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

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DALE E. and LETA L. ANDERSON; DALE E. ANDERSON and LETA  
L. ANDERSON, TRUSTEES OF THE DALE E. ANDERSON AND  
LETA L. ANDERSON FAMILY TRUST; and RIVER PROPERTY, LLC,

**Respondents/Cross-Appellants,**

v.

JAMES W. BROWN; ROBERTA D. DAVIS; KAE HOWARD,  
TRUSTEE OF THE KAE HOWARD TRUST; MICHAEL J. and CRISTI  
D. DEFREES; TUAN TRAN and KATHY HOANG; VINCENT and  
SHELLY HUFFSTUTTER; THOMAS J. and GLORIA S. KINGZETT;  
LARRY R. and SUSAN I. MACKIN; TOD E. MCCLASKEY, JR. and  
VERONICA A. MCCLASKEY, TRUSTEES OF THE MCCLASKEY  
FAMILY TRUST—FUND; CRAIG STEIN, RICHARD AND CAROL  
TERRELL,

**Appellants/Cross-Respondents.**

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**RESPONDENTS/CROSS-APPELLANTS' SUPPLEMENTAL BRIEF  
IN RESPONSE TO THE CITY OF VANCOUVER'S OPENING  
BRIEF**

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## I. INTRODUCTION AND RELEVANT BACKGROUND

On July 23, 2012, the Commissioner granted Respondent Dale and Leta Anderson's ("Andersons") request to file a supplemental brief responding to Respondent City of Vancouver's ("City") Opening Brief ("City's Opening Br."). The complete factual background is set forth in the Andersons' Response Brief on file with the Court. To facilitate review of this Supplemental Response, the Andersons provide relevant facts specific to the position taken by the City in its Opening Brief.

Dale and Leta Anderson own Lot 2 of the Plat of Rivershore Phase I ("Plat of Rivershore"). The Plat of Rivershore established a tract of tidelands abutting Lots 1-13 (referred to as "Tract A"). Note 4 on the Plat of Rivershore assigned each Lot an undivided interest in Tract A: "Tract 'A' to be owned and maintained by owners of record Lots 1-13; will be conveyed as undivided 1/13th interest in and to Tract 'A.'" (CP at 1288.) The face of the Plat of Rivershore does not restrict further division of Lots 1-13. (*Id.*)

The Andersons propose to redivide their Lot 2 into two lots: a smaller Lot 2 and a newly created Lot 2-1 ("Anderson Short Plat"). (CP at 768.) The Anderson Short Plat complies with all applicable zoning criteria. Unlike the Plat of Rivershore, which expressly assigned an undivided interest in Tract A to Lots 1-13, the Anderson Short Plat does

not assign, convey, or transfer any portion of Lot 2's undivided interest in Tract A to proposed Lot 2-1. (CP at 775.) Moreover, a condition of the City's approval of the Anderson Short Plat requires that Note 4 on the Plat of Rivershore also be inscribed on the final Anderson Short Plat. (CP at 775, 789 (Condition of Approval 18)). Thus, Lot 2's undivided interest in Tract A remains with Lot 2 as assigned by Note 4 on the Plat of Rivershore.

## **II. SUPPLEMENTAL RESPONSE TO CITY'S OPENING BRIEF**

Respondents Dale and Leta Anderson agree with the City of Vancouver's position that the redivision of a platted lot alone does not trigger the plat alteration procedures. (City's Opening Brief at 4-5). The Andersons disagree, however, with the City's unsupported argument that the Anderson Short Plat alters the parent Plat of Rivershore by diluting Lots 1-13's ownership interest in Tract A. (*Id.* at 6.)

First, whether the Anderson Short Plat assigns or conveys an interest in Tract A and thereby dilutes the ownership interest in Tract A is not reviewable by this Court. The City concedes that it did not appeal the Hearing Examiner's decision, much less assign error to the Hearing Examiner's finding that the Anderson Short Plat did not convey its interest in Tract A to Lot 2-1. (City's Response to Motion to Strike at 2)

("[Andersons'] contention that the issue is not properly before this Court is a valid one.)) Therefore, the Hearing Examiner's unchallenged finding is a verity.

Second, even if the finding were reviewable, the City has not met its burden of demonstrating that the Hearing Examiner erred under LUPA's standards of review. The City does not cite to any evidence in the record to support its claim that the Anderson Short Plat assigns an interest in Tract A to Lot 2-1. Likewise, to the extent the City asserts that whether the Anderson Short Plat dilutes the ownership of Tract A is a legal question, the City fails to reference any supporting authority. The City's failure to support its argument with citations to the record or supporting law render its argument legally deficient under LUPA as well as the Rules of Appellate Procedure ("RAP") 10.3(a)(6).

Finally, the City misstates Respondents' position when it states that the alteration statute only applies if public infrastructure is changed. (City's Opening Br. at 3.) Respondents' position is that the plat alteration statute applies when a proposal alters a communal right conveyed by the plat to all owners of lots within the plat such that their majority consent is justified by a cognizable property interest in the portion of the plat being altered. (Andersons' Opening Br. at 14-15.) Appellants here have no

legally cognizable property interest in Andersons' Lot 2 and therefore, the plat alteration procedures do not apply.

**A. The Hearing Examiner's Finding that the Anderson Short Plat Did Not Convey Any Interest in Tract A to Proposed Lot 2-1 Is a Verity**

An administrative finding is verity on appeal unless it is specifically assigned error. *United Development Corp. v. City of Mill Creek*, 106 Wn. App. 681, 688, 26 P.3d 943 (2001); *see also First Pioneer Trading Co. v. Pierce County*, 146 Wn. App. 606, 617, fn 5, 191 P.3d 928 (2008) (refusing to entertain argument in LUPA proceeding because the petitioner failed to assign error to the hearing examiner's jurisdiction determination). The City Hearing Examiner found that the Anderson Short Plat does not divide or alter ownership of Tract A: "The instant short plat does not convey any of Lot 2's 1/13th interest in Tract A, or otherwise provide access to Tract A, to Lot 2-1." (CP at 376, Finding 13.) Neither the City nor Appellants assigned error to this determination. The City did not appeal the City Hearing Examiner's decision affirming the City's approval of the Anderson Short Plat. Likewise, Appellants' Land Use Petition did not assign error to any of the Hearing Examiner's factual findings. (CP at 47-56.) Therefore, the Hearing Examiner's findings are verities for purposes of this appeal.

**B. The City Fails to Meet Its Burden to Demonstrate that the Anderson Short Plat Alters Tract A**

**1. Even If the Hearing Examiner's Finding that the Anderson Short Plat Does Not Convey an Interest in Tract A to Proposed Lot 2-1 Is Reviewable, Which It Is Not, the Finding Is Supported By Substantial Evidence**

Even if the Hearing Examiner's finding that the Anderson Short Plat does not affect Tract A is reviewable, the City fails to meet its burden that the Hearing Examiner erred in making that determination. The City, like the Appellants, carries the burden of demonstrating that the Hearing Examiner's decision is erroneous under LUPA. RCW 36.70C.130(1). The City fails to meet that burden because it cites no evidentiary or legal support for its claim.<sup>1</sup> (City Opening Br. at 4-5.)

Nevertheless, substantial evidence in the record supports the Hearing Examiner's determination that the Anderson Short Plat does not convey or divide Lot 2's interest in Tract A. First, the Andersons' application for a short plat does not propose to divide Lot 2's interest in Tract A. (CP at 775.) Second, the City required that the Anderson Short Plat include the "notes that are on the face of [the Plat of Rivershore]" as a condition to approval. (CP 775, 789, Condition of Approval 18.) Thus,

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<sup>1</sup> Not only does the City fail to meet its LUPA burden, but the City's Opening Brief is procedurally deficient. An appellant must provide argument in support of the issues presented for review together with citations to legal authority and references to relevant parts of the record. RAP 10.3(a)(6). Arguments that are not supported by reference to the record or citation to authority need not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

the Anderson Short Plat must include Note 4 which limits ownership of Tract A to Lots 1-13 of the Plat of Rivershore. Finally, the Andersons, through their counsel, confirmed to the City Hearing Examiner that they do not propose to divide Lot 2's undivided 1/13th interest in Tract A. Given the lack of any evidence to the contrary, the Hearing Examiner's determination that the Anderson Short Plat does not "convey any of Lot 2's 1/13th interest in Tract A" to proposed Lot 2-1 is supported by substantial evidence.

**2. The City Fails to Meet its Burden of Demonstrating That the Anderson Short Plat Implicitly Divides Lot 2's Interest in Tract A with Lot 2-1**

The City also suggests that the Anderson Short Plat divides Lot 2's interest to the Tract A by implication. But again, the City offers no support for its claim. First, a plat cannot implicitly accomplish what is expressly prohibited. Plats are interpreted in the same manner as any other writing and are construed as a whole to ascertain the intent of the platter. *Ditty v. Freeman*, 55 Wn.2d 306, 309, 347 P.2d 870 (1959). Here a condition of approval expressly requires that the Andersons include Note 4 from the Plat of Rivershore restricting ownership and maintenance of Tract A to Lots 1-13 of the Rivershore Plat on the fact of the final Anderson Short Plat. Thus, the face of the final Anderson Short Plat will unambiguously restrict ownership of Tract A to Lot 2.

Second, state law does not favor implied creations of property rights through subdivisions. See *Bersos v. Cape George Colony Club*, 4 Wn. App. 663, 667, 484 P.2d 485 (1971) (refusing to interpret a plat as creating an implied right against future division of lots). In *Bersos* the Court of Appeals Division Two refused to construe a plat to create property interests that were not expressly created on the face of the plat. The court reasoned that "if the parties desired such a restriction ... then they presumably could have expressly included it, in which case the problem would be different from that we now face." 4 Wn. App. 663, 667, 484 P.2d 485 (1971). Indeed, even the Vancouver Municipal Code ("VMC") does not allow plats to create implied rights: a plat must depict "all the descriptions, specifications, and provisions concerning the subdivision of land." VMC 20.150.040(B) (defining "plat") (emphasis added). Here the Anderson Short Plat does not assign any interest in Tract A to proposed Lot 2-1. Rather, the Anderson Short Plat must include Note 4 which expressly restricts ownership of Tract A to Lot 2. Thus the City's unsupported claim that the Anderson Short Plat will implicitly divide Lot 2's interest in Tract A is unavailing and should be rejected.

**3. The Plat Alteration Procedures do not Cure the Administrative Problems Recited by the City**

The City also presents examples of problems that it feels would arise if the Court does not require a plat alteration in this case. (City's Opening Br. at 7.) The City does not contend that the Anderson Short Plat will cause any of these problems, only that it fears that a future proposal could cause these problems if the Court does not require a plat alteration in this particular case. The City also does not explain how the plat alteration provisions would cure the City's fears. It seems that the City presumes (albeit erroneously) that a majority of parcel owners will *always* veto a proposal that might compromise government-imposed conditions on plats. Yet, if parcel owners view the short subdivision process as a means to circumvent government-imposed conditions (as the City fears) on the use of their land, it more reasonable to presume that a majority would approve "plat alterations" to avoid such conditions. Regardless, the City's fears are not well founded and may be remedied by existing provisions in the VMC.

First, the City's claim that significant impacts to existing infrastructure might go unchecked if short plats are not processed as plat alterations is unpersuasive. (City's Opening Br. at 7.) The City's fear is not cured by giving the majority of owners in a parent plat the ability to

veto a proposal. The problem is more appropriately cured by adopting infrastructure standards in the City code and providing City officials the authority to condition proposals to require infrastructure improvements or fees to mitigate for infrastructure impacts. Indeed, the City already has this authority and exercised it when approving the Anderson Short Plat. *See* VMC 20.320.040(C) (an applicant for a subdivision must demonstrate that "[a]ppropriate provisions to the extent necessary to mitigate an impact of the development have been made for open space, parks, schools, dedications, easements and reservations"). Specifically, the City conditioned approval of the Anderson Short Plat on paying "school and park impact fees" among other things. (CP at 775, 778-790; Conditions of Approval 1-35.) Thus, requiring majority approval of other lot owners through the plat alteration process is not necessary to mitigate infrastructure impacts as the City contends.

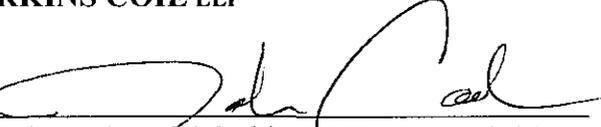
Second, the City's claim that government-imposed mitigation measures recorded on the face of a plat may be compromised if the court does not require compliance with the plat alteration procedures is similarly unpersuasive. As is explained above, the logical flaw in the City's argument is that it presumes a majority of lot owners will vote in accordance with the City's desires. The plat alteration statute does not require that a majority of lot owners vote in accordance with the City's

interests. *See* RCW 58.17.215. Additionally, like infrastructure improvements, the City Code provides the mechanism to alleviate this alleged problem. The VMC requires that a resubdivision of land comply with "all the terms and conditions of the existing subdivision's conditions of approval." VMC 20.320.040(E). Thus, the City has full authority to deny or condition a redivision of land when it determines that the redivision does not comply with the terms and conditions of approval for the parent plat.

### III. CONCLUSION

In sum, the City's argument is barred because no party assigned error to the Hearing Examiner's determination that the Anderson Short Plat does not convey Lot 2's undivided interest to Tract A or otherwise provide access to the Tract A, to Lot 2-1. Even if the determination were reviewable, the City's argument that Hearing Examiner erred is unsupported, and factually and legally flawed. The Andersons respectfully request that this Court deny the City's request for relief and affirm the decision of the City Hearing Examiner.

DATED: August 6<sup>th</sup>, 2012 **PERKINS COIE LLP**

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**CERTIFICATE OF SERVICE**

I certify that I caused the foregoing RESPONDENTS/CROSS-APPELLANTS SUPPLEMENTAL BRIEF IN RESPONSE TO THE CITY OF VANCOUVER SUPPLEMENTAL BRIEF to be served on the following:

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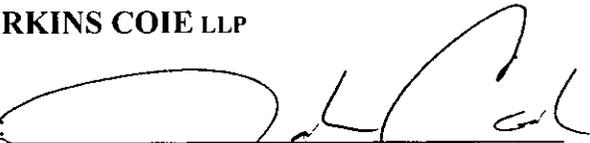
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