision would still be time-barred. Our Supreme Court has suggested that a LUPA appeal filed within 21 days of actual notice of certain land use decisions not requiring notice may be timely. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 409, 120 P.3d 56 (2005). Failure to file a LUPA petition within 21 days of actual notice, however, will absolutely bar a subsequent attack of the decision in another permitting process. *Id.* Respondents' had actual notice of the 1998 Decision long before the preliminary plat hearing. (See e.g. AR respondents submittal to Examiner dated May 26, 2009 at AR 521-40.) They chose not to commence a LUPA appeal until after the plat decision. Their decision bars their current challenge.

Without any legal support, respondents next surmise, without citation to legal authority, that it was "unlikely that they could have been a party" to the 1998 proceeding. (Brief at 11.) Their supposition is incorrect. It takes very little to become a party to a public proceeding such as the 1998 appeal. PCC 1.22.040.L defines 'parties

of record' as persons who (1) indicate on a sign-up sheet that they wish to become a party; (2) advised the Planning Department or Examiner by letter or electronic mail of their desire to become a party; or (3) the applicant or appellant. To become a party, respondents were required to do no more than show up at the public hearing or write a letter. They were not precluded from participating.

Respondents next assert, again without citation to legal authority, that they did not have standing or reason to appeal the 1998 Decision. Just as in this appeal, the issue presented in 1998 was of interest or concern to the neighbors. Obviously, respondents believe that their interests are sufficiently affected to have standing to participate in the plat hearing and assert this LUPA appeal. Their standing has never been disputed. The standing analysis would have been no different in the 1998 proceeding, which likewise addressed the commercial uses allowed on this property. Respondents' are not shielded from the preclusive effect of this now final Decision.

In the following ten-plus years, F.G. reasonably relied on the 1998 and supplied the many professional studies requested in the subsequent review process. The now well-established law on finality of land use decisions precludes respondents' collateral attack in this

later permit proceeding. *Habitat Watch*, 155 Wn.2d at 400-11;
Wenatchee Sportsman v. Chelan County, 141 Wn.2d at 180-81.

The crux of LUPA is that persons and agencies who oppose a final land use decision made by the local permitting authority must appeal that decision within 21 days. RCW 36.70C.040(3).

Twin Bridge Marine Park, LLC v. Dept. of Ecology, 162 Wn.2d 825, 843, 175 P.3d 1050 (2008).

LUPA's underlying rationale is that prolonged uncertainty is manifestly unfair to land owners who seek a final determination of their property's status.

Id. at 845. The finality doctrine underlying LUPA ensures that, once a final land use decision is made, the land owner may then reasonably rely without concern for a later collateral attack. *Id.* at 839.

II. RESPONDENTS' ALTERNATIVE GROUNDS CANNOT SUSTAIN THE TRIAL COURT'S REVERSAL

The trial court based its reversal exclusively upon its conclusion that the April 25, 1996 application was incomplete. The trial court addressed no other challenges to the Examiner's decision. (CP 236-38.) Respondents did not cross appeal or independently present assignments of error so as to broaden the appeal presented by F.G.

In an attempt to broaden the scope of this appeal, respondents cite *Lamon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989),

and assert that this Court may sustain the trial court's reversal on any other bases supported by the record. The *Lamon* rule, however, is applied to affirm a decision by the original fact-finding tribunal, not a court sitting in an appellate capacity. Recall, this Court reviews the Examiner's decision directly and disregards the trial court's decision. (See Opening Brief at 24.) To the extent the *Lamon* rule applies in a LUPA appeal, it should be applied to affirm the administrative decision on review, not a decision by a trial court acting in an appellate capacity. See, e.g., *Whidbey Environmental Action Network v. Island County*, 122 Wn. App. 156, 168, 93 P.3d 885 (2004)(applying *Lamon* to affirm a decision of the Growth Management Hearings Board).

A. The "Cancellation" of the F.G. Application Was A Computer Mistake, Not An Appealable Decision.

Respondents defend the computer cancellation of the F.G. plat application on two grounds. First, they challenge the credibility of Senior Planner Belieu's sworn testimony that the initial notice letter was sent without review of the file and both the letter and the subsequent cancellation were in error. F.G. had actively been responding to the County's information requests and submitting professional studies and the letter should not have been sent. (See 7-23-09 RP at 16-10.) Respondents presented no testimony to

contradict the Senior Planner's testimony. The record supports the Examiner's finding that, PALS properly corrected the computer error.

Respondents next argue that the computer error could not be corrected without a LUPA appeal. Of course, the computer action was not a final, appealable decision. No notice was sent after the computer acted. (7-23-09 RP at 19.) There certainly was no written notice with the requisite clear statement that the action constitutes a final appealable decision as required by LUPA. See *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668, 679, 86 P.3d 1169 (2004). A LUPA appeal was not required to correct the computer generated mistake.

B. A Fish & Wildlife Variance Is Not For Preliminary Plat Approval.

F.G. did not seek a variance because it was expressly advised by PALS that none was required. (CP 675.) It is undisputed there are no fish in the drainage course on F.G.'s property. PALS concluded a variance was not necessary and would serve no purpose, since the single purpose of the variance criteria is to protect fish in a regulated stream. (*Id.*) F.G. was entitled to rely on that decision.

F.G. maintains that PALS determination that variance is not required to construct in or near this drainage ditch. Even if a later determination is made that a variance is required in advance of construction, F.G. can apply for such a variance at that time. See

Lauer, 2010 WL 3490234. The Examiner conditioned construction under the preliminary plat approval upon compliance with “all other local, state and federal laws and obtain relevant permits.” (AR 46, Condition 6.) The Washington Supreme Court has held that it is wholly appropriate to conditionally approve a project permit subject to future compliance with applicable laws, ordinances and standards. *Friends of the Law*, 123 Wn.2d at 526-28. A variance, even if required, is not a prerequisite to preliminary plat approval.

C. An Hydraulic Project Approval (HPA) Is Not A Prerequisite To Preliminary Plat Approval.

Respondents disagree with the WDFW's conclusion that a HPA is not required for this development. (AR 647.) The Legislature, however, gave WDFW sole authority to make that determination. RCW 77.55.021(1). The County Examiner was without authority to make a contrary decision. Nonetheless, the Examiner ensured compliance by conditioning construction upon compliance with “all other local, state and federal laws and obtain relevant permits.” (AR 46, Condition 6.)

Topping v. Pierce County Bd. of Com'rs, 29 Wn. App. 781, 783, 630 P.2d 1385 (1981), does not require the Examiner to separately determine if an HPA is required. To the contrary, *Topping* held that an Examiner need not address compliance with regulations enforced by other agencies to approve a preliminary plat “unless conditions or

infirmities appear or exist which would preclude any possibility of approval of the plat.” *Id.* No such showing has been made here.

D. The Examiner Properly Ensured Compliance With Applicable Storm Drainage Regulations.

Respondents complain that the Examiner’s record does not include a storm drainage plan and that the omission is fatal to preliminary plat approval. Respondents did not raise the issue to the Examiner. Had it been raised, the issue could have been addressed, since the storm plan was presented in other contexts. (See AR 63-65; 100; 257 63-65; 4-29-09 hearing RP 16-19.) Respondents’ general reference to storm water concerns was insufficient to alert preserve this issue which is essentially procedural in nature. See, *Boehm v. City of Vancouver*, 111 Wn. App. 711, 722, 47 P.3d 137 (2002).

Respondents’ claim that a storm plan must be submitted prior to preliminary plat approval is not supported by the ordinance they cite. The ordinance states at pages 45-46: “In certain situations, a conceptual storm drainage plan will be required before the project is given preliminary approval.” (Emphasis added.) Respondents omit, perhaps strategically, the “situations” requiring advanced listed in the ordinance. None of the described “situations” are present in this case.

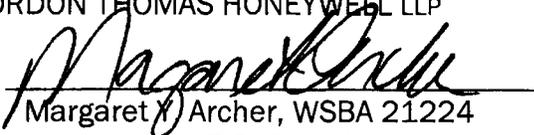
E. The Examiner’s Finding On Public Interest Is Well Supported By The Substantial Evidence In The Record.

Finally, respondents ask the Court to substitute its judgment for that of the Examiner's on the question of whether the project as a whole is in the public interest and compatible with the area under RCW 58.17.110. They ask this Court to weigh the "concerns" articulated by respondents (without supporting expert analysis) against the professionally prepared studies that disprove those concerns. Whether a proposed development is within the public interest and compatible with the surrounding area is a factual determination that must be affirmed if supported by the substantial evidence in the record. *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 186, 61 P.3d 332 (2002). The Examiner adequately addressed the public interests question and his findings are supported by the record. At best, respondents demonstrate that conflicting evidence was presented on the issue of the public's interests. Respondents cannot and did not demonstrate that the Examiner's findings are without support from the evidence in the record.

Dated this 27th day of September, 2010.

Respectfully submitted,
GORDON THOMAS HONEYWELL LLP

By


Margaret Archer, WSBA 21224
Attorneys for F.G. Associates

APPENDIX A

Title 16

SUBDIVISIONS AND PLATTING

CHAPTERS:

- 16.02 GENERAL PROVISIONS.**
- 16.04 PRELIMINARY PLAT PROCEDURE - PREFILING PROCEDURE - SEPA.**
- 16.06 PRELIMINARY PLAT PROCEDURE - FILING PROCEDURE.**
- 16.08 PRELIMINARY PLAT PROCEDURE - REVIEW PROCEDURE.**
- 16.10 IMPROVEMENTS.**
- 16.12 SHORT SUBDIVISIONS - LARGE LOT DIVISIONS.**
- 16.14 MISCELLANEOUS, REVIEW, PENALTIES, AND SEVERABILITY.**
- 16.20 BOUNDARY LINE ADJUSTMENTS.**

Chapter 16.02

GENERAL PROVISIONS

Sections:

16.02.010 Applicability.

16.02.015 Division of Land by Roads or Rights-of-Way.

16.02.020 Definitions.

Cross-references: Chapters 36.70, 36.80, 58.17, and 64.32 RCW

16.02.010 Applicability.

Every subdivision shall comply with the provisions of Chapter 58.17 Revised Code of Washington, this Title and all future amendments or applicable Federal, State or local laws. After final plat or short plat approval, any subsequent division of platted or short platted lots, parcels, tracts, sites or divisions, shall be allowed only if the procedures of this Title or the short plat ordinance are first followed, and these requirements shall be applicable to all plats approved prior to the effective date of this Title. Except for the large lot division procedure specified herein, the provisions of this Title shall not apply to the following:

- A. Cemeteries and other burial plots while used for that purpose;
- B. Divisions of land into lots or tracts each of which is 1/32 of a Section of land, or larger, or 20 acres or larger if the land is not capable of description as a fraction of a Section of land; PROVIDED, the division meets the minimum lot size zoning requirements for the area involved and provided further, that for the purpose of computing the size of any lot under this item which borders on a street or road, the lot size shall be expanded to include that area which would be bounded by the center line of the road or street and the side lot lines of the lot running perpendicular to such center line;
- C. Divisions made by testamentary provisions or the laws of descent;
- D. Divisions of land into lots or tracts classified for industrial or commercial use when Pierce County has approved a binding site plan which authorizes specific uses of said land in accord with the Pierce County Zoning Code; PROVIDED, that when a binding site plan authorizes a sale or other transfer of ownership of a lot, parcel, or tract, the binding site plan shall be filed for record in the County Auditor's office on each lot, parcel, or tract created pursuant to the binding site plan; PROVIDED FURTHER, that the binding site plan and all of its requirements shall be legally enforceable on the purchaser or other person acquiring ownership of lot, parcel, or tract; AND PROVIDED FURTHER, that sale or transfer of such a lot, parcel, or tract in violation of the binding site plan, or without obtaining binding site plan approval, shall be considered a violation of Chapter 58.17 RCW and shall be restrained by injunctive action and be illegal as provided in Chapter 58.17 RCW;
- E. A division for the purpose of lease when no residential structure other than mobile homes or travel trailers are permitted to be placed upon the land when Pierce County has approved a binding site plan in accordance with Section 18.10.550 of the Pierce County Code.

- F. The transfer of contiguous unplatted lots if:
 - 1. The lots were created in compliance with all applicable State and County subdivision regulations in effect at the time of the creation of said lots; or
 - 2. The lots transferred and remaining lots are improved with dwellings. Provided that transfers pursuant to item 1. or 2. shall not be effective until the proponent is issued a certificate of compliance from the Planning and Land Services Department. A certificate shall be issued when the owner or applicant shows that the lot conforms to the criteria above.
 - G. A division which is made by subjecting a portion of a parcel or tract of land to Chapter 64.32 RCW, the Horizontal Property Regimes Act (Condominiums), if the County has approved a binding site plan for all of such land.
- (Ord. 92-2S § 1, 1992; Ord. 91-167 § 2 (part), 1991; Ord. 91-83S § 1 (part), 1991; Ord. 88-75S § 1 (part), 1988; Ord. 87-201 § 2 (part), 1988; Ord. 81-117 § 1 (part), 1982; Res. 17409 § 1 (part), 1974; prior Code § 67.02.010)

16.02.015 Division of Land By Roads or Rights-of-Way.

The County recognizes that a parcel has been divided into separate, legal lots by any one of the following:

- A. a State or Federal road or highway; or
- B. a County road that has been adopted as part of the County road system; or
- C. a County road right-of-way that has been acquired or accepted by Pierce County but is an unopened County road as defined in Section 2.00 of the Pierce County Site Development Regulations, or as amended.

In the case of a County road that has been adopted as part of the County road system or an unopened County road right-of-way, the division line between the lots created shall be the centerline of the right-of-way. Where a County road or an unopened County road right-of-way is located on the margin or edge of a parcel, such right-of-way shall not divide the parcel.

(Ord. 94-96S § 1, 1994)

16.02.020 Definitions.

As used in this Title, unless the context or subject matter clearly requires otherwise, the following words or phrases shall have the following meanings:

- A. "Binding Site Plan" means a drawing to a scale as specified by the Planning and Land Services Department. The site plan shall:
 - 1. Identify and show the area and location of all streets, improvements, utilities, open space;
 - 2. Contain inscriptions or attachments setting forth such appropriate limitations and conditions for the use of the land as are established by the Pierce County Hearing Examiner or other appropriate Pierce County Department or government body having authority to approve the site plan;
 - 3. Contain provisions requiring that all development occurring within the proposal's boundaries be in conformity with the site plan.
- B. "Block" is a group of lots, tracts or parcels within well defined and fixed boundaries.
- C. "Council" means the Pierce County Council.
- D. "County Assessor-Treasurer" shall be as defined in Pierce County Charter.
- E. "County Auditor" shall be as defined in Pierce County Charter.
- F. "County Road Engineer" shall be as defined in Chapter 36.40 RCW.

- G. "Dedication" is the deliberate appropriation of land by an owner for any general and public uses, reserving to himself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted. The intention to dedicate shall be evidenced by the owner by the presentment for filing of a final plat or short plat showing the dedication thereon; and, the acceptance by the public shall be evidenced by the owner by the presentment for filing of a final plat or short plat showing the dedication thereon; and, the acceptance by the public shall be evidenced by the approval of such plat for filing by the appropriate governmental unit.
- H. "Developer" shall mean the person, party, firm or corporation who applies for said plat.
- I. "Examiner" means the land use hearing examiner who is herein authorized to approve subdivisions, and hear appeals on short subdivisions and large lot divisions.
- J. "Final Plat" is the final drawing of the subdivision and dedication drawn to a scale not smaller than one inch equals one hundred feet (1" = 100') unless approval of another scale is given by the Planning Director, on standard 18" x 24" sheet size, prepared for filing for record with the County Auditor and containing all elements and requirements set forth in State law and in this Title.
- K. "Geological Hazard" means any hazard caused by natural or artificial causes which may damage persons or property and which would include but not be limited to slides, slippage or instability of earth, rock and soil.
- L. "Improvement" shall mean any thing or structure constructed for the benefit of all or some residents of the subdivision or the general public such as but not limited to roads, alleys, storm drainage systems and ditches, sanitary sewer pipes or main lines, and storm drainage containment facilities.
- M. "Large Lot Divisions" means any number of divisions of land into lots, tracts or parcels for any purpose, each of which the smallest lot size is 5 acres or larger or 1/128 of a Section but smaller than 20 acres or larger.
- N. "Lot" is a fractional part of divided lands having fixed boundaries, being of sufficient area and dimension to meet minimum zoning requirements for width and area. The term shall include tracts or parcels.
- O. "Model Home." A model home for the purpose of this Code shall be defined as a dwelling in accordance with the Pierce County Zoning Code.
- P. "Original Tract" means a unit of land which the applicant holds under single or unified ownership, or in which the applicant holds controlling ownership and the configuration of which may be determined by the fact that all land abutting said tract is separately owned by others, not including the applicant or applicants; PROVIDED, that where a husband and wife own contiguous lots in separate or community ownership, said contiguous lots shall constitute the original tract.
- Q. "Planning Agency" means the Pierce County Planning and Land Services Department together with the Planning Commission.
- R. "Planning Commission" means that body as defined in Chapter 36.70 RCW as designated by the Council to perform a planning function.
- S. "Plat" is a map or representation of a subdivision, showing thereon the division of a tract or parcel of land into lots, blocks, streets and alleys or other divisions and dedications.
- T. "Preliminary Plat" is a neat and approximate drawing of a proposed subdivision showing the general layout of streets and alleys, lots, blocks and restrictive covenants to be applicable to the subdivision which shall furnish a basis for the approval or disapproval of the general layout of a subdivision.

- U. "Reserved Road Area" means a defined area of land within the short subdivision which is required by the County Engineer to be reserved for a future road, and said area shall be dedicated to the County at the time of approval, but the road need not be constructed by the applicant or developer until such time as stated in the ordinance. Setbacks shall be established as if the reserved road area were dedicated.
- V. "Short Plat" is the map or representation of a short subdivision.
- W. "Short Subdivision" is any voluntary or involuntary division or redivision of land into four or fewer lots, tracts, parcels, sites or subdivisions for the purpose of sale, lease or transfer of ownership.
- X. "Subdivision" is any voluntary or involuntary division or redivision of land into five or more lots, tracts, parcels, sites or division for the purpose of sale, lease, or transfer of ownership except as provided in subsection M. of this Section.

(Ord. 91-83S § 1 (part), 1991; Ord. 88-75S § 1 (part), 1988; Ord 81-117 § 1 (part), 1982; Res. 20633 § 1 (part), 1978; Res. 17409 § 1 (part), 1974; prior Code § 67.02.020)

Chapter 16.04

PRELIMINARY PLAT PROCEDURE - PREFILING PROCEDURE - SEPA

Sections:

16.04.010 Explanation of Prefiling.

16.04.020 Plan Required.

16.04.030 Recommendations on Road, Drainage, Sewer, Water and Fire Systems.

Cross-reference: Chapter 86.16 RCW

16.04.010 Explanation of Prefiling.

Certain steps are required of the developer and of the County prior to the actual filing date of the preliminary plat. These steps include the developer's completion of the Environmental Worksheet and submitting nine copies of the proposed preliminary plat to the Planning Department and eight copies of the Environmental Worksheet. (Ord. 88-75S § 1 (part), 1988; Ord. 81-117 § 1 (part), 1982; Res. 17409 § 1 (part), 1974; prior Code § 67.02.030)

16.04.020 Plan Required.

Whenever it is essential for purposes of evaluating environmental or other concern, the County Engineer may require the developer to submit certain concept drawings prior to preliminary plat approval.

Prior to the construction of an improvement, the developer shall submit to the County Engineering Department, two copies of the plan, profiles and specifications for said streets, drainage, utilities and other proposed improvements to be constructed in the proposed subdivision. Plans and profiles shall be drawn upon standard 22" x 36" Federal Aid Plan profile sheets or such other sheets as may be acceptable to the County Engineer. Prior to construction, the construction plans for any dedicated improvement must be approved by the County Engineer and construction plans for other improvements may be required to be approved. (Ord. 88-75S § 1 (part), 1988; Res. 17409 § 1 (part), 1974; prior Code § 67.02.040)

16.04.030 Recommendations on Road, Drainage, Sewer, Water and Fire Systems.

The County Engineer, the County Health Officer and the Fire Marshal shall review and certify to the Examiner, their respective recommendations as to the adequacy of the proposed road system and storm drainage system, the proposed sewage disposal and water supply systems, and fire protection services for the subdivision. The recommendations of the County Engineer, the County Health Officer and the Fire Marshal shall become part of the record and shall be included with the Examiner's decision, if said matter is appealed to the Council. (Ord. 88-75S § 1 (part), 1988; Res. 20633 § 1 (part), 1978; Res. 17409 § 1 (part), 1974; prior Code § 67.02.050)

Chapter 16.06

PRELIMINARY PLAT PROCEDURE - FILING PROCEDURE

Sections:

16.06.010 Fees.

16.06.020 Filing.

16.06.030 Staff Procedure.

16.06.040 Notice.

16.06.010 Fees.

- A. An application fee, as set forth in Chapter 2.05, shall be paid to Pierce County when the preliminary plat is filed.
- B. A fee, as set forth in Chapter 2.05, shall be paid when the final plat is filed for approval.
- C. A fee, as set forth in Chapter 2.05, shall be paid for each extension of time period granted under the provisions of PCC 16.08.040 B. and C.
- D. A fee, as set forth in Chapter 2.05, shall be paid when a request for reconsideration is filed under the provisions of PCC 16.08.050.

Fees are not refundable.

(Ord. 92-93 § 6 (part), 1992; Ord. 91-167 § 2 (part), 1991; Ord. 91-50S § 2 (part), 1991; Ord. 89-109 § 1 (part), 1989; Ord 88-75S § 1 (part), 1988; Ord. 87-201 § 2 (part), 1988; Ord. 85-182S § 5 (part), 1985; Res. 17409 § 1 (part), 1974; prior Code § 67.02.060)

16.06.020 Filing.

A preliminary plat of a proposed subdivision and/or dedication of land located in the unincorporated areas of Pierce County shall be submitted for approval by the Examiner by filing with the Pierce County Planning Department, an application, paying the application fee, filing 16 copies and 1 reproducible copy of the proposed preliminary plat, submitting a list of adjacent landowners as specified herein, submitting an approved Environmental Worksheet and when appropriate, an application for zone amendment. Said application for zone amendment may be considered with the application for preliminary plat approval. (Ord. 88-75S § 1 (part), 1988; Res 20633 § 1 (part), 1978; Res. 17409 § 1 (part), 1974; prior Code § 67.02.070)

16.06.030 Staff Procedure.

If the preliminary plat, as filed, is in conformance with all of Pierce County's land use codes and is otherwise acceptable in form and substance, the Planning Department shall receive the application and shall promptly forward copies of the preliminary plan to appropriate governmental agencies for their review. (Ord. 88-75S § 1 (part), 1988; Ord. 87-201 § 2 (part), 1988; Res. 17409 § 1 (part), 1974; prior Code § 67.02.080)

16.06.040 Notice.

- A. **Notice of Filing.** Notice of the filing of a preliminary plat shall be given to the State, municipalities, public utilities and school districts in the following cases and manner:
 - 1. When a proposed subdivision which is to be located within one mile of any city or town, or which contemplates the use of any public utilities, notice shall be given to the city or town's legislative body and to the public utilities governing body.

2. When a proposed subdivision which is to be located adjacent to the right-of-way of a State highway, notice shall be given to the State Department of Highways or its successor.
3. Notice shall be given to the school district within which the subdivision is proposed.
4. When the proposed subdivision lies within a designated flood control zone pursuant to Chapter 86.16 RCW, notification shall be given to the Department of Ecology of the State of Washington, or its successor.

Notice of filing as above required, shall be accomplished by the Planning Director or his authorized assistant's notifying the proper agencies by letter of the proposed subdivision filing, which letter shall include its legal description, a small map showing location, subdivision acreage, number of home or building lots, and the hour and location of the first hearing on the preliminary plat. Said letter shall be mailed or delivered at least 14 days before the date for the initial hearing.

- B. List of Adjacent Landowners.** The developer shall obtain and submit to the Planning Department Director, the names and addresses of all persons of record, who own or who are contract purchasers of the real property to within 300 feet of the exterior boundary of the proposed subdivision site and outside of the developer's ownership or partial ownership.

The names and addresses herein required shall be obtained from the Assessor-Treasurer's records.

(Ord. 88-75S § 1 (part), 1988; Ord. 81-117 § 1 (part), 1982; Res. 17409 § 1 (part), 1974; prior Code § 67.02.090)

Chapter 16.08

PRELIMINARY PLAT PROCEDURE - REVIEW PROCEDURE

Sections:

- 16.08.010 Notice of Hearing.**
- 16.08.020 Review of Preliminary Plat.**
- 16.08.030 Required Written Findings and Determinations.**
- 16.08.040 Time Limitations.**
- 16.08.050 Reconsideration.**
- 16.08.060 Appeal of Examiner's Decision.**
- 16.08.070 Council Action on Appeals.**
- 16.08.080 Requirement for Each Plat Filed for Record.**
- 16.08.090 Certificate Giving Description, Statement of Owners, and Dedication Requirements.**
- 16.08.100 Administrative Review of Final Plats.**
- 16.08.110 Submission to Examiner.**
- 16.08.120 Examiner's Determinations.**

Cross-references: RCW 58.17.110, 58.24.040

16.08.010 Notice of Hearing.

- A. General.** All hearing notices shall include a description of the location of the proposed subdivision. The description may be in the form of a vicinity location sketch or a location description in nonlegal language.
- B. Newspaper Notice.** Upon receipt of an application for preliminary plat and after completion of a Final Environmental Impact Statement, if necessary, or Negative Declaration, the Planning Department staff shall set a date for a public hearing before the Examiner and shall give notice by arranging publication of at least one notice not less than ten days prior to the hearing in the newspaper of general circulation, in Pierce County, and a newspaper of general circulation in the area where the real property which is proposed to be subdivided is located.
- C. Notice to Adjacent Ownership.** The Planning Department shall notify by letter, the persons who own or are contract purchasers of the real property, as shown by the records of the County Assessor-Treasurer, located within 300 feet, but not less than 2 parcels deep, around the perimeter of any portion of the boundary of the proposed subdivision. If the owner of the real property which is proposed to be subdivided owns another parcel or parcels of real property which lie adjacent to the real property proposed to be subdivided, notice under this subsection shall be given to owners of real property located within 300 feet, but not less than 2 parcels deep, around the perimeter of any portion of the boundaries of such adjacently located parcels of real property owned by the owner of the real property proposed to be subdivided. Said notice shall specify the particulars of the initial hearing on the proposed subdivision and shall include a description of the location of the proposed subdivision in nonlegal language or a vicinity location sketch and shall be mailed not less than 21 days before said hearing.

- D. Posting Requirements.** After acceptance of a preliminary plat application, notice of application shall be posted by the applicant on the property at its principal entry point to the nearest right-of-way, as determined by the Planning and Land Services Department. Notice shall be posted on a 3 foot by 4 foot waterproof sign. The sign shall be made of corrugated plastic to specifications provided by Pierce County. If desired, a sign may be purchased from Pierce County at a cost to be determined by the manufacturing cost at the time of purchase. The sign(s) shall be located so as to be easily visible from the abutting road. When more than one road abuts the property, the sign(s) shall be easily visible from the road having the greatest traffic volume as determined by the Planning and Land Services Department. When a proposal is within an existing subdivision, planned development district or planned unit development, an additional sign shall be posted at each major roadway entrance to the development as determined by the Planning and Land Services Department. When the sign(s) is posted, the applicant shall complete and return a notarized affidavit of posting to the Planning and Land Services Department. The sign(s) shall be erected and maintained by the applicant for a minimum of 30 days prior to the public hearing and until a decision is rendered on the application or appeal. The sign(s) shall be removed by the applicant within one week following the decision by the Hearing Examiner or County Council.

(Ord. 90-31S § 3 (part), 1990; Ord. 88-75S § 1 (part), 1988; Ord. 81-117 § 1 (part), 1982; Res. 20633 § 1 (part), 1978; Res. 17409 § 1 (part), 1974; prior Code § 67.02.100)

16.08.020 Review of Preliminary Plat.

The Examiner shall review all proposed preliminary plats and shall take such action thereon as to assure conformance of the proposed subdivision to the general purposes of the comprehensive plan and to planning standards and specifications as adopted by the County. The approval of any preliminary plat may be conditioned upon the developer's obtaining proper zoning for the subdivision.

The decision by the Examiner is a final and conclusive decision but said decision may be appealed to the Council as specified herein. The Examiner's written decision on the preliminary plat shall include findings and conclusions, based on the record, to support the decision. Each final decision of the Examiner, unless a longer period is mutually agreed to by the applicant and the Examiner, shall be rendered within ten working days following the conclusion of all testimony and hearings.

(Ord. 88-75S § 1 (part), 1988; Ord. 81-117 § 1 (part), 1982; Res. 20633 § 1 (part), 1978; Res. 17409 § 1 (part), 1974; prior Code § 67.02.110)

16.08.030 Required Written Findings and Determinations.

- A.** The Examiner shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. The Examiner shall determine:
1. If appropriate provisions are made for, but not limited to the public health, safety, and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds, and shall consider all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who walk to and from school; and
 2. Whether the public interest will be served by the subdivision and dedication.

- B. A proposed subdivision and dedication shall not be approved unless the Examiner makes written findings that:
1. Appropriate provisions are made for the public health, safety, and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who walk to and from school; and
 2. the public use and interest will be served by the platting of such subdivision and dedication. If the Examiner finds that the proposed subdivision and dedication make such appropriate provisions and that the public use and interest will be served, then the Examiner shall approve the proposed subdivision and dedication.

(Ord. 94-96S § 3, 1994; Ord. 88-75S § 1 (part), 1988; Res. 20633 § 1 (part), 1978; Res. 17409 § 1 (part), 1974; prior Code § 67.02.120)

16.08.040 Time Limitations.

- A. **In General.** A final plat meeting all of the requirements of law shall be submitted to the County within three years of the date upon which the approval of the preliminary plat is final. The approval of a preliminary plat shall be automatically null and void if final plat approval is not obtained within the time limitations specified herein.
- B. **Initial Extension of Time.** The applicant for plat approval shall be entitled to one 1-year extension of time within which to submit a final plat upon a showing that he has attempted in good faith to do so within the initial 3-year period. Knowledge of the expiration date and initiation of a request for an extension of approval time is the responsibility of the applicant.
- C. **Additional Extensions.** The applicant for plat approval may be entitled to additional extensions of time within which to submit a final plat. In the event of a written request for additional extensions, the Examiner may, upon request by a party of record or County agency, alter or expand the conditions of approval applicable to any such plat. However, prior to the alteration or expansion of conditions of approval, the proponent of such change in conditions shall establish that either (a) such conditions are required by laws or regulations adopted subsequent to original approval; or (b) such changes are necessary for the protection of the public health, safety or general welfare as a result of material changes in, or discovery of, relevant conditions or circumstances which have occurred since the date of approval of the preliminary plat.
- D. **Procedure.**
1. **Time for Filing.** A written application for any extension of time under the provisions of this Section shall be filed with the Planning Department at least 30 days prior to the expiration of the existing period of approval currently applicable. The applicable time period shall be tolled from the date of filing the application for extension until the date of the final decision by the County. Each application shall be accompanied by payment of a filing fee in an amount established by ordinance.
 2. **Additional Extensions-Changed Conditions.** Upon filing of an application for extension, a copy shall be sent to each party of record together with governmental departments or agencies as were involved in the process of preliminary plat approval. By letter, the Examiner shall request that written comments, if any, be delivered to the Examiner's office within ten working days of the date of the Examiner's letter. If any comment requests the alteration or expansion of conditions of approval, the

applicant shall be provided with a copy of such proposal and a period of ten working days in which to file objections, if any, and/or a request for formal hearing. In the absence of such objection, the Examiner may conclude that the proposed change in conditions is acceptable to the applicant and proceed to a decision in accordance with procedures set forth in this Section.

3. **Hearing Examiner-Hearing.** If, in the opinion of the Examiner, substantial issues have been raised concerning the application for extension, he may schedule a public hearing. In the case of a request for extensions of time beyond the initial 1-year period, if a proposal is made to alter or expand the conditions of approval, a public hearing shall be held upon written request by the applicant or any party of record upon a determination by the Hearing Examiner that there are substantial issues which necessitate a public hearing.
 4. **Hearing Examiner-Decision.**
 - a. **With hearing.** If a public hearing is held under the provisions of Section D.3. above, the Examiner shall issue a decision together with findings and conclusions in support thereof within ten working days of the date of the hearing.
 - b. **Without hearing.** If no public hearing is held, the Examiner shall issue his decision with ten working days of the date upon which written comments were to be filed with the Examiner.
 5. **Hearing Examiner-Decision-Appeal.** The decision of the Examiner to grant or deny extensions of time shall be final unless appealed under the provisions of Sections 16.08.050, 16.08.060, and 16.08.070.
- E. **Stages.** If the developer desires to develop said subdivision in stages, each stage or division must be approved within the time limits specified herein.
- F. **Applicability.** The provisions of this Title shall retroactively apply to any preliminary plat pending before the County as of July 24, 1983, where the authority to proceed with the filing of final plat has not otherwise elapsed under the applicable law.

(Ord. 88-75S § 1 (part), 1988; Ord. 83-130 § 2, 1983; Res. 20633 § 1 (part), 1978; prior Code § 67.02.130)

16.08.050 Reconsideration.

Any aggrieved person feeling that the decision of the Examiner is based on errors of procedures or errors or misinterpretation of fact may make a written request for review by the Examiner within seven working days of the date of the written decision. This request shall set forth the alleged errors or misinterpretations, and the Examiner may, after review of the record, take such further action as he deems proper and may render a revised decision. Only one request for reconsideration may be filed by any one person or party even if the Examiner reverses or modifies his original decision or changes the language in the decision originally rendered. (Ord. 88-75S § 1 (part), 1988; Res. 22487 § 2 (part), 1980; Res. 20633 § 1 (part), 1978; Res. 17409 § 1 (part), 1974; prior Code § 67.02.140)

16.08.060 Appeal of Examiner's Decision.

The final decision by the Examiner on a preliminary or final plat may be appealed to the Council by any aggrieved person directly affected by the Examiner's decision. Said appeal procedure is as follows:

ORIGINAL

No. 65279-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

F.G. ASSOCIATES,

Appellants,

v.

GRAHAM NEIGHBORHOOD ASSOCIATION, a Washington non-profit
corporation; RAY STRUB; GEORGE WEARN; JAMES L. HALMO; and
PIERCE COUNTY,

Respondents.

CERTIFICATE OF SERVICE

GORDON THOMAS HONEYWELL LLP
William T. Lynn
Margaret Y. Archer
Attorneys for Appellants F.G. Associates

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2010 SEP 27 PM 4:21

Suite 2100
1201 Pacific Avenue
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500
WSBA No. 2122421224

THIS IS TO CERTIFY that on this 27th day of September, 2010, I
did serve true and correct copies of the following:

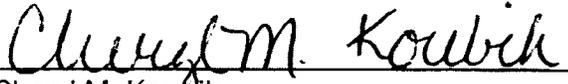
1. Appellants F.G. Associates; Reply Brief; and
2. Certificate of Service.

via ABC Legal Messengers (or by other method indicated below) by
directing delivery to and addressed to the following:

Keith P. Scully
GENDLER & MANN, LLP
1424 Fourth Avenue, Suite 715
Seattle, WA 98101
keith@gendlermann.com

Jill Guernsey
Deputy Prosecuting Attorney – Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402
jguernsey@co.pierce.wa.us

Dated this 27th day of September, 2010, at Tacoma,
Washington.


Cheryl M. Koubik
Legal Assistant to Margaret Y. Archer