

No. 36811-1-II

**COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON**

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DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*

CITY OF GIG HARBOR, a Washington municipal
Corporation, Appellant,

v.

NORTH PACIFIC DESIGN,
a Washington corporation, Respondent

APPELLANT'S OPENING BRIEF

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I. Introduction.

This appeal involves two issues of law relating to a planned residential development (“PRD”). The PRD technique is used in many jurisdictions throughout the country, with different names – planned unit development, planned residential development, planned development district or cluster subdivision/development. It is a departure from traditional zoning,¹ which allows creativity, flexibility and more efficient use of land:

A planned unit development is a residential land subdivision of individually owned homes with neighborhood owned open areas and recreational facilities. It is a relatively new approach to a time proven concept of residential land use. . . . In the cluster technique for developing new residential areas, large open spaces and recreational areas are obtained by intensive use of land for housing in some sectors while preserving other sectors as open space for the benefit of residents.²

With the increasing popularity of large-scale residential developments, particularly in suburban areas, it has become apparent to many local

¹ “The traditional ‘single lot zoning envelope’ was originally developed to preserve light and air where the land was divided into many small lots, each of which would probably be developed by a different owner or builder. The length, width and height of the envelope are defined for each lot by detailed rules which typically cover setback requirements, side and rear yard specifications, lot coverage or floor area ratios, open space, spacing of more than one building on a single lot. These restrictions do keep some open space and orderliness in the city, but the Procrustean rules offer little chance for imaginative architecture and planning.” *Zoning of Planned Residential Developments*, 73 Harv. L. Rev. 241, 243 (1959).

² *Planned Unit Development and Land Intensity*, 114 U. Pa. L. Rev. 15 (1965).

municipalities that land can be more efficiently used, and developments more aesthetically pleasing, if zoning regulations focus on density requirements rather than on specific rules for each individual lot. One type of density zoning commonly used in planned unit developments is 'cluster zoning,' a technique which stresses economy, flexibility and scenic beauty. When cluster zoning is used the zoning ordinance usually permits the size and width of individual lots within a large development to be reduced, provided that the overall density of the tract remains constant.³

While some may argue that a PRD provides a more desirable result, not everyone would agree:

It must be noted, however, that planned unit development is not a complete panacea for all that ails the world of zoning. Critics argue that the PUD takes away the certainty that characterizes traditional zoning and with that lack of certainty comes risks. . . . [T]he flexibility of PUD zoning may result in misuse by developers and abuse of discretionary authority by a municipality's governing agency. Because of these risks, PUD ordinances are generally required to incorporate standards to protect against arbitrary state action and to prevent developers from using the PUD ordinance to circumvent zoning regulations. The flexibility of PUD zoning is not hindered by the imposition of standards, rather, these standards ensure that a City Council's enhanced discretion under a planned development ordinance will be guided by proper considerations . . .⁴

The central issue presented in this appeal is whether a PRD must meet the all of the standards set forth in the ordinance which

³ 8 McQuillin Mun. Corp. Sec. 25.92.20 (3rd ed.).

⁴ 5 Rathkopf's The Law of Zoning and Planning, Sec. 88:1 (4th ed.).

authorizes the creation of the PRD. In this appeal, the City's Hearing Examiner determined that a developer (here North Pacific Design or "NPD") may pick and choose between the density standards in the PRD ordinance and the density standards in the underlying zone, in order to obtain the most intense use of the developer's property, without providing the public amenities (such as additional open space) that offset the negative impacts of the increased density. The effect of this decision is significant because the developer was not only absolved from providing the additional public amenities – the developer was allowed to increase density on a piece of property on which such an increase was prohibited.

The City asks the Court to find that a PRD is by definition, a departure from conventional zoning restrictions (or a rezone), and so the exclusive standards to be applied in the PRD zone are those contained in or included by reference in the PRD ordinance. As in every PRD ordinance, the control of density in the Gig Harbor's PRD ordinance is essential, because density increases in the PRD are carefully balanced by regulations which offset the associated negative impacts by requiring additional open space and other amenities to benefit the public. The Court should reverse the Hearing Examiner and superior court on this issue.

In addition, the City asks the Court to find that the Hearing Examiner correctly determined that NPD is not allowed to count the area in the perimeter buffer for the development as part of the open space that is required under the PRD ordinance. The Hearing Examiner's decision on this issue should be affirmed, and the superior court's decision reversed.

II. Assignments of Error.

A. The Hearing Examiner and superior court erred by approving the Courtyards at Skansie subdivision/PRD by determining that a developer could apply for a conditional use permit (using the regulations in the underlying zone) to increase density from 8 dwelling units per acre to 12, ignoring the PRD requirements for density increases, and yet apply the PRD standards to reduce the lot size and other dimensional requirements based upon the increased density.

B. The superior court erred by reversing the portion of the Hearing Examiner's decision which correctly determined that the developer could not use the perimeter setback for the PRD to count as the required open space for the PRD.

Issues Pertaining to Assignments of Error.

A. If the City's PRD ordinance specifically describes the exclusive means of increasing density in a PRD (GHMC Section 17.89.100(A)), did the Hearing Examiner err by allowing NPD to increase density by following a different procedure (through a conditional use permit process applicable to the underlying zone)? (Assignment of Error 1.)

B. If the City's PRD ordinance specifically describes the exclusive means of increasing density in a PRD, prohibits any such increases if inconsistent with the comprehensive plan (GHMC Section 17.89.100(A)(1)), did the Hearing Examiner err by allowing NPD to increase density by following a different procedure and approving additional density even though the increase was inconsistent with the comprehensive plan? (Assignment of Error 1.)

C. Did the Hearing Examiner err by deciding to "harmonize" the PRD code provisions relating to density and the code provisions in the underlying zone relating to density through a conditional use permit, when there was no conflict between the two? (Assignment of Error 1.)

D. If this Court finds that there is a conflict between the code provisions relating to increases in density in a PRD and the

increase in density allowed in the underlying zone, did the Examiner err by not following the code and applying the most restrictive provision (as required by GHMC Section 17.01.060)? (Assignment of Error 1.)

E. If this Court finds that there is a conflict between the code provisions described in D above, did the Examiner err by not following the rules of statutory interpretation and determining that: (1) the more clearly expressed ordinance should prevail over the more indefinite; and (2) latest enacted ordinance should prevail over the older one? (Assignment of Error 1.)

F. Did the Examiner err by not recognizing that a PRD is basically a rezone, and that a developer may not pick and choose from the development standards in the new zone and the old zone, in order to obtain approval under the PRD regulations? (Assignment of Error 1.)

G. Because the standard of review for LUPA cases requires this Court to apply RCW 36.70C.130 directly to the Hearing Examiner's decision, not the superior court's decision, should the portion of the Examiner's decision finding that NPD could not count the area in the PRD perimeter buffer as required open space be affirmed? (Assignment of Error 2.)

III. STATEMENT OF THE CASE.⁵

A. NPD's Property and Development Proposal

NPD sought approval for a 174-lot residential preliminary plat on approximately 18.8 acres of property located at the northeast corner of Hunt Street and Skansie Avenue in the City of Gig Harbor. Doc. 1185, 508 (approved site plan). A typical lot size in the project is 2,317 square feet. Doc. 508. The proposed setbacks for the single family homes are 3 feet for the side yards, 3-6 six feet for the rear yards and between 6-18 feet for front yards. Doc. 514. The typical lot is 34 feet wide by 68 feet deep. *Id.* The lot dimensions for the 174 proposed lots are set forth on the preliminary plat at Doc. 515.

Required open space for this development under a PRD (with no additional density) is 243,200.61 square feet or 5.58 acres of open space. (*Id.*, p. 14) The plans submitted by NPD show that 5.66 acres of open space has been provided, but this includes the entire perimeter buffer areas (including required front yards) in the plat. The City's code, however, does not allow inclusion of the

⁵ The City's understands that the Court of Appeals has the administrative record, and that citations to the record will be the same on appeal as before the Superior Court. In other words, the Hearing Examiner's exhibits are referenced as "Ex __," and the pages within the individual exhibits are referenced as "Ex __, p. _." The transcript of the hearing is referenced as "Tr _."

required front yard area in the open space calculation. (GHMC Section 17.89.110(A)(2) provides that: "structures located on the perimeter of the PRD shall be setback in accordance with the front yard setbacks of the underlying zone," (which is 20 feet in this instance (GHMC Section 17.30.050(C))). The City has interpreted this to mean that the 20 feet from the perimeter structures may not be used in the open space calculation. Therefore, the application shows a shortfall of 26,382 square feet of open space. Exhibit 1, p. 14.

The subject property was a part of an annexation to the city in 1994. As a part of the annexation, a Concomitant Zoning Agreement for the Tallman annexation was adopted by the City Council under its Resolution 398-anx-91-07 (annexation agreement) in June 1994. See Ex. 2, Doc. 44-73. This Agreement provided that the subject property would be zoned Residential Business (RB-2) under the City's zoning ordinance (see Doc. 46), allowing all uses permitted in the RB zone within the annexed area, with the exception of multi-family dwellings. *Id.* The Agreement allowed the City to make future amendments to its comprehensive plan zoning ordinances "as the City deemed necessary in the public interest." Doc. 51.

Under the City's comprehensive plan, the applicant's land use designation is "Employment Center" which does not include residential uses. See Findings and Conclusions of the Hearing Examiner (hereinafter "Decision"), p. 9 (Doc. 1177-1218).

The Gig Harbor Municipal Code (GHMC) sets forth the regulations applicable to the RB-2 zone at Chapter 17.30 GHMC, which is attached hereto as Attachment A. The intent of the RB-2 zone is set forth at GHMC Section 17.30.010 as follows:

It [the RB-2 zone] is intended to serve as a transitional buffer between high intensity commercial areas and lower intensity residential areas.

GHMC Section 17.14.020 sets forth the zoning code's "Land Use Matrix" which lists the uses permitted in each of the City's zones, including prohibited uses and those allowed only as conditional uses. See Attachment B hereto. As the Land Use Matrix describes, the RB-2 zone allows all residential uses and many "home occupations" such as day care, adult family homes and professional services. *Id.* The RB-2 zone was adopted by Gig Harbor Ordinance 554 in 1989, with certain modifications in 2006. See, Attachment A.

The development standards for the RB-2 zoned district are included in GHMC Section 17.30.050, establishing a large minimum

lot size of 12,000 square feet with minimum lot width of 70 feet.

The permissible setbacks in the RB-2 zone are as follows:

- Front Yard Setback: 20 feet
- Side Yard Setback: 8 feet
- Rear Yard Setback: 15 feet.

The maximum density in the RB-2 zone is described as:

- G. Maximum Density: Eight dwelling units per acre permitted outright; 12 dwelling units per acre allowed as a conditional use.

NPD applied for three separate approvals for the Courtyards at Skansie Park project; (a) a conditional use permit under Chapter 17.64 of the GHMC to increase the maximum density of the proposal from eight units per acre to twelve; (b) approval under the Planned Residential Development (PRD) zone (ch. 17.89 GHMC) (the text of which is appended hereto as Attachment C), to modify lot sizes, setbacks, lot width, required yards, etc.; (c) approval for a subdivision as generally regulated under the State subdivision statute, chapter 58.17 RCW and Title 16 GHMC. Both under state law (RCW 58.17.195) and the GHMC, subdivisions may not be approved unless there are written findings that the proposed subdivision is in conformance with applicable zoning, comprehensive plans or other land use controls. See GHMC 16.08.001.

In the course of the processing of its application, NPD requested that the City "piggyback" a conditional use permit for additional density (under the RB-2 zone) with the PRD approval to reduce lot sizes and setbacks, all of which resulted in a proposal with significantly higher density and much smaller lots and setbacks than allowed in the RB-2 zone. (Ex. 45, 46.)

As provided for by state law and city ordinances, a consolidated public hearing was held on the Courtyards at Skansie Park applications on December 13, 2006. (Decision, p. 1, Doc. 1189.) There was substantial public comment at the hearing. In addition to the written comments submitted into the record, twenty-five individuals testified, the vast majority of which opposed the project on density grounds and many of whom stated outright that the CUP should be denied. All had concerns of how the extreme density of this project would affect traffic, fire safety, water supply, stormwater, wetlands, parking availability and community services such as the already overcrowded schools in the area. In the SUB05-1011 transcript, public comment starts on page 3 and continues to the end at page 19. In SUB 06-1248, public comment begins on page 34 and continues to page 85. Thus of the 131 pages of transcripts, 69 pages were devoted to public comment.

Public comments were also submitted in written form, assigned exhibit numbers 5, 9-23, 25-28, 30, 34-35, 51-65, 67, 70-72, 78, and 85-86 (page numbers GH 000080-85, 90-113, 116-122, 126, 133-1-133-2, 543-567, 571, 835-913, 994-995, 1007-1035). Nearly all these 43 exhibits (174 pages) from concerned Gig Harbor citizens and their families contained negative comments and a high level of concern about the impacts of the project. The Hearing Examiner noted the outpouring of public opposition relating to the proposal:

Numerous letters written by citizens within the neighborhood were received regarding the proposal, and many other citizens testified at the public hearing. The letters expressed concern that the proposed medium density development would be too dense for this site and that it would have a negative impact on their quality of life. The record reflects specific concern regarding traffic, stormwater, wetland impacts, schools, tree removal, water and sewer availability, and fire protection.

Decision, Ex. 90, p. 13, Doc. 1189. A full record of the hearing is found in the transcript of proceedings at Exhibits 88 and 89 of the record.

During the course of the hearing, the City Attorney took the position that by seeking to develop the property under the PRD ordinance, the applicant was required to comply with the density

regulations in that ordinance, because an approval would rezone the property to PRD. The City Attorney noted that the PRD ordinance not only limits additional density but also requires, as a condition to approval, the give-back of community and neighborhood benefits in exchange for increased density. See Doc. 921, et-seq. especially 925-929. In this case, because the underlying comprehensive plan designation for the property was inconsistent with residential use, an increase in density was not even allowed in the PRD. (GHMC Section 17.89.100(A)(1).)

Provision was made by the Hearing Examiner for additional documents and responses to be submitted after the hearing closed. Following the receipt of these additional materials, the record was closed.

B. Examiner's Decision

On January 24, 2007, the Hearing Examiner, issued his Findings, Conclusions and Decision. See Ex. 90, Doc. 1177-1218. The Examiner's decision dealt with multiple aspects of the development and generally approved the conditional use permit, PRD and the preliminary plat. The Examiner identified the three permit requests sought by NPD:

The request includes a conditional use permit application to increase the maximum density from eight to twelve dwelling units per acre. All of the structures proposed would be single family structures with garages.

Decision, p. 9, Doc. 1185. The Examiner also noted that the applicant sought approval to rezone to a Planned Residential Development:

The applicant has proposed a PRD in order to vary from the setback, lot area, lot width and lot coverage requirements for single family development in this zone. Generally, three-foot side yard setbacks, three and one-half foot rear yards, and front yards varying from six to 18 feet are proposed.

Doc. 1187. In addition, the Examiner considered the criteria for approval of preliminary plats pursuant to GHMC Title 16. See Decision, p. 18-24 (Doc. 1194-1200).

In his decision, the Hearing Examiner discussed his legal interpretation of the provisions of the RB-2 and PRD zones at Doc 1187:

11. A key legal issue here involves City Attorney Carol Morris' contention that the PRD ordinance effectively nullifies the RB-2 conditional use standards with respect to density calculations, and that the PRD application constitutes a rezone. The City Attorney cites persuasive appellate authority in that regard. Ex. 75. The applicant's attorney, Alexander Mackie, contends instead that the PRD ordinance and the conditional use provisions of the

RB-2 zone can, and should be read harmoniously. Ex. 87.

12. For purposes of this decision, the Examiner adopts Mr. Mackie's legal rationale. While subsequent judicial review of applicable legal principles will be de novo, of course, the Examiner is persuaded that the two code sections should be read together. Here, the PRD application does not seek density greater than that conditionally permitted in the underlying RB-2 zone. As such, the PRD application cannot constitute a rezone, as was the case in the legal authority cited by Ms. Morris. The application seeks twelve units per acre, and the City Council has expressly permitted that density in the RB-2 zone, with a conditional use permit. GMHC 17.30. Likewise, a PRD may be pursued for, "Those primary, accessory, and *conditional* uses permitted in the underlying zoning district." GMHC 17.89.050.A.

Thus, the Hearing Examiner's legal interpretation was that an applicant for a project in the RB-2 zone could use the conditional use provisions in the RB-2 zone at GHMC 17.05.050(G) to increase density from 8 to 12 dwelling units per acre (a 50 percent density increase). Then, with the increase in density, the applicant could make an application for treatment under the PRD ordinance to reduce lot sizes and setbacks. Given his interpretation, the Hearing Examiner did not require the applicant to meet any standards for a density increase required under the PRD ordinance; nor did the Hearing Examiner limit the increase in density to the 30 percent maximum in GHMC 17.89.100. In fact, he considered the

provisions of the PRD regulating density as “inapplicable.” See Ex. 90, Doc. 1200-1202.

The City appealed the Examiner’s decision to superior court under the Land Use Petition Act (“LUPA”) on the density/conditional use permit issue. CP 41, 81. NPD also appealed under LUPA on the open space issue. CP 38. The two appeals were consolidated, and the superior court rendered a decision in favor of NPD on both issues.

C. Standard of Review.

Under the Land Use Petition Act (“LUPA”, chapter 36.70C RCW), a court can grant relief when it determines that:

(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;

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

RCW 36.70C.130(1). The City contends that the Hearing Examiner failed to follow a prescribed process when he allowed density increases in the Courtyards project without requiring compliance

with provisions of the PRD ordinance that specifically set forth standards by which such requests will be considered.

The Hearing Examiner's decision is also an erroneous interpretation of the law, and a clearly erroneous interpretation the law to the facts. A decision is "clearly erroneous" 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." *Boehm v. Vancouver*, 111 Wash. App. 711, 717, 47 P.3d 137 (2002).

In reviewing a decision of a local government, the review is *de novo* on issues of law:

This court's review of any claimed error of law in the City Council's interpretation of city ordinances is *de novo* and must accord deference to the City Council's expertise. *Isla Verde*, 146 Wn. 2d at 751, 49 P.3d 867; RCW 36.70C.130(1)(b).

Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Associates, 151 Wn. 2d 279, 290, 87 P.3d 1176 (2004). This rule is confirmed by the Supreme Court:

Statutory construction is a question of law reviewed *de novo* under the error of law standard. *Wenatchee Sportsmen*, 141 Wn. 2d at 176, 4 P.3d 123.

Isla Verde Intern. Holdings, Inc. v. City of Camas, 146 Wn. 2d 740, 751, 49 P.3d 867 (2002). In reviewing municipal ordinances, the

court applies the same rules of construction as are applied to state statutes. *Sandona v. City of Cle Elum*, 37 Wn. 2d 831, 836-837, 226 P.2d 889,892 (1951).

This court stands “in the same position as the superior court when reviewing an administrative decision.” *Boehm v. Vancouver*, 111 Wash. App. 711, 717, 47 P.3d 137 (2002). The appropriate standard of review is applied directly to the administrative record. *Id.* In addition, this Court reviews the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact finding authority.” *Id.*

In the present case, the Hearing Examiner committed clear errors of law and failed to follow procedures required by the City of Gig Harbor zoning ordinance on the issue whether a conditional use permit should have been granted to allow an increase in density in a PRD. This Court should review this issue *de novo*. The findings and conclusions entered by the superior court should be disregarded as surplusage. *Wellington River Hollow, LLC v. King County*, 113 Wn. App. 574, 54 P.3d 213 (2002).

With regard to the issue whether the City correctly determined the amount of open space to be provided in the PRD, this Court must view the evidence and reasonable inferences in the

light most favorable to the City, as the City prevailed on this issue before the Examiner. The Examiner's decision on the open space issue must be affirmed.

IV. ARGUMENT SUMMARY.

The Hearing Examiner (and the superior court) erred in approving a conditional use permit to increase the density allowed in a PRD from 8 dwelling units per acre to 12, by means of a conditional use permit. The City zoning code is clear that if density increases are requested in a PRD, then the means and manner of increasing that density must be through the PRD ordinance itself, and must be limited to a 30 percent increase in density. Here, because the comprehensive plan designation for the underlying property is inconsistent with residential development, no additional density should have been allowed under GHMC Section 17.89.100(A)(1).

The Hearing Examiner was correct⁶ in finding that "common open space" in a PRD does not include the required yards for structures," and that the perimeter setback for the PRD is established to create an open area between the boundary line of the property and structures. If a property owner wishes to avail

⁶ The trial court erred on this issue.

itself of the benefits of the PRD chapter to gain additional houses, then it must provide more open space – but that open space cannot include land area within the required yard.

V. ARGUMENT.

A. The Hearing Examiner's Decision is clearly erroneous and he failed to follow a prescribed process when he allowed NPD to increase density in a PRD in violation of GHMC 17.89.100(A), which is exclusive method for increasing density in a PRD.

The Examiner and the trial court erred by allowing NPD to “mix and match” the development standards in the RB-2 and PRD zones, and by allowing NPD to maximize development on its property without the required trade-off in public amenities for increased density.⁷ This ignored the fact that the PRD ordinance expressly provides that GHMC Section 17.89.100 describes the exclusive method for the increase in density in a PRD. The fact that the PRD standards must be followed as a separate “zone” is evident upon examination of the RB-2 zone and the PRD ordinance.

The “Residential and Business District,” RB-2 in the City of Gig Harbor allows a full complement of residential uses including

⁷ In addition, GHMC Section 17.89.100(A)(1) would not allow any increased density because the underlying comprehensive plan designation is inconsistent with residential use.

single family dwellings on individual lots. Attachment A. Densities up to 8 units to the acre are permitted outright in the RB-2 zone (GHMC 17.30.050G). In the RB-2 zone, the minimum lot size is 12,000 square feet established for all uses, including single family residential uses. GHMC 17.30.050.

Under the RB-2 zone, a property owner seeking to construct a building consistent with the above-described development standards needs no further or special approval. This includes a preliminary plat which complies with the 12,000 square foot minimum lot size and lot widths of 70 feet, as long as approval is granted under the subdivision codes. If a property owner seeks to increase the density on a piece of property within the RB-2 zone up to 12 dwelling units per acre, he/she must apply for a conditional use permit, GHMC Section 17.30.050(G). The conditional use permit would allow additional density for projects developed under the RB-2 zone, but not a deviation from the other RB-2 regulations, such as lot size, width, setbacks, etc.

Based on the argument presented by NPD in the superior court appeal, there appears to be some confusion regarding the difference between a “conditional use” in the RB-2 zone and the conditional use permit process that must be followed in order to

obtain the increased density in an RB-2 District. All uses allowed in the RB-2 District, both permitted and conditional uses, are listed in the City's Land Use Matrix, GHMC Section 17.14.020. There is no density listed as a "use" in the Matrix for the RB-2 District.

"Density" is also not a "use" of property, it is a term for quantifying the intensity of a particular use. Thus, the use of the term "conditional use" to increase density in the RB-2 District (GHMC 17.30.050(G)) refers to the process associated with the conditional use permit.

For applicants who wish to vary the terms of the underlying residential zones to more intensely use their land, an application may be made for consideration as a Planned Residential Development Zone under chapter 17.89 GHMC. Treatment under the PRD code is entirely voluntary and is applicable only for residential zones.⁸ See GHMC 17.89.020(A). The intent section of the PRD chapter provides:

The intent of the PRD zone is to allow opportunity for more creative and imaginative residential projects than are generally possible under strict application of the zoning regulations in order that such projects shall provide substantial additional benefit to the general

⁸ The zoning code also provides for a "planned unit development" for commercial and business zones, in nearly the same form as planned residential developments. See chapter 17.30 GHMC.

community. It is further intended to preserve unique or sensitive physical features, such as steep slopes, public views, retention of natural vegetation and to provide more open space and recreational amenities, for residents of the development and the general public, than would be available under conventional land development practices.

GHMC Section 17.89.010 (emphasis supplied).

The PRD zone is a planned zone which specifically permits the design and dimensional standards of the underlying zoning district to be varied, including lot sizes, setbacks, impervious surfaces and height, in exchange for various amenities designed to benefit the public. GHMC 17.89.060(a). To be considered for the special treatment allowed in the PRD zone, an applicant must submit a specific application and development plans, the requirements of which are set forth at GHMC 17.89.040(A). The 13 items of information required for the PRD zone application include written text and explanatory materials including a specific narrative in subsection 11:

11. A narrative describing how the proposed PRD provides substantial additional benefit to the citizens of the city of Gig Harbor (the benefit accruing as a result of implementation of the PRD process as opposed to following the development standards of the underlying zone) and how it is proposed the additional amenities and benefits should apply to the percentage of additional density and/or height being requested;

(Emphasis supplied). In addition, the applicant must provide specific plans for the entire proposed development which include the following:

6. Plans drawn to a scale no smaller than one inch equals 30 feet showing the proposed location and size of proposed uses, buildings, buffer areas, yards, open spaces and landscaped areas;

These plans disclose the densities of development being sought as well as the lot size and setback variations being proposed for PRD approval. Plans describing circulation, drainage, stormwater runoff and landscaping are also required. GHMC 17.89.040(A)(7), (8) and (9). It is through the use of these required plans that compliance with the various requirements of the PRD zone is established. The important point here is that the development standards in a PRD apply to all facets of a proposed project such that the resulting residential development will be planned in an integrated, comprehensive fashion, to gain approval as a PRD. Nothing in the City's code contemplates that a property owner would be allowed to "mix and match" by choosing the development standards that he/she likes in the underlying RB-2 zone (such as a conditional use permit process for increased density) and ignore the development standards in the PRD regulations that he/she dislikes (limitations on

increased density and requirement to provide additional amenities in exchange for increased density).

The Washington courts have held that the legal effect of approving a PRD or planned unit development is an action of “rezoning,” which would mean that the standards in the new zone (the PRD zone) must be followed in order to obtain approval of the PRD. Contrary to the Hearing Examiner’s decision, the Washington courts have held that PRD’s and PUD’s are rezones, even if a change in use from the underlying zone is not involved. Here is a summary of a few of the applicable cases:

Wiggers v. County of Skagit, 23 Wn.App. 207, 596 P.2d 1345 (1979). This court held: “the legal effect of approving a planned residential development by the county commissioners is an action of rezoning.” *Id.*, 23 Wn. App. at 215. In this case, the developer did not seek to change the underlying use of the property with a PRD, nor did he ask for additional density. The project involved 265 residences, 120 individually owned campsites, 50 acres of open space and 6 acres devoted to related commercial and condominium development. *Id.*, 23 Wn. App. at 209. The density of the development was less than one-half of the maximum allowable.

Kenart & Assoc. v. Skagit County, 37 Wn. App. 295, 680 P.2d 439 (1984). This court held: “A request for approval of a planned unit development is treated as a request for a rezone.” *Id.*, 37 Wn. App. at 298. In *Kenart*, the developer did not seek to change the use or density. The existing zoning was residential, and the developer proposed a residential PUD. However, the existing zoning required a full acre for each residence, while the PUD proposed 80 residential lots on 79.5 acres with 39 acres of clustered residential development, 30 acres of open space and 10 acres for a gravel pit. *Id.* 37 Wn. App. at 298.

Johnson v. City of Mount Vernon, 37 Wn. App. 214, 679 P.2d 405 (1984). This court held: “A request for a PUD is treated as a request for a rezone. ... “It is inescapable that application of the PUD to this tract constituted an act of rezoning.” In *Johnson*, there was no request for a change in the underlying zoning. The existing zoning was single family residential on lots having a minimum lot size of 13,500 square feet. The developer proposed a residential PUD with a 69 acre mobile home subdivision on 45 lots. As framed by the court, the issue in *Johnson* was “if [the developer] desires to develop lots under 13,500 square feet in his 69 acres

that are presently zoned for single family residences with minimum 13,500 square foot lots, he in essence desires a rezone, even if proceeding under the City Code's PUD provisions which permit smaller lots. ... A request for a PUD is treated as a request for a rezone." *Id.* 37 Wn. App. at 218.

Schofield v. Spokane County, 96 Wn. App. 581, 980 P.2d 277 (1999). In this case, the developer applied to the County for approval of a preliminary plat, rezone and planned unit development. *Id.*, 96 Wn. App. at 584. The plat consisted of 56 acres divided into 10 single family lots, and the separate rezone application included a request for a change in the zoning from general agriculture to semi-rural residential-5. The lots varied in size from 1.13 acres to 6.66 acres. Eight of the lots were less than five acres in size (the underlying zone permitted one residence per 5 acres). *Id.* Here is the court's discussion on the issue whether the PUD's proposed lot size was allowable:

Mr. Schofield argues density rather than lot size should control the interpretation and application of the Section 15.2.7 guidelines. We disagree. Since Mr. Schofield is requesting a PUD, rezone law applies. See, *Johnson v. City of Mount Vernon*, 37 Wn. App. 214, 218-19, 679 P.2d 405 (1984) (regarding treatment of PUD as rezone). Lot size and density are different legal concepts in a zoning context.

Id., 96 Wn. App. at 589, emphasis added.

Lutz v. Longview, 83 Wn.2d 566, 520 P.2d 1374 (1974).

Here, the court held that imposition of a planned unit development or floating zone upon a specific parcel of land constituted an “act of rezoning.” As stated by the court (and similar to the Gig Harbor PRD ordinance):

Under the Longview ordinance, the PUD is not affixed, at the outset, to any particular area. Hence this flexible device is often referred to as a floating zone. It hovers over the entire municipality until subsequent action causes it to embrace an identified area.⁹

Lutz, 83 Wn.2d at 569. The *Lutz* court did not find that the PUD was a rezone simply because a change in use was proposed:

What is the legal nature and effect of the act of imposing a PUD on a specific parcel of land? We hold that it is an act of rezoning which must be done by the city council because the council's zoning power comes from the statute and that is what the statute requires. It is inescapable that application of the PUD to this tract constituted an act of rezoning. Before the PUD was authorized, the tract here was limited to low density single family residences primarily. After authorization of the PUD the permitted use is the erection of two large buildings, one of them 55 feet high, consisting of 28 living units, containing 46,900 square feet. There would be 32 underground parking spaces and 30 on site spaces. The change in permitted use is obvious.

⁹ The Gig Harbor PRD chapter does not affix the PRD regulations, at the outset to any particular zone. It is allowed in all districts zoned residential, the WM and WR zones. GHMC Section 17.89.020.

Lutz, 83 Wn.2d at 569.

Because an applicant for a PRD seeks to deviate from the development regulations in the underlying zone, the applicant must comply with the regulations of the new zone – the PRD regulations.

A density increase in a PRD development must follow the procedures in the PRD ordinance, not the underlying zone:

The density may be increased in a PRD over that permitted in the underlying zone but only if: 1) consistent with the underlying comprehensive plan designation for the property; and 2) the density increase will not exceed thirty percent over the density allowed in the underlying zone. Density calculations shall be made as set forth in Chapter 17.05 GHMC.

GHMC Section 17.89.100(B) (emphasis supplied.)

Furthermore, there are three sets of criteria for that must be met before density increases can be made in a PRD. First, in GHMC Section 17.89.100(A)(1), a density increase may only be approved if consistent with the underlying zone. Here, the density increase is not consistent because residential uses are not identified as a permissible use in the Employment Center comprehensive land use designation for the property.

Second, in GHMC Section 17.89.100(B) the PRD plans must show specific features, each of which allows a certain percentage

increase in density. These requirements are paraphrased as follows:

- Additional open space - 10% increase in density
- Preservation of natural features - 10% increase in density
- Preservation of scenic vistas accessible to the public - 10% increase in density
- Stormwater facilities as visual aesthetic and physically accessible to the public - 10% increase in density

As described above, the maximum increase in density is 30% over that allowed in the original zone.

Third, any applicant requesting a density increase must make certain showings to qualify for density increases under GHMC Section 17.89.070(A). These are tied specifically to the density increases under GHMC Section 17.89.100, and include the following:

6. Identification of any extraordinary public improvements proposed for acceptance of ownership by the city in connection with the planned development and that qualify for the density and/or height bonus under GHMC 17.89.100;
7. Identification of any unique natural features of the property proposed for acceptance of ownership by the city for preservation, and that qualify for the density and/or height bonus under GHMC 17.89.100;
8. Identification of any unique historic or cultural features of the property and surrounding neighborhood proposed for acceptance of ownership by the city for preservation and that qualify for density and/or height bonus; and
9. Identification of any proposed recreational opportunities in excess of those normally required of a

subdivision and a description of how they qualify for density and/or height bonus.

As may be seen, each of the criteria sets a high standard, e.g. “extraordinary and unique.” Each of them is also intended to provide public amenities and use.

Here, NPD did not provide any additional amenities. In fact, NPD argues that it is not even required to provide the minimum open space for a PRD, which is the subject of the second issue in this appeal.

While no Washington cases were found on the issue whether an applicant could “mix and match” preferred development regulations outside a PRD in order to intensely develop property, courts in other jurisdictions have considered the issue. In *Michaels Development Co., Inc. v. Benzinger Township Bd. of Supervisors*, 50 Pa. Cmwlth. 281, 413 A.2d 743, 747 (1980), the court held:

It is the very essence of a planned residential development that it may diverge from zoning requirements. Instead, a PRD must meet the requirements of the particular Ordinance.

Id. And as stated by another court:

A planned development zone is, by definition, a departure from conventional zoning restrictions . . . The exclusive standards to be applied in such a zone are those contained in the section of the regulations

that permits them and imposes restrictions and conditions before such a project may proceed.

Brennick v. Planning and Zoning Com'n of Town of Newington, 41 Conn. Supp. 593, 597 A.2d 346 (1991). Another court noted that in planned unit or cluster developments, which is "a device for grouping dwelling to increase the dwelling densities on some portions of the development area in order to have other portions free of buildings, . . .the plan is to devise a better use of undeveloped property than that which results from proceeding on a lot-to-lot basis." *Orinda Homeowners Committee, Bd of Sup'rs, Contra Costa County*, 11 Cal. App.3d 768, 90 Cal. Rptr. 88, 90, 43 A.L.R.3d 880 (1970). Further:

Control of density in the area to be developed is an essential part of the plan. The reservation of green, or at least open, spaces in a manner differing from the conventional front or back yard is another ingredient.

Id., 90 Cal. Rptr. at 90.

Obviously, the intent of ordinances allowing PRDs, planned unit developments or cluster zoning is to ensure that the project as a whole conforms to the regulations allowing these types of developments. If a developer is allowed to deviate from the PRD ordinance to increase density under traditional zoning methods applicable to lot-by-lot development, the result will be much

different than that contemplated by the drafters of the PRD ordinance, because the increase in density will not be addressed by any corresponding increase in open space or other public amenities.

In summary, the applicant cannot pick and choose from the two zones (RB-2 regulations and the PRD regulations) in order to customize a development that allows the most intensive use of the property possible, thereby avoiding the provision of the public amenities that make PRD's palatable to the public.

B. The Examiner's Decision is a clearly erroneous application of the law to the facts and is a clearly erroneous interpretation of the law because the Examiner "harmonized" provisions of the code that he never identified as "conflicting."

In the Decision, the Examiner claims that he "harmonized" the provisions of GHMC 17.89.100 ("Density bonus" in chapter 17.89 GHMC on PRD's) with GHMC 17.30.050(G) (12 dwelling units per acre as a conditional use in the RB-2 zone). However, he simply allowed the development to proceed with 12 dwelling units per acre, under a conditional use permit. This shows that he disregarded GHMC 17.89.100 altogether, in favor of GHMC 17.30.050(G). Furthermore, the Examiner did not make a finding that either ordinance was ambiguous, which is a necessary

prerequisite in order to engage in statutory construction or “harmonization.”

A reading of the language of GHMC 17.89.100 demonstrates that it is the sole method to increase density in a PRD. Furthermore, because the residential PRD is inconsistent with the City’s Comprehensive Land Use Plan for the property, no density increase over the base density is allowed:

17.89.100 Density bonus.

A. The density may be increased in a PRD over that permitted in the underlying zone but only if (1) consistent with the underlying comprehensive plan designation for the property; and (2) the density increase will not exceed 30 percent over the density allowed in the underlying zone. Density calculations shall be made as set forth in chapter 17.05 GHMC.

B. Density bonuses may be allowed only as follows:

. . .

(GHMC 17.89.100, emphasis added.) These terms “but only if” and “only” indicate that no other method for increasing density in a PRD may be used. These common, everyday words are not defined in the ordinance, so the dictionary meaning is used. “But” means “only.” Webster’s New Collegiate Dictionary, 7th Ed. “Only” means “exclusively, solely, alone in its class or kind, as a single fact for instance and nothing more.” Id. “Statutory construction begins by

reading the text of the statute or statutes involved.”¹⁰ *State v. Roggenkamp*, 153 Wn.2d 614, 620, 106 P.3d 196 (2005). “If the language is unambiguous, a reviewing court is to rely solely on the statutory language.” *Id.* “When a statute or ordinance is unambiguous, construction is not necessary as the plain meaning controls.” *McTavish v. Bellevue*, 89 Wn. App. 561, 565, 949 P.2d 837 (1998). “Another well-settled principle of statutory construction is that ‘each word of a statute is to be accorded meaning.’” *Roggenkamp*, 153 Wn.2d at 624. As stated by the *Roggenkamp* court:

The drafters of legislation . . . are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute. In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000). ‘We may not delete language from an unambiguous statute: Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.’

Id., at 624. As stated by another court:

Our starting point must always be the statute’s plain language and ordinary meaning. When the plain language is unambiguous – that is, when the statutory language admits of only one meaning – the legislative intent is apparent, and we will not construe the statute otherwise. Just as we cannot add words or clauses to

¹⁰ Municipal ordinances are the equivalent of statutes, so they are evaluated under the same rules of construction. *Faben Point Neighbors v. City of Mercer Island*, 102 Wn. App. 775, 11 P.3d 322 (2000).

an unambiguous statute when the legislature has chosen not to include that language, we may not delete language from an unambiguous statute.

State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

There is no ambiguity in GHMC 17.89.100, and the Examiner has not identified any ambiguity. As a result, the plain language of the ordinance controls. It provides that there is one and only one method for increasing density in a PRD, and that method is included in GHMC 17.89.100. The Examiner's Decision should be reversed because he totally disregarded the plain language of GHMC 17.89.100, in order to find that the words "but only if" were superfluous.

C. The Examiner's Decision is a clearly erroneous application of the law to the facts and is a clearly erroneous interpretation of the law, even if this Court finds that there is a conflict between the RB-2 and PRD regulations.

Nothing in the Examiner's decision indicates that he found GHMC 17.89.100 ambiguous, but he then decided that the PRD density method should be "harmonized" with the RB-2 density provision. This "harmonization" consisted of totally ignoring all of GHMC 17.89.100, and instead approving a conditional use permit for additional density without observing the 30% limitation on density, the prohibition on additional density because of the

property's comprehensive plan designation or NPD's failure to provide additional amenities (as required by GHMC 17.89.100).

This procedure is inconsistent with law, even if GHMC 17.89.100 was ambiguous. "Statutes relating to the same subject matter must be read together and harmonized, if possible, to give effect to the provisions of each. . . . Two statutes that relate to the same subject and are not actually in conflict are interpreted to give meaning and effect to each." *Wright v. Miller*, 93 Wn. App. 189, 198, 963 P.2d 934 (1998) (emphasis added). "If reconciliation is not possible, the more recently enacted provision should prevail unless the language of the earlier provision is more clear and explicit." *Elford v. City of Battleground*, 87 Wn. App. 229, 234, 941 P.2d 678 (1997).

Apparently, the Examiner decided to completely throw out the PRD method for calculating density in GHMC 17.89.100 (even though it is more recent and specific to the subject matter) because "the application seeks twelve units per acre, and the City Council has expressly permitted that density in the RB-2 zone, with a conditional use permit." This is another erroneous interpretation of the law, not only because he ignored the rules of statutory construction, but also because the Examiner failed to realize that in

1989, the City Council “expressly permitted” 12 units per acre with a conditional use permit only for the type of development described in chapter 17.30 (RB-2) GHMC. In other words, in 1989, when the City Council adopted the RB-2 zone, it contemplated that developments in that zone would have a minimum lot area of 12,000 square feet, a minimum lot width of 70 feet, a front yard setback of 20 feet, a side yard setback of 8 feet and a rear yard setback of 15 feet. GHMC 17.30.050. The Council also contemplated that the development would conform to the lot coverage requirements in GHMC 17.30.060. There was no PRD ordinance in effect at that time, and so the City Council believed that if the density in the RB-2 were to increase to 12 units per acre, the end result would still be a development conforming to the development standards adopted for the RB-2 zone.

What the Council never “expressly permitted” or even imagined in 1989, was that a developer would seek a PRD to vary from the setbacks, lot area, lot width and lot coverage requirements in the RB-2 zone, and then to also request a conditional use permit to vary from the density. The Council never contemplated that a developer would obtain approval for a single family development comprised of 174 residential lots on 18.8 acres, and that the lots

would only be 2,312 square feet in size, 34 square feet in width, with 3 foot side yard setbacks, 3-1/2 foot rear yards, or front yards ranging from 6 to 18 feet in size. This creates a significantly different development in appearance than was imagined by the Council in 1989 when it adopted the RB-2 zone.

Much later, when the Council adopted a PRD ordinance, it specifically prohibited this result in a PRD, by adopting a density bonus provision in the PRD ordinance and by adding clear language which made such provision the exclusive means of increasing density in a PRD. It is simply false to state that at the time the Council adopted the RB-2 zone in 1989, that it would have had the ability to foresee that it would later adopt an ordinance to allow a developer to vary from the RB-2 development standards to such a great extent and to take advantage of the RB-2 density increase conditional use permit procedure.

Therefore, the most that the Examiner could have concluded regarding the Council's intent when it adopted the maximum density requirements in GHMC 17.30.050(G), and allowed additional density through a conditional use permit in 1989, was that if such a conditional use permit was granted, any resulting single-family development would still meet the remaining

development standards in an RB-2 zone. The Courtyards at Skansie Park will not look like single family development permitted under the RB-2 zone – that is why PRD approval is required. Furthermore, the Examiner had no reason to conclude that the Council would have foreseen that a development like the Courtyards could be approved, given that such a development was expressly prohibited (by later adoption of GHMC Section 17.89.100).

The Examiner also held that the Council knew that a developer could increase the density in the RB-2 zone, even in a PRD, because it adopted GHMC 17.89.050, which reads:

17.89.050 Types of uses permitted.
The following uses are permitted in a PRD:
A. Those primary, accessory and conditional uses permitted in the underlying zoning district; . . .

The above provision applies to “uses,” not density. The definition of “use” in the Zoning Code is: “how land or a building is arranged, designed, occupied or maintained.” GHMC Section 17.04.840. This definition does not describe density, and density does not automatically become a “use” simply because GHMC Section 17.30.050(G) provides that a conditional use permit is required in order to increase the density. A plain reading of chapter 17.30

GHMC (governing the RB-2 zone) discloses that “density” is identified as a “development standard,” in a separate section with other development standards (GHMC Section 17.30.050), not a “use.”

If additional density were actually a “use,” then it would show up as a “primary, accessory or conditional use permitted in the underlying zone.” These primary, accessory or conditional uses are identified in GHMC 17.30.020, .030 and chapter 17.14 GHMC. The Land Use Matrix in chapter 17.14 GHMC discloses a number of permitted and conditional uses allowed in the RB-2 zone, but there is no indication that density or additional density is a “use” permitted in the RB-2 zone. Therefore, GHMC 17.89.050 only applies to uses, not development standards like density, and does not apply to allow a developer the ability to bypass the exclusive method for increasing density in the PRD chapter (GHMC Section 17.89.100).

“Another fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms.” *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 193 (2005).

In the adoption of GHMC 17.89.050, the City Council described the “primary, accessory and conditional uses permitted in the

underlying zoning district” that could be authorized in a PRD.

There is no language in GHMC 17.89.050 that allows anything that isn't a "use" of property, merely because it requires a conditional use permit, to be included in these “primary, accessory and conditional uses,” which are described in chapter 17.14 GHMC.

Here, the Council used the terms “primary, accessory or conditional uses” in GHMC 17.89.050 instead of “development standards requiring a conditional use permit” because the Council clearly intended that any increase in density would be accomplished through the procedure in GHMC 17.89.100.

C. The Examiner's Decision is a clearly erroneous application of the law to the facts, and the land use decision is an erroneous interpretation of the law because the Examiner failed to follow the code, which required application of the most restrictive code provision (the PRD).

Even if conflict exists between sections of the codes, the zoning ordinance specifically describes how that issue will be resolved. The zoning code provides:

17.01.060 Conflict with other regulations.
Whenever the regulations of this title are at variance with the requirements of any other lawfully adopted rule or regulation or ordinance of the city, then the most restrictive of these provisions, or the provision imposing the highest standards as the case may be, shall apply. (Ord. 573, Section 2, 1990).

This section makes clear that the provisions that call for the higher standards, and the most restrictive, will apply. In this case, as the foregoing discussion indicates, the provisions found in the PRD ordinance control over any conflicts with the density provisions of the RB-2 ordinance because they are more restrictive and impose higher standards in the public interest.

In addition, the provisions regulating the density increases under the PRD ordinance are far more specific and detailed, with more specific standards than those under the conditional use provisions. Our courts continuously state that the clearer law will control:

But it should be remembered that the fundamental objective in construing ordinances and statutes is to ascertain the legislative (in this case, the Board of County Commissioners') intent. *Amburn v. Daly*, 81 Wash.2d 241, 501 P.2d 178 (1972); *In re Renton*, 79 Wash.2d 374, 485 P.2d 613 (1971); *Graffell v. Honeysuckle*, 30 Wash.2d 390, 191 P.2d 858 (1948). In doing this, if possible all provisions should be harmonized; no words or phrases should be rendered superfluous or meaningless. *Davis v. Washington Toll Bridge Authority*, 57 Wash.2d 428, 357 P.2d 710 (1960); *DeGrief v. Seattle*, 50 Wash.2d 1, 297 P.2d 940 (1956). But if there are two conflicting provisions, then that which is more clearly expressed should control. *Schneider v. Forcier*, 67 Wash.2d 161, 406 P.2d 935 (1965); *State ex rel. Olympia Credit Bureau, Inc. v. Ayer*, 9 Wash.2d 188, 114 P.2d 168 (1941).

Williams v. Pierce County, 13 Wash. App. 755, 758, 537 P.2d 856, 858 (1975) (emphasis supplied). The more clearly expressed PRD ordinance should prevail over the more indefinite terms of the provisions of the RB-2 ordinance describing the conditional use process.

The Washington courts, in the event of conflict, will also give preference to the latest enactments:

As explained in *Williams v. Pierce Cy.*, 13 Wash.App. 755, 760, 537 P.2d 856 (1975):

Frequently it is held that where a statute, particularly one of doubtful meaning, is amended by a subsequent enactment so as to make it more certain, the subsequent amendment is a strong indicator of the legislative intention with respect to the original provision.

State v. Garrison, 46 Wash.App. 52, 56, 728 P.2d 1102, 1104 (1986). As stated by another court:

In placing a judicial construction upon a legislative enactment, the entire sequence of all statutes relating to the same subject matter should be considered. . . . Since legislative policy changes as economic and sociological conditions change, the relevant legislative acts which are nearer in time to the enactment in question are more indicative of legislative intent than those which are more remote.

Connick v. City of Chehalis, 53 Wn.2d 288, 291, 333 P.2d 647

(1958). In the instant case, the order of original adoption of the ordinances in question is as follows:

- Chapter 17.30, RB-2 - 1989
- Chapter 17.89, PRD Zone – 1990
- Execution of 1994 Concomitant Agreement for property
- Chapter 17.05, adoption of 17.89.100 (exclusive method for increasing density in PRD process) – 2004

This clarifies that the manner of density increases in residential zones is governed by the PRD ordinance.

Further, the PRD ordinance is clear, and is complementary to the density ordinance (GHMC 17.05.020) in that “the density may be increased in a PRD over that permitted in the underlying zone but only if such density is consistent with the comprehensive plan and then only a 30% increase is permitted.” GHMC 17.89.100(A) (emphasis supplied). As the RB-2 ordinance indicates at GHMC 17.30.050(G), maximum density is “eight dwelling units per acre permitted outright; . . . ”. Accordingly, the only vehicle for increasing density is through compliance with the PRD standards.

Consider also that the simultaneous processing of density increases with dimensional variations makes sense, as the two criteria go hand in hand. Increased density will likely mean decreased lot size, particularly in these circumstances where the minimum lot size in the RB-2 zone is 12,000 square feet.¹¹

The obvious error in the Examiner's decision in this case is that he refused to apply PRD standards and criteria to evaluate density increases. Thus, at page 24 of the decision (Doc. 1200-1202), the Examiner stated the criteria for density increases in GHMC 17.89.070(A) relating to unique characteristics of the property, unique characteristics of the proposed uses, the identification of extraordinary public benefits, the identification of unique natural features of the property proposed by ownership by the City, identification of unique historic or cultural or historic features proposed for acceptance by the City and identification of

¹¹ The minimum 12,000 square foot lot size in the RB-2 zone may seem incongruous with the permitted eight units per acre density. However, since the RB-2 zone permits multi-family and small scale retail uses as described above, the minimum 12,000 square foot lot size is consistent with the intent to provide the transitional buffer between low density residential uses and commercial uses. See GHMC17.30.010. The 12,000 square foot minimum lot size is a deterrent to single family lot development in this zone.

recreational opportunities in excess of those normally required, were all answered by a single response:

Since the applicant is not seeking increased density through the PRD process or increased height, this requirement is not applicable.

Accordingly, the Examiner departed from the clear standards and criteria of the PRD ordinance, concluding that such standards related to density were “not applicable” to his considerations.

D. The Hearing Examiner correctly determined that NPD failed to provide sufficient open space for the PRD, but the superior court erred in reversing this portion of his decision.

The PRD ordinance allows setback standards in the Courtyards development to be modified such that the only required setbacks are for the homes located along the perimeter of the PRD property. These setbacks must be consistent with the front yard setbacks of the underlying zone (in this case, the RB-2 setback of 20 feet). GHMC Section 17.89.060. Under GHMC Section 17.78.060(B), a 25 foot buffer consisting of a dense vegetated screen must be provided along the perimeter of the PRD. Ex. 1, p. 9. The Concomitant Agreement requires a 40 foot dense vegetative screen buffer along all boundaries with single family uses along the north and west boundaries of the PRD. *Id.*

The PRD must set aside open space as provided in GHMC

17.89.110(A):

Common open space shall comprise at least 30 percent of the gross area of the PRD, and shall be used as a recreational, park or environmental amenity for collective enjoyment by occupants of the development.

However, in defining the allowable open space, the code specifically eliminates certain areas that may not be counted as common open space:

Common open space shall not include public or private streets, driveways, parking area or required yards for buildings or structures; provided however, that up to 30 percent of the required open space may be composed of open space on contiguous privately owned property reserved by easement or covenant to assure that the open space will be permanent.

GHMC Section 17.89.110(A) (emphasis supplied).

Here, NPD argued that despite the plain language in the code, it is entitled to include areas within the required yards for the homes as part of its open space calculation. The total PRD area, adjusted by reducing the right of way, is 810,668.72 square feet or 18.6 acres. Ex. 1, p. 14. Therefore, 243,200.61 square feet or 5.58 acres of open space is required. NPD provided plans showing that 246,360 square feet or 5.66 acres of open space was provided; however, this calculation includes the entire buffer areas provided

on the plat. *Id.* These perimeter buffer areas are 25 feet wide along the south and east boundaries, and 40 feet along the north and west boundaries of the PRD.

It is clear from the code that the perimeter setback is designed to create an open area between the boundary line of the property and structures. However, if the required yard for the structures is 20 feet, but the perimeter buffer is only 25 feet wide along two boundaries, only 5 feet of this buffer is truly “common open space.” Since the only “required yard” is the perimeter yard setback area in GHMC section 17.89.060(A)(2), the intent is clear that this area cannot be counted as open space.

VI. CONCLUSION.

Because this Court considers the administrative record, and does not review the trial court’s decision, the City asks that the Court reverse the Hearing Examiner’s decision on the issue of density in the Courtyards PRD. Contrary to the clear terms of the Gig Harbor zoning ordinance, the Examiner approved a dramatic increase in density for the Courtyards at Skansie Park project without meeting the standards in the PRD ordinance.

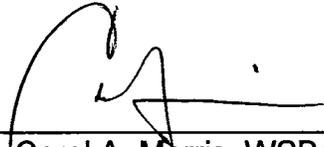
The Examiner correctly determined that NPD could not count the perimeter buffer toward the required open space for the PRD.

Therefore, the City asks the Court to affirm the Examiner's decision on the open space issue.

Dated this ³¹29th day of January, 2008.

LAW OFFICE OF CAROL A. MORRIS, P.C.

By



Carol A. Morris, WSBA #19241
Attorney for appellant City of Gig Harbor

storage shall be screened by a wall, fence, landscaping or structure from surrounding properties and streets.

D. Outdoor Lighting. Outdoor lighting shall conform to the standards of GHMC 17.99.350 and 17.99.460. Such lighting shall be shielded so that the direct illumination shall be confined to the property boundaries of the light source. Ground-mounted floodlighting or light projection above the horizontal plane is prohibited between midnight and sunrise.

E. Trash Receptacles. Trash receptacles shall be screened from view. Screening shall be complementary to building design and materials.

F. Design. Development in the RB-1 district shall conform to the design and development standards contained in Chapter 17.99 GHMC.

G. Restaurant 1 and Food Stores. In addition to all other performance standards, restaurant 1 and food store uses shall be situated on the street level in an office building and not exceed 800 square feet in floor area. No outside sales or storage are allowed. The hours of operation are limited to 16 hours per day. (Ord. 1086 § 15, 2007; Ord. 1045 § 30, 2006; Ord. 975 § 34, 2004; Ord. 573 § 2, 1990).

Chapter 17.30

RESIDENTIAL AND BUSINESS DISTRICT (RB-2)

Sections:

- 17.30.010 Intent.
- 17.30.020 Permitted uses.
- 17.30.030 Conditional uses.
- 17.30.040 Site plans.
- 17.30.050 Development standards.
- 17.30.060 Site coverage.
- 17.30.070 Maximum building height.
- 17.30.080 Parking.
- 17.30.090 Signs.
- 17.30.100 Loading.
- 17.30.110 Performance standards.

17.30.010 Intent.

The RB-2 district is intended to provide a mix of medium density residential uses with certain specified business, personal and professional services. It is intended to serve as a transitional buffer between high intensity commercial areas and lower intensity residential areas. The RB-2 zone is similar in construction to the RB-1 zone while allowing a higher percentage of impervious coverage and multifamily residential development. Furthermore, the RB-2 zone would serve to minimize impacts to adjacent residential uses by limiting general operational impacts of a use to that portion of the site between the structure(s) and the fronting road. (Ord. 554 § 1A, 1989).

17.30.020 Permitted uses.

Refer to Chapter 17.14 GHMC for uses permitted in the RB-2 district. (Ord. 1045 § 32, 2006).

17.30.030 Conditional uses.

Refer to Chapter 17.14 GHMC for uses permitted in the RB-2 district. (Ord. 1045 § 34, 2006).

17.30.040 Site plans.

Prior to the issuance of a building permit in the RB-2 district, the site plan review process specified under this title shall be completed to the satisfaction of the city. (Ord. 554 § 1D, 1989).

Attachment A

17.30.050 Development standards.

In an RB-2 district, development standards shall be satisfied for all new and redeveloped uses:

	Single-Family and Duplex Dwellings	Other Residential and Nonresidential
A. Minimum lot area	12,000 sq. ft.	12,000 sq. ft.
B. Minimum lot width	70'	70'
C. Front yard setback	House: 20' Porch: 12' Garage: 26'	20'
D. Side yard setback ¹	8'	8'
E. Rear yard setback ¹	30'	15'

F. Any nonresidential yard abutting an existing residential use or zone: 40 feet with dense vegetative screening. Easements not having dense vegetative screening are not included;

G. Maximum density: Eight dwelling units per acre permitted outright; 12 dwelling units per acre allowed as a conditional use.

¹Garages accessory to single-family and duplex dwellings may be located in the defined side and rear yards, provided they conform to the criteria in GHMC 17.99.490(A)(1).

(Ord. 1085 § 8, 2007; Ord. 954 § 3, 2004; Ord. 710 § 26, 1996; Ord. 554 § 1E, 1989).

17.30.060 Site coverage.

Impervious site coverage in an RB-2 district shall be limited as follows:

A. Fifty-five percent site coverage is permitted outright.

B. Seventy percent site coverage is conditionally allowed, subject to the following:

1. For every one percent increase in site coverage, an additional 0.5 feet of buffer shall be provided between the use and adjacent single-family residential use or zone;

2. Increased buffering shall consist of one of the following:

a. Undisturbed native vegetation which meets the definition of a dense vegetative screen,

b. Appropriate landscape vegetation consisting of a mixture of coniferous and broadleaf evergreen species with minimum planting height of six feet and capable of providing a dense vegetative screen within three years of planting,

c. As an alternative to paragraph b of this subdivision, the opaque portion of the screen may consist of a weather-resistant wood fence of six feet in height, constructed along the property line.

C. Buffer vegetation shall be maintained for the life of the project. Dead, diseased or dying vegetation may be removed; provided, that replanting of vegetation of a like or similar species in size and area coverage shall be accomplished within six months from removal. (Ord. 554 § 1F, 1989).

17.30.070 Maximum building height.

In an RB-2 district, all buildings and structures shall not exceed 35 feet except as provided for under Chapter 17.62 GHMC, Height Restriction Area, and as provided under GHMC 17.99.390(A)(3) and 17.99.510(A)(2) and (B). (Ord. 975 § 35, 2004; Ord. 710 § 27, 1996; Ord. 554 § 1G, 1989).

17.30.080 Parking.

In an RB-2 district, parking on private property shall be provided in connection with any permitted or conditional use as specified in Chapter 17.72 GHMC. Where the parcel abuts a residential use or zone, parking and vehicle access areas shall be located between the fronting road and the structure(s); provided, that where site characteristics or design preclude locating parking and access as described, that an additional 10 feet of buffering shall be required. (Ord. 554 § 1H, 1989).

17.30.090 Signs.

In an RB-2 district, signs may be allowed in conjunction with any permitted use and are subject to the provisions of Chapter 17.80 GHMC. (Ord. 554 § 1I, 1989).

17.30.100 Loading.

In an RB-2 district, off-street loading facilities shall be provided in accordance with the provisions of Chapter 17.72 GHMC. (Ord. 554 § 1J, 1989).

17.30.110 Performance standards.

In an RB-2 district, performance standards are as follows:

A. Exterior Mechanical Devices. Air conditioners, heating, cooling and ventilating equipment, pumps and heaters and all other mechanical devices shall be screened.

B. Landscaping. Landscaping is required and shall be installed in conformance with Chapter 17.78 GHMC and/or by conditions of approval of discretionary applications required by this title; such landscaping shall be maintained in a neat manner. In no event shall such landscaped areas be used for storage of materials or parking of vehicles.

C. Outdoor Storage of Materials. The outdoor storage of materials, including but not limited to lumber, auto parts, household appliances, pipes, drums, machinery or furniture, is permitted as an incidental or accessory activity of a permitted use or the principal feature of a conditional use. Such storage shall be screened by a wall, fence, landscaping or structure from surrounding properties and streets.

D. Outdoor Lighting. Outdoor lighting shall conform to the standards of GHMC 17.99.350 and 17.99.460. Such lighting shall be shielded so that the direct illumination shall be confined to the property boundaries of the light source. Ground-mounted floodlighting or light projection above the horizontal plane is prohibited between midnight and sunrise. Temporary outdoor lighting intended to advertise a temporary promotional event shall be exempt from this requirement.

E. Trash Receptacles. Trash receptacles shall be screened from view. Screening shall be complementary to building design and materials.

F. Design. Development in the RB-2 district shall conform to the design and development standards contained in Chapter 17.99 GHMC. (Ord. 1086 § 16, 2007; Ord. 975 § 36, 2004; Ord. 710 § 28, 1996; Ord. 554 § 1K, 1989).

Chapter 17.31

DOWNTOWN BUSINESS DISTRICT (DB)

Sections:

- 17.31.010 Intent.
- 17.31.020 Permitted uses.
- 17.31.030 Conditional uses.
- 17.31.040 Site plans.
- 17.31.050 Minimum lot requirements.
- 17.31.060 Minimum building setback requirements.
- 17.31.070 Maximum impervious coverage by all buildings.
- 17.31.075 Maximum gross floor area.
- 17.31.080 Maximum height of structures.
- 17.31.090 Parking/loading.
- 17.31.100 Signs.
- 17.31.110 Performance standards.

17.31.010 Intent.

- A. The purpose of the DB district is to:
 1. Provide for an area that offers a broad range of goods and services for the citizens of Gig Harbor;
 2. Promote and enhance services and activities which cater to visitors to the city; and
 3. Maintain the traditional scale and character of downtown Gig Harbor.

B. The standards for development in this chapter are intended to allow uses which are:

1. Primarily conducted within enclosed buildings except for parking, dining areas and newsstands;
2. Protect views; and
3. Allow for commercial developments which do not adversely affect residences through excessive noise or bothersome activities. (Ord. 573 § 2, 1990).

17.31.020 Permitted uses.

Refer to Chapter 17.14 GHMC for uses permitted in the DB district. (Ord. 1045 § 36, 2006).

17.31.030 Conditional uses.

Refer to Chapter 17.14 GHMC for uses conditionally permitted in the DB district. (Ord. 1045 § 38, 2006).

17.31.040 Site plans.

Before a building permit will be issued in a DB district, the site plan review process as specified in Chapter 17.96 GHMC shall be followed. (Ord. 573 § 2, 1990).

site or in the neighborhood which can be conserved and still leave the applicant reasonable use of the land by the use of a PRD; or

2. The property or its neighborhood has an historical character of importance to the community that will be protected by use of a PRD. (Ord. 867 § 2, 2001; Ord. 710 § 82, 1996; Ord. 573 § 2, 1990).

17.89.030 Permit application procedures.

A. Type of Permit. A preliminary PRD application shall be processed according to the procedures set forth in GHMC Title 19 for Type III-A project permit applications. Final PRD applications shall be processed according to the procedures in GHMC Title 19 for Type III-A project permit applications.

B. Expiration of PRD. Within five years of the date of the preliminary PRD approval, an application shall be submitted for final PRD approval, otherwise, the preliminary PRD approval shall expire. Building construction on the project must commence within 12 months from the date of the final approval; otherwise, preliminary PRD approval becomes null and void.

C. Concurrent Applications. Unless an applicant for preliminary plat approval requests otherwise, a preliminary plat shall be processed simultaneously with a PRD, to the extent that procedural requirements allow simultaneous processing. If an applicant requests that a preliminary PRD application be processed prior to the time a preliminary plat application is submitted, the preliminary PRD application shall not be considered to be vested, i.e., such application shall not be considered under the subdivision, zoning or other land use control ordinances in effect at the time the fully completed application for a preliminary PRD has been submitted to the city.

D. Phasing. If a proposed PRD is to be developed in phases, the entire PRD shall be portrayed in the preliminary PRD application, and each phase shall individually receive final PRD approval within the time periods established in subsection B of this section.

E. Design Review. The applicant shall submit an application for design review approval concurrent with the preliminary PRD application. The hearing examiner shall be present at the design review board hearings as necessary to ensure coordination of decisionmakers as allowed under GHMC 19.01.002(C).

F. Extensions. Knowledge of the expiration date and initiation of a request for an extension of time is the responsibility of the applicant. Requests

for an extension of time must be submitted to the planning department at least 30 days prior to the expiration of PRD approval. The planning department shall schedule the request for extension for public hearing before the hearing examiner. One extension is the maximum to be granted and it shall be for no more than one year and the PRD may be subject to any new or amended regulations, requirements, policies or standards which are adopted after the original date of approval, unless 50 percent or more of the on-site work has been completed. (Ord. 867 § 3, 2001; Ord. 710 § 83, 1996; Ord. 573 § 2, 1990).

17.89.040 Contents of complete PRD application.

A. In addition to the applicable requirements of GHMC 19.02.002, a complete application for preliminary PRD shall consist of the following information:

1. An environmental checklist or impact statement, as may be applicable, pursuant to GHMC Title 18;

2. The title and location of the proposed development, together with the names, addresses and telephone numbers of the recorded owners of the land and the applicant, and if applicable, the name, address and telephone number of any architect, planner, designer or engineer responsible for the preparation of the plan, and of any authorized representative of the applicant;

3. A written description addressing the scope of the project, gross acreage, the nature and size in gross floor area of each use and the total amount of land in square feet to be covered by impervious surfaces;

4. A vicinity map showing site boundaries and existing roads and accesses within and bounding the site, as well as adjacent parcels and uses;

5. A topographic map delineating contours, existing and proposed, at two-foot intervals and which locates and classifies existing streams, wetlands, steep slopes and other natural features and/or critical areas;

6. Plans drawn to a scale no smaller than one inch equals 30 feet showing the proposed location and size of proposed uses, buildings, buffer areas, yards, open spaces and landscaped areas;

7. A circulation plan drawn to a scale acceptable to the public works director illustrating all access points for the site and the proposed size and location of driveways, streets and roads that have immediate impact on public rights-of-way;

8. Utility, drainage and stormwater runoff plans;

9. A plan of all proposed landscaping including buffers and screening to be used as well as identification of areas of significant vegetation proposed to be retained;

10. A statement explaining how the proposed PRD is consistent with and implements the city of Gig Harbor comprehensive plan, the designation under the comprehensive plan, current zone classification, and desired zone classification;

11. A narrative describing how the proposed PRD provides substantial additional benefit to the citizens of the city of Gig Harbor (the benefit accruing as a result of implementation of the PRD process as opposed to following the development standards of the underlying zone) and how it is proposed the additional amenities and benefits should apply to the percentage of additional density and/or height being requested;

12. A map of the area, with area proposed for rezone outlined in red; and

13. Two sets of mailing labels for all property owners whose parcels are within 300 feet of any border of the subject property, as provided by the Pierce County auditor's office.

B. In addition to the applicable requirements of GHMC 19.02.002, a complete application for final PRD approval shall consist of the following information:

1. Two sets of mailing labels for all property owners whose parcels are within 300 feet of any border of the subject property, as provided by the Pierce County auditor's office;

2. A complete application for design review as required under GHMC 17.98.040. (Ord. 951 § 4, 2004; Ord. 867 § 4, 2001; Ord. 573 § 2, 1990).

17.89.050 Types of uses permitted.

The following uses are permitted in a PRD:

A. Those primary, accessory and conditional uses permitted in the underlying zoning district;

B. Other residential and low impact retail uses may be located within the PRD, if a rezone application is submitted concurrently with the preliminary PRD application, and all of the following criteria are satisfied, in addition to the rezone criteria in Chapter 17.100 GHMC:

1. Such uses constitute 10 percent or less of the proposed project;

2. Such uses are an integral component of the planned residential development;

3. Such uses are compatible with any existing residential uses; and

4. Such uses are consistent with the Gig Harbor comprehensive plan. (Ord. 867 § 5, 2001; Ord. 573 § 2, 1990).

17.89.060 Development and design standards.

A. The performance standards of the underlying zoning district may be varied in a PRD, subject to the criteria in this chapter, only as follows:

1. Lot Area and Lot Width. Lot area and width requirements may be reduced where the site plan is such that light, air and privacy are provided. Cluster housing is supported.

2. Setbacks. Structures located on the perimeter of the PRD shall be set back in accordance with the front yard setbacks of the underlying zone.

3. Impervious Surface Coverage. Impervious surface coverage of individual parcels may exceed the percentage of impervious surface coverage allowed in the underlying zone; provided, that overall impervious surface coverage of the PRD does not exceed the percentage permitted by the underlying zone.

4. Height. Building height may exceed the maximum permitted by code; provided, that the design protects the views and privacy of properties inside and outside of the project but in no case shall the maximum height exceed 35 feet in R-1 and R-2 districts. Variances from the height limits as provided in the City Height Restriction Area Map, as adopted by Chapter 17.62 GHMC, shall not be allowed. For perimeter buildings exceeding the maximum height of the underlying zone, the distance between such buildings and the perimeter of the PRD shall not be less than the front yard setback of the underlying zone plus five feet for each foot of excess height.

B. The performance standards which may not be modified or altered in a PRD are:

1. Shoreline regulations when the property is located in an area under the jurisdiction of the Gig Harbor shoreline master program;

2. Standards pertaining to development in environmentally sensitive areas;

3. Regulations pertaining to nonconforming uses;

4. Standards pertaining to screening around outdoor storage areas;

5. Total coverage by impervious surface coverage; and

6. Height restrictions as identified on the adopted City of Gig Harbor Height Restriction Area Map and shoreline master program. (Ord. 867 § 6, 2001; Ord. 573 § 2, 1990).

17.89.070 Criteria for approval of preliminary PRD application.

A. Applicants for a preliminary PRD application shall demonstrate that, with the exception of the sections of the code from which the applicant intends to vary (as allowed by GHMC 17.89.060), the proposed PRD satisfies all applicable code requirements, and is compatible with surrounding properties. In addition, applicants must make the following showing:

1. Landscaping and site plans showing the location of proposed open space or parks, road layout and proposed buffering of buildings, parking, integrated pedestrian circulation, loading and storage areas, all approved under the design review process;

2. Identification of unique characteristics of the subject property proposed to be retained and how those characteristics qualify for density and/or height bonus under GHMC 17.89.100;

3. Identification of unique characteristics of the proposed use(s) and how those characteristics qualify for density and/or height bonus;

4. The proposed relationship and arrangement of buildings and open spaces as they relate to various uses within or adjacent to the PRD approved under the design review process;

5. Measures proposed to mitigate visual impact of the PRD upon the surrounding area and approved under the design review process;

6. Identification of any extraordinary public improvements proposed for acceptance of ownership by the city in connection with the planned development and that qualify for the density and/or height bonus under GHMC 17.89.100;

7. Identification of any unique natural features of the property proposed for acceptance of ownership by the city for preservation, and that qualify for the density and/or height bonus under GHMC 17.89.100;

8. Identification of any unique historic or cultural features of the property and surrounding neighborhood proposed for acceptance of ownership by the city for preservation and that qualify for density and/or height bonus; and

9. Identification of any proposed recreational opportunities in excess of those normally required of a subdivision and a description of how they qualify for density and/or height bonus.

B. In addition to the above, the PRD may only be approved if the city finds that all of the following criteria are satisfied:

1. The director of public works and the decisionmaker finds that the site access, proposed on-site circulation and off-street parking meet all pub-

lic works standards and makes adequate provision for roads, streets, alleys and other public ways. Streets and sidewalks, existing and proposed, must be suitable and adequate to carry anticipated traffic within the proposed PRD and in the vicinity of the PRD;

2. The director of public works and the decisionmaker finds that the PRD makes adequate provision for all public utilities, including, but not limited to, water, sewer and stormwater drainage. Water, sewer and stormwater facilities, existing and proposed, must be suitable and adequate to provide service within the proposed PRD and in the vicinity of the PRD;

3. The PRD is consistent with the comprehensive plan;

4. The PRD accomplishes, by the use of permitted flexibility and variation in design, a development that is better than that resulting from traditional development, and benefiting the general public as well as the residents of the PRD. Net benefit to the city may be demonstrated by one or more of the following:

a. Placement, type or reduced bulk of structures, or

b. Interconnected usable open space, or

c. Recreational facilities, or

d. Other public facilities, or

e. Conservation of natural features, or

f. Aesthetic features and harmonious design, or

g. Energy efficient site design or building features;

5. The PRD results in no greater burden on present and projected public utilities and services than would result from traditional development;

6. The fire marshal and the decisionmaker find that adequate provision has been made for fire protection;

7. The perimeter of the PRD is compatible with the existing land use or property that abuts or is directly across the street from the subject property. Compatibility includes but is not limited to size, scale, mass and architectural design;

8. One or more major circulation point(s) functionally connected to a public right-of-way as required by the director of public works, or the fire marshal, or any other appropriate decisionmaker;

9. Open space within the PRD is an integrated part of the project rather than an isolated element of the PRD and is accessible to the general public;

10. The design is compatible with and responds to the existing or intended character, appearance, quality of development and physical

characteristics of the subject property and immediate vicinity;

11. Each phase of the proposed PRD, as it is planned to be completed, contains the required parking spaces, open space, roads, recreation space, utilities and utility area and landscaping necessary for creating and sustaining a desirable and stable environment.

C. If the PRD requires a rezone(s), such rezone(s) shall be approved before or concurrently with the PRD is approval. (Ord. 867 § 7, 2001; Ord. 710 § 84, 1996; Ord. 573 § 2, 1990).

17.89.080 Criteria for approval of final PRD application.

A. Applicants for a final PRD application shall demonstrate that all of the following criteria have been satisfied:

1. All features and amenities identified in the preliminary PRD have been constructed and/or are retained or improved;

2. The city public works director has documented that all conditions imposed on the preliminary PRD requiring public works department approval have been constructed or improved to the satisfaction of the director;

3. The city fire marshal has documented that all conditions imposed on the preliminary PRD requiring fire code approval have been constructed (or per the fire marshal's discretion will be constructed pursuant to a subsequent permit) to the satisfaction of the fire marshal;

4. The city planning director has documented that all conditions imposed on the preliminary PRD requiring planning department approval have been constructed to the satisfaction of the director;

5. Findings must be made that the preliminary PRD (and/or preliminary plat) conforms to all terms of preliminary PRD approval, and that the PRD meets the requirements of this chapter and all other applicable codes and state laws.

B. The applicant shall provide a bond or other financial assurance acceptable to the hearing examiner to ensure that any improvements made in the common open space will be completed. The city shall release the bond or financial assurance when the improvements have been completed in accordance with the preliminary PRD.

C. As a condition of approval of the final PRD, and before any permits are issued for the property, the applicant shall submit to the city any covenants, deeds and/or homeowners' association bylaws, or other documents guaranteeing maintenance, construction and common fee ownership, if applicable,

of open space, community facilities, and all other commonly owned and operated property. These documents shall be reviewed and approved as to form by the city attorney to ensure that they comply with the requirements of this chapter prior to final PRD approval. Such documents and conveyances shall be recorded with the county auditor as a condition of any final PRD approval. (Ord. 867 § 8, 2001; Ord. 573 § 2, 1990).

17.89.090 Roads.

All roads shall be consistent with the adopted policies and standards of the city of Gig Harbor public works construction standards for public roads. (Ord. 867 § 9, 2001; Ord. 573 § 2, 1990).

17.89.100 Density bonus.

A. The density may be increased in a PRD over that permitted in the underlying zone but only if: (1) consistent with the underlying comprehensive plan designation for the property; and (2) the density increase will not exceed 30 percent over the density allowed in the underlying zone. Density calculations shall be made as set forth in Chapter 17.05 GHMC.

B. Density bonuses may be allowed only as follows:

1. Open Space.

a. Satisfaction of the standards in GHMC 17.89.110 for open space; and

b. Provision of open space exceeding by at least 30 percent of the minimum required by the design review manual or the existing zoning code (whichever is greater); or at least 30 percent more than the level of service standards for open space and active recreational areas in the capital facilities element of the adopted Gig Harbor comprehensive plan: 10 percent increase;

2. Preservation of Natural Features. Preservation of a desirable natural feature that would not otherwise be preserved such as, but not limited to, an unregulated wetland, stream corridor, unique geological feature, substantial over story vegetation: 10 percent increase;

3. Preservation of Scenic Vistas. Preservation of a scenic vista corridor(s) within and off-site and accessible to the general public rather than private property owners: 10 percent increase;

4. Design of Stormwater Treatment System as Amenity. A stormwater treatment (retention/detention) facility is also designed as a visually aesthetic and physically accessible amenity for the enjoyment of the public: 10 percent increase. (Ord. 951 § 5, 2004; Ord. 867 § 10, 2001; Ord. 573 § 2, 1990).

17.89.110 Open space.

In order to be approved, a preliminary PRD application must demonstrate that all of the following performance standards are satisfied:

A. Common open space shall comprise at least 30 percent of the gross area of the PRD, and shall be used as a recreational, park or environmental amenity for collective enjoyment by occupants of the development. Common open space shall not include public or private streets, driveways, parking areas or the required yards for buildings or structures; provided, however, that up to 30 percent of the required open space may be composed of open space on contiguous privately owned properties reserved by easement or covenant to assure that the open space will be permanent.

B. No naturally submerged lands on site will be counted as open space unless explicitly allowed under GHMC 17.89.100, Density bonus.

C. At least 50 percent of the common open space area must be usable for active or passive recreation, and which is also not utilized as a utility improvement or structure.

D. Common open space may contain such structures and improvements as are necessary and appropriate for the out-of-doors enjoyment of the residents of the PRD.

E. Common open space associated with density bonus must be freely accessible to the general public, identified on the face of the plat, and clearly identified by on-site signage.

F. All common open space must be unique to the project, and may only be credited a single time and to a single project. Such open space may also include a proportionate contribution that is a portion of a city-approved off-site mitigation.

G. Land shown in the final development plan as common open space, and landscaping and/or planting contained therein, shall be permanently maintained by and conveyed to one of the following:

1. An association of owners shall be formed and continued for the purpose of maintaining the common open space. The association shall be created as an association of owners under the laws of the state and shall adopt and propose articles of incorporation or association and bylaws, and adopt and improve a declaration of covenants and restrictions on the common open space that are acceptable to the city in providing for the continuing care of the space. No common open space may be put to a use not specified in the final development plan unless the final development plan is first amended to permit the use. No change of use may be considered as a waiver of any of the covenants limiting the use of common open space area, and all rights

to enforce these covenants against any use permitted are expressly reserved to the city as well as the owners.

2. A public agency which agrees to maintain the common open space and any buildings, structures or other improvements, which have been placed upon it.

H. Common open space shall be suitably improved for its intended use, except when it contains natural features worthy of preservation which may be left unimproved. The buildings, structures and improvements to be permitted in the common open space are those appropriate to the uses which are authorized for the common open space. (Ord. 867 § 11, 2001; Ord. 573 § 2, 1990).

17.89.120 Minor and major amendments of the final plan.**A. Minor Amendments.**

1. A minor amendment to the final PRD is a Type I permit application and shall be processed as provided in GHMC Title 19.

2. Minor amendments are those which may affect the precise dimensions or siting of building (i.e., lot coverage, height, setbacks) but which do not affect the basic character or arrangement and number of buildings approved in the final PRD, nor the density of the development or the amount and quality of open space and landscaping.

3. In addition to the permit application requirements set forth in GHMC 19.02.002, a complete application for a minor amendment shall consist of the following:

a. All plan sheets or pages, or document sheets or pages which reflect changes proposed, or that are affected by such changes.

B. Major Amendments.

1. Major amendments are Type III-A permit applications and shall be processed in accordance with GHMC Title 19.

2. Major amendments are those which substantially change the character, basic design, density, open space or other requirements and conditions of the site plan.

3. In addition to the permit application requirements set forth in GHMC 19.02.002, a complete application for a major amendment shall consist of the following:

a. A complete application packet as required under GHMC 17.96.050.

b. A complete application packet as required by GHMC 17.98.040 and the design manual.

c. An amended environmental checklist, and addendums to all environmental documents

affected by the proposed change including the traffic impact analysis.

C. Concurrent Processing of Applications. A minor PRD application may be processed concurrent with a building permit application. If an application for a major amendment is submitted, no building or other permit associated with such major PRD amendment shall issue until all review proceedings required under GHMC Title 19 for a major PRD amendment are completed and all necessary approvals obtained. (Ord. 867 § 13, 2001; Ord. 710 § 86, 1996; Ord. 573 § 2, 1990. Formerly 17.89.130).

Chapter 17.90

PLANNED UNIT DEVELOPMENT

Sections:

- 17.90.010 Intent of the planned unit development zone ("PUD").
- 17.90.020 Where PUDs are permitted and acceptable parcel characteristics.
- 17.90.030 Permit application procedures.
- 17.90.040 Contents of a complete preliminary PUD application.
- 17.90.050 Types of uses permitted.
- 17.90.060 Development and design standards.
- 17.90.070 Criteria for approval of preliminary PUD application.
- 17.90.080 Criteria for approval of final PUD application.
- 17.90.090 Maximum gross floor area bonus.
- 17.90.100 Open space.
- 17.90.110 Roads.
- 17.90.120 Minor and major amendments of the final PUD.

17.90.010 Intent of the planned unit development zone ("PUD").

The intent of the PUD zone is to allow opportunity for more creative and imaginative commercial and business projects than generally possible under strict application of the zoning regulations in order that such projects shall provide substantial additional benefit to the community. It is further intended to preserve unique or sensitive physical features, such as steep slopes, views, retention of natural vegetation and to provide more open space, recreational amenities, and urban design amenities than would be available under conventional land development practices. Additionally, it is intended to promote more economical and efficient use of land and a unified design concept for commercial and business development. (Ord. 866 § 1, 2001; Ord. 710 § 87, 1996; Ord. 573 § 2, 1990).

17.90.020 Where PUDs are permitted and acceptable parcel characteristics.

A. PUDs may be permitted in all districts zoned commercial and business.

B. In the Waterfront Commercial (WC), Downtown Business (DB), Residential Business I (RB-1), and in adjacent zones, careful transition with existing development located at the perimeters of the zone must be provided.

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DIVISION II

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STATE OF WASHINGTON

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DEPUTY

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

CITY OF GIG HARBOR, a Washington
corporation,

Appellant,

vs.

NORTH PACIFIC DESIGN, et al.,

Respondent.

NORTH PACIFIC DESIGN, a Washington
corporation; and HUNT SKANSIE LAND,
LLC, a Washington limited liability
company,

Petitioners,

vs.

THE CITY OF GIG HARBOR, a
Washington municipal corporation, and
JOHN SCHULLER,

Respondents.

**Pierce County Superior Court
NO. 07 02 05289 1**

**Court of Appeals
NO. 36811-1-II**

ERRATA SHEET

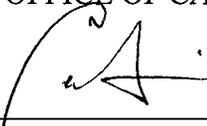
1 The following minor typographical errors were made in the Appellant City's Opening
2 Brief, filed on January 29, 2008. These errors are corrected in the attached amended Opening
3 Brief:

	<u>Page Number</u>	<u>Error and Change</u>
4		
5		
6	1. iii	F. . . . "recognizingt" to "recognizing"
7	2. v.	<i>Boehm</i> . . . 111 Wash. App. 711, . . .
8	3. 9.	2 nd to the last line, comma removed
9	4. 16.	Add "CP 41, 81." "CP 38."
10	5. 18.	7 lines from bottom of page, "should have <u>been</u> granted . . ."
11	6. 20.	7 lines from bottom of page, eliminate "standards," add "method"
12	7. 20.	10 lines from bottom of page, "zones, <u>and by allowing</u> NPD . . ."
13	8. 24	7 lines from bottom of page, eliminate "has been" add "will be"
14	9. 25.	Show "Id." as " <i>Id.</i> " twice on this page
15	10. 26.	Show "Id." as " <i>Id.</i> " and "Kenart" as " <i>Kenart</i> " and "Johnson" as " <i>Johnson</i> "
16		
17		
18	11. 27.	Show "Id." as " <i>Id.</i> " three times on this page
19	12. 28.	Show "Id." as " <i>Id.</i> " once and "Lutz" as " <i>Lutz</i> "
20	13. 29.	Show "Lutz" as " <i>Lutz</i> "
21	14. 31.	5 th line (of text): "NPD argues that it is not <u>even</u> required . . ."
22	15. 40.	10 th line from bottom (of text): "The Examiner also <u>held asserts</u> "
23	16. 42.	3 rd line from top: " <u>isn't even a use</u> . . ."
24		
25	17. 44.	6 th line from top: " In addition, <u>The</u> Washington courts, in the event of a conflict, will <u>also</u> . . ."

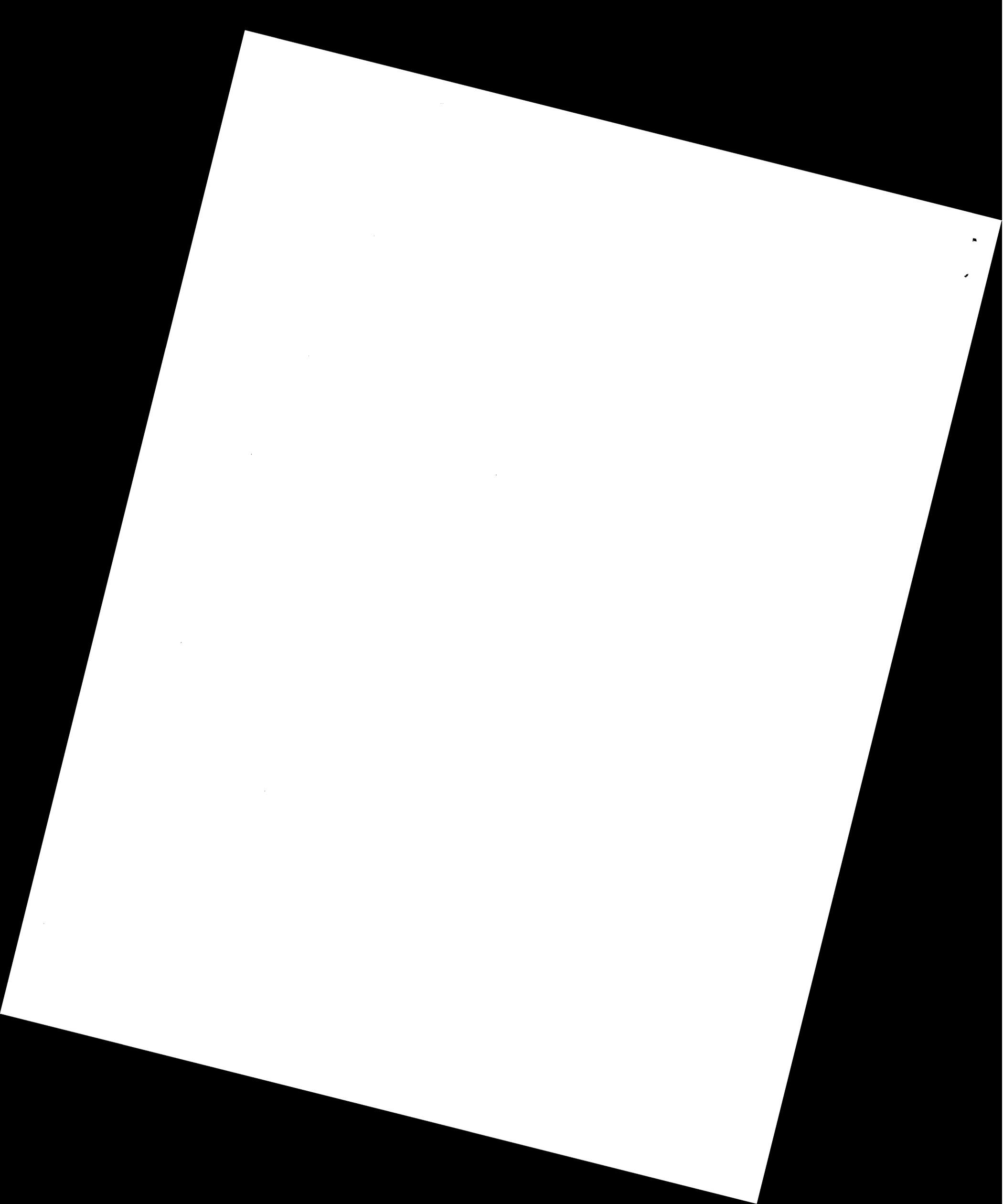
1 DATED this 31st day of January, 2008.

2 LAW OFFICE OF CAROL A. MORRIS, P.C.

3
4 By



5 _____
6 Carol A. Morris, WSBA #19241
7 Attorney for Appellant City of Gig Harbor
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STATE OF WASHINGTON
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DECLARATION OF SERVICE

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LLC, a Washington limited liability
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Petitioners,

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THE CITY OF GIG HARBOR, a
Washington municipal corporation, and
JOHN SCHULLER,

Respondents.

CAROL A. MORRIS, declares and states as follows:

1. I am the attorney for the City of Gig Harbor in the above-referenced case.

