

No. 42490-8-II

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

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NORTHSHORE INVESTORS, LLC, a Washington limited liability  
company and SAVE NE TACOMA, a Washington non-profit  
corporation, et. al.

Appellants/Cross-Respondents

v.

CITY OF TACOMA,

Respondent/Cross-Appellant

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II  
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**RESPONSE  
OF APPELLANT/CROSS-RESPONDENT  
SAVE NE TACOMA, et. al.**

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SAVE NE TACOMA, Johnnie E. Lovelace, Lois S. Cooper and James V. and Renee D. Lyons (together "SNET") by and through Gary D. Huff of Karr Tuttle Campbell, hereby respond to the Opening Brief of Appellant Northshore Investors, LLC as follows.

**I. ADOPTION AND INCORPORATION BY REFERENCE OF THE RESPONSE BRIEF OF THE CITY OF TACOMA.**

SNET fully supports and adopts by reference the arguments and legal authority presented by the City of Tacoma in its Response Brief herein. In addition, SNET provides this supplemental response and argument.

**II. ADDITIONAL FACTUAL BACKGROUND AND CONTEXT.**

The following additional factual background is relevant to the proper consideration of Appellant's arguments. Prior briefing has not fully disclosed or fairly characterized the manner in which open space restriction came about. The history and the reasons for its adoption distinguish this situation from routine rezone requests. It is also important to remember when considering Appellant's arguments that despite the recitation of the parties in the case caption on the first page of each of the parties' briefs, NSGA (the owner of the golf course) did not appeal the ruling of the Pierce County Superior Court in the LUPA

proceedings below. NSGA is not a party to these proceedings. Any determination of the rights, claims or arguments of NSGA are therefore final and not subject to re-argument here. Appellant may not adopt these personal circumstances for its own use and re-argue alleged changes of circumstances when NSGA for whatever reason accepted the Superior Court ruling and declined to participate in these proceedings.

In his ruling in the Declaratory Judgment action below<sup>1</sup>, Judge Hartman recited the factual history pertaining to the open space condition:

The undisputed factual record establishes that:

- (1) This lawsuit pertains to a Planned Residential Development (“PRD) located in Tacoma, Washington, commonly referred to as North Shore Country Club Estates (Country Club Estates”).
- (2) Prior to 1978, all property now included in the Country Club Estates PRD including the Golf Course, was owned by the Tacoma Land Company (“TLC”) The zoning classification for the property was R-2, One Family Dwelling District, until a re-zone of the property to R-2 PRD in 1981.

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<sup>1</sup> Prior to the review by and public hearing before its Hearing Examiner, the City of Tacoma brought a declaratory judgment action before Superior Court Judge Hartman for a determination of the validity and ongoing effect of the Open Space Taxation Agreement (“OSTA”) and Concomitant Zoning Agreement (“CZA”) which were the documents by which the 1981 Hearing Examiner Decision and Recommendation and City Council Approvals, including the open space restriction, were implemented. Judge Hartman’s Decision is attached hereto as Appendix A. The 1981 Hearing Examiner Decision and recommendation is attached as Appendix B.

- (3) In 1978, NSGA was operating a golf course on land that it leased from TLC. On November 20, 1978, TLC and NSGA entered into a Real Estate Contract in which NSGA agreed to purchase the Golf Course from TLC. However, at the time, Nu-West Pacific, Inc. ("Nu-West") and its partner Brownfield and Associates, Inc. ("Brownfield"), acting through a joint venture North Shore Associates ("NSA") already held option purchase rights to purchase the Golf Course and adjacent property from TLC. Accordingly, NSGA and TLC were not able to carry out the contract for sale of the Golf Course to NSGA without the consent of Brownfield and Nu-West.
- (4) On May 10, 1979, Defendant NSGA entered into an Agreement Concerning North Shore Golf Course dated May 10, 1979, ("1979 Agreement") with Nu-west and Brownfield. This 1979 Agreement required NSGA to (1) subject the Golf Course to the master planning process; (2) restrict the use of the Golf Course for such period as required by the City of Tacoma for density and open space requirements; and (3) execute all documents so that Nu-West may use the property for density and open space and other requirements as through it were owned by Nu-West. In return NSGA obtained the option purchase rights to purchase the Golf Course from TLC. Upon satisfaction of its obligations under the 1979 Agreement, the Agreement was to expire and only the restrictions on the Golf Course imposed by the City of Tacoma under the master planning and development process were to remain.
- (5) On June 21, 1979, North Shore Associates, as applicant, and Nu-West and NSGA as owners submitted to Tacoma an application for reclassification of the Country Club Estates property, including the Golf Course, from R-2 to R-2 PRD. This application included a master plan that *offered the golf course for designation as open space as part of this PRD*

*planning process.* In addition to being involved as an owner in the application for the PRD reclassification, NSGA submitted a separate application to Tacoma for establishment of Open Space Current Use Classification for the Golf Course pursuant to RCW Ch. 84.34. On February 10, 1981, the PRD and open space classification applications were considered by the Hearing Examiner at a single combined hearing. Evidence considered by the Hearing Examiner included the 1979 Agreement. The Hearing Examiner *recommended that the Golf Course should be designated as open space as a condition of the PRD approval. The City Council PRD decision included the same condition.*

- (6) On September 21, 1981, NSGA and duly authorized representatives of Tacoma executed the OSTA. The OSTA unambiguously provides that "(t)he use of (the Golf Course) shall be restricted solely to golf course and open space use. No use of such land other than as specifically provided hereunder shall be authorized or allowed without the express consent of Tacoma." The OSTA further provides that the "agreement shall be effective commencing on the date the legislative body receives the signed agreement from the Owner and shall remain in effect until such time as nullified by Tacoma."
- (7) On November 3, 1981, the Tacoma City Council adopted Rezone Ordinance No. 22364, which incorporated the conditions recommended by the Hearing Examiner. This Rezone Ordinance resulted in PRD-2 Zoning of the Golf Course and surrounding property. The legal description in this Rezone Ordinance includes the Golf Course within the boundaries of the PRD zoning.
- (8) On November 6, 1981, Nu-West and duly authorized representatives of Tacoma executed the CZA. The CZA applies to certain described property, including

the Golf Course. The CZA condition 2(tt) provides that “(t)o ensure the integrated development of the site, the total development shall be constructed and thereafter maintained in a united manner. Such unified development and maintenance shall be in accordance with this agreement and the approved Site Plan, irrespective of the state or division of ownership of the site.” The legal description of the property covered by the CZA includes the Golf Course. The master plan and site plans pertaining to the R-2 Planned Residential Development show the Golf Course as a golf course.<sup>2</sup>

Thus, NSGA offered the golf course to city in satisfaction of open space requirements and as part of a bargain under which the City staff agreed to support the rezone request. The open space condition was again the subject of written agreements with the City (the OSTA and CZA) which provide a contractual element here (not unlike a contract rezone) which is not often associated with routine rezone requests. Such a contractual context adds a layer of complexity not normally associated with routine rezone requests and arguably makes the normal “change of circumstances” test inapplicable.

Regardless, the purpose of the open space restriction was clear-- to ensure the permanent existence of the critical open space upon which the rezone was based. As will be more fully explained below, even the

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<sup>2</sup> AR 476-489 (See Appendix A, pp. 5-7)

attorney for the golf course owners acknowledged in his testimony before the Examiner that the financial viability of the golf operation could not be guaranteed. He further testified that if the golf operation was not financially viable and the golf course closed, the open space would nonetheless remain.<sup>3</sup>

The obvious intent of the Examiner, with the agreement of the golf course owners, was permanent open space, not necessarily permanent golf. Therefore, any analysis of extent of changed circumstances must necessarily focus on the continued ability of the land to serve as open space, whether as a golf course or as passive open space areas.

### **III. TACOMA MUNICIPAL CODE STANDARDS FOR APPROVAL OF APPELLANT'S MODIFICATION REQUEST.**

Pursuant to the provisions of Tacoma's municipal code, Appellant's request to remove the open space condition adopted as part of the original 1981 approvals (and as implemented by contractual documents signed by or on behalf of the golf course owners) must satisfy *all* of the criteria set forth in TMC 13.06.650. Here, at each stage of review, the Hearing Examiner, City Council and Pierce County Superior

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<sup>3</sup> CP 1496 (See Appendix B, p. 9)

Court each independently determined that the application met *none* of the requirements.

A request to modify existing zoning conditions is reviewed in the same manner and must meet the same criteria as a request for a full rezone. The pertinent provisions of the applicable standards are as follows:

**TMC 13.06.650 Application for rezone of property.**

B. Criteria for rezone of property. An applicant seeking a change in zoning classification must demonstrate consistency with *all* of the following criteria:

1. That the change of zoning classification is generally consistent with the applicable land use intensity designation of the property, policies, and other pertinent provisions of the Comprehensive Plan.
2. That substantial changes in conditions have occurred affecting the use and development of the property that would indicate the requested change of zoning is appropriate. If it is established that a rezone is required to directly implement an express provision or recommendation set forth in the Comprehensive Plan, it is unnecessary to demonstrate changed conditions supporting the requested rezone.
3. That the change of the zoning classification is consistent with the district establishment statement for the zoning classification being requested, as set forth in this chapter.
5. That the change of zoning classification bears a substantial relationship to the public health, safety, morals, or general welfare.

(Emphasis added.)

Here, Appellant would have the Court substitute its judgment and order the City to approve the replacement of the golf course open space with 860 residential units. Appellant's request ignores the fact that the Washington State Supreme Court recently ruled that *local governments, not courts*, are the appropriate entity to determine whether a land use application meets code-imposed standards, including specifically whether the proposal bears a substantial relationship to the public health, safety, morals, or general welfare.<sup>4</sup> Here, at each level of review, that question was answered in the negative. This alone justifies a decisive rejection of Appellant's request.

#### **IV. LEGAL ARGUMENT.**

Appellant has throughout the entirety of these proceedings repeatedly advanced a number of superficially attractive but easily disprovable themes and legal propositions. Arguments have been proffered based on misquotes from prior rulings. That these same themes and arguments should now be renewed, in slightly revised forms so as to avoid the most egregious of the prior misstatements, continues to be troubling.

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<sup>4</sup> *Phoenix Development v. City of Woodinville*, 171 Wn.2d 820, 256 P.3d 1150 (2011).

**A. The “City Decision” Encompasses Three Distinct Determinations By Three Separate Entities.**

Appellant combines the separate and independent decisions of the Hearing Examiner, City Council and Superior Court into one “City decision.” Each body independently heard argument, reviewed the record, undertook its own analysis and made its own determination. In each instance, each tribunal arrived at the identical conclusion—that Appellant’s applications fail to meet any of the required criteria and must therefore be denied.

**B. The Facts, not a “Massive Outpouring of Citizen Outrage,” Dictated the Denial of Appellant’s Applications.**

Appellant has long-maintained that the decisions of the Hearing Examiner and City Council were made in response and were based solely on the ‘massive outpouring of citizen outrage noted by the Examiner.’<sup>5</sup> Appellant’s contention now appears to also embrace the Superior Court.

Appellant contended below that the City’s decision was solely based on public opinion. “Despite the voluminous record, the sole issue before the (Superior) Court is whether the City erred in denying the

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<sup>5</sup> AR 2341 (Petitioner’s Opening LUPA Brief, p. 50).

Rezone Modification on the basis of public opposition, which the Examiner characterized as a ‘massive outpouring of citizen rage.’<sup>6</sup>

In its Opening Brief herein, Appellant maintains that “[T]he Examiner yielded to this (public) opposition”<sup>7</sup> while the City Council “acquiesced and adopted the Examiner’s finding and conclusion and recommendation.”<sup>8</sup> Appellant continues to assert that the denial was based on “a massive outpouring of citizen outrage”<sup>9</sup> and was based on a desire of the City to “appease the community.”<sup>10</sup>

*Even if* the Appellant were accurate in arguing that the Examiner was inappropriately influenced by public sentiment, there is no evidence of any kind in the record that the City Council was so swayed. The City Council did not and could not accept public testimony. The Council’s review and decision were based solely on the cold hard facts in the record before it. The voice of the public was entirely silent in those proceedings.

It is even more unlikely that a Superior Court judge, two steps removed from the public hearing, would be influenced in this regard.

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<sup>6</sup> *Id.* pp. 2, 50 and 52.

<sup>7</sup> *See* Appellant’s Opening Brief, p. 1.

<sup>8</sup> *Id.*, pp. 1-2.

<sup>9</sup> *Id.*, p. 21

<sup>10</sup> *Id.*, p. 25

As will be more fully explained below, the “City Review” was thorough and well-reasoned. Appellant’s assertions are misplaced and should be summarily rejected.

**C. The City’s Careful Review of the Rezone Criteria of TMC 13.06.650.**

Appellant unfairly and inaccurately denigrates the Examiner and his decision and recommendation. Even a cursory review of the document demonstrates the thorough analysis and legal justification underpinning his determination and recommendation.<sup>11</sup> Despite Appellant’s simplistic summarization, the Examiner’s decision is thorough and well-reasoned and offers multiple bases for the rejection of the applications. While citizen opposition to the potential loss of the open space/golf course “centerpiece” of their community was to be expected and was no doubt obvious, the Examiner based his ruling his analysis of the requirements of the Tacoma Municipal Code.

After recognizing the history of the open space condition, the Planned Residential District (“PRD”) design principles and the “centerpiece” role of the golf course within the PRD’s design, the Examiner successively reviewed each of the rezone approval criteria.

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<sup>11</sup> CP 130-142 (See Appendix C hereto)

The Examiner analyzed the extent to which Appellant's request met or did not meet each of the criteria of TMC 13.06.650. The Examiner's recitation of the criteria and his underlining of the critical language of the criteria is shown below:

A rezone modification, under the Tacoma Municipal Code (*TMC*), is treated like a permit modification. The applicant seeks to eliminate a condition from the zoning approval that created the R-2 PRD district. The subject request, therefore, constitutes a major modification (See *TMC* 13.05.080) and the standards for original approval apply. The relevant criteria are set forth in *TMC* 13.06.650, as follows:

(1) That the change of zoning classification is generally consistent with the applicable land use intensity designation of the property, policies and other pertinent provisions of the comprehensive plan.

(2) That substantial changes in condition have occurred affecting the use and development of the property that would indicate the requested change of zoning is appropriate. If it is established that the rezone is required to directly implement an express provision or recommendation set forth in the comprehensive plan, it is unnecessary to demonstrate changed conditions supporting the requested rezone.

(3) That the change of the zoning classification is consistent with the district establishment statement for the zoning classification being requested.

(5) That the change of zoning classification bears a substantial relationship to the public health, safety, morals, or general welfare.<sup>12</sup>

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<sup>12</sup> CP 130-131 (See Appendix C, pp. 9-10)

## 1. The Open Space Requirements of the PRD Code.

The Examiner discussed the PRD open space requirements as follows:

A PRD zone, originally or as modified, must meet the relevant standard for open space. The standard to which the subject application is vested is for "usable open space." As set forth at former *TMC* 13.06.140(F)(6), the definition, in pertinent part, reads:

Usable open space. A minimum of one-third of that area of the site not covered by buildings or dedicated street right-of-way shall be developed and maintained as usable landscaped recreation areas.<sup>13</sup>

After reciting the relevant criteria to be applied in review of the requested modification, including the requirement that then-existing open space standards must continue to be met, the Examiner next applied the code criteria to the facts and decided in each and every instance that the application failed to satisfy each of the code-established approval criteria.

The Examiner noted that Appellant's proposal is predicated on the assumption that private yards within the PRD satisfy the 1/3 open space requirement. The Examiner recognized that if this interpretation

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<sup>13</sup> CP 131 (*See* Appendix C, p. 10)

is correct, *then none of the golf course is required to satisfy the open space requirement.*<sup>14</sup> (Emphasis added.) The Examiner further found that the 1981 development plan was based on the concept that the golf course would supply the open space needed for the PRD.<sup>15</sup>

The Examiner next stated that from the manner in which the golf course was treated at the time of the original approval, it can be inferred that no one considered the use of private lawns as satisfying this requirement.<sup>16</sup>

The Examiner also ruled that whether private yards should qualify as open space need not be decided. “The golf course was designated as open space and that land use designation was by the conditions of approval to remain in perpetuity. The open space for the PRD whatever its size, is what it is. The setting aside of more open space than the minimum does not, ipso facto, require or imply that the excess should be converted to another use.”<sup>17</sup>

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<sup>14</sup> References to “FOF” (Findings of Fact) and to “COL” (Conclusion of Law) are to specific provisions of the January, 2009 Hearing Examiner’s Decision and Recommendation regarding Appellant’s application (CP 134, Appendix C). FOF 63 at p. 13.

<sup>15</sup> *Id.*, FOF 64 at p. 13.

<sup>16</sup> *Id.*, FOF 65 at p. 13.

<sup>17</sup> *Id.*, FOF 71 at p. 14.

**2. The Circumstances Surrounding Both the Property as Open Space and of the Surrounding Community Remain Entirely Unchanged.**

In making its arguments concerning age of at least some of the shareholders in the golf course ownership corporation, the alleged decline in the annual number of rounds played and stormwater concerns, Appellant mistakenly argues (assuming for these purposes that Appellant may appropriate, for its own purposes, circumstances particular to individuals not parties herein) that these factors are relevant to the purpose of and justification for the on-going open space condition.

As will be explained more fully below (and as argued in 1981 by the attorney representing the very same golf course owners), the purpose behind the original approval condition was *not* to ensure the continued operation of a golf course. The purpose was instead to guarantee the continued existence of *open space* which had been so critical in the agreement leading to and including the 1981 approvals.

The age of the individuals and the annual number of rounds of golf played at North Shore are entirely irrelevant to the “circumstances” surrounding the adoption and ongoing viability of the open space

condition. *Those circumstances* have not changed in the slightest. Regardless, the Examiner considered and rejected the same arguments now proffered by Appellant.

The parties for whom circumstances have arguably changed are not before the Court. They determined of their own accord not to participate in these proceedings. Appellant's counsel does not represent the golf course owners. Appellant should not be allowed to argue on behalf of the parties whose circumstances arguably changed when, as to those parties, their failure to appeal the decisions below foreclosed further review of this issue.

It goes without saying that the individuals who own a majority of the stock in NSGA have aged. They may well wish to retire. Still, Appellant's indicia of changed circumstances were each presented to and considered by the Examiner.<sup>18</sup> The Examiner heard additional testimony from others regarding the condition of the course, of other golf course sales in the Puget Sound region and of the refusal of the owners to consider a sale at the market rate for golf courses (as opposed to sales for redevelopment).<sup>19</sup> The Examiner considered *all* of

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<sup>18</sup> *Id.*, FOF 72-83, COL 11-16 at pp 14-16, 20.

<sup>19</sup> VRP 157-158, 164-168 and AR 2341 (Appendix C, FOF 78 at p.15)

the testimony of *all* parties and was not persuaded by Appellant's arguments.

The Examiner, at FOFs 73 through 81, refutes each of Appellant's attempted showings of the required change in circumstances. Of particular import is FOF 80 wherein the Examiner states:

“As to the surrounding neighborhood, there has been no change in circumstances since the original rezone. The area has simply become what was envisioned in 1981. Country Club Estates was designed and remains a residential development around a golf course. No new or different uses have been introduced nearby. The golf course continues to function as the open space centerpiece of the development.”

At FOF 81, the Examiner states that:

“There has been no change in public opinion as to the appropriateness of the use to which the golf course has been put. The sentiment of those who live in the vicinity is overwhelmingly in favor of keeping the golf course as open space. Many neighboring homeowners feel that the City made a promise of permanence to the residents of Country Club Estates in designating the golf course as open space for the surrounding residential development.”

In FOF 82, the Examiner recites language from the Staff Report which offers its independent opinion that that there have not been substantial changes in condition to justify a rezone modification.

The Examiner concurred with and adopted the Staff FOF as his own in FOF 83.

Instead of demonstrating changed circumstances in the normal context, Appellant's arguments confirm the foresight and wisdom of the original 1981 Hearing Examiner (and of the attorney who then represented the very same individuals who now control NSGA). Rather than demonstrating changed circumstances, Appellant's arguments embody the fulfillment of the exact redevelopment pressures, with the attendant loss of required open spaces) which the Examiner envisioned might eventually be brought to bear.

The words of the attorney representing these same golf course owners belies Appellant's current arguments. The minutes of the Examiner's 1981 hearing regarding the application describe the following exchange between the Examiner and the owners' counsel:

The Examiner indicated that he is concerned over the fact that there are two separate ownerships and the applicant is using the golf course as part of its open space, therefore he is asking if the applicant is closely tied up to make sure it didn't change? Mr. Fishburn indicated that he *could not guarantee the economic operation of the golf course . . . and he feels that if they have to close the golf course, it will be passive open space unless someone seeks approval to build on it.*<sup>20</sup>

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<sup>20</sup> CP 1496 (See Appendix B, p. 9)

(Emphasis added).

As recognized by owners' counsel, if the golf course proved uneconomic, the land would remain as passive open space unless otherwise agreed by the city. The alleged change of circumstance, which the current Examiner rejected, was in fact contemplated from the outset.

The owners have conveniently forgotten the basis on which the PRD was approved and the commitment they were required to make in order to acquire the golf course property in the first instance.

Further, the authorities relied upon by Appellant to not stand for the proposition for which they are cited.<sup>21</sup>

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<sup>21</sup> In *Henderson v. Kittitas County*, 124 Wn. App. 747 (2004), the court specifically noted the change in circumstances to the surrounding property. *Id.* at 754-55. There, the court stated, "Development on these lots around INP's property reportedly interfered with its marketability as a private retreat. Based on this evidence, the planning commission found that 'the proposed amendment is appropriate because of changed circumstances due to the fact that once the area was used as a cattle ranch grazing area and over a period of time *residential areas have grown up around it.*'" *Id.* at 754 (emphasis added).

Similarly, *Tugwell v. Kittitas County*, 90 Wn. App. 1 (1997), is also not helpful to Appellant. There, the evidence submitted regarding the substantial change of circumstances primarily dealt with the surrounding properties. Here, the surrounding properties have developed exactly as contemplated.

The fact that there was a change in the circumstances of the subject property was merely an additional requirement in the *Tugwell* case, not the sole factor. *Id.* at 9-10 ("And while the Snowdens' use of their property apparently had not changed since 1980, the changing character of the neighboring property had an effect on their farm, such as increasing liability insurance costs and traffic. In light of the whole record before the court, there is substantial evidence that the circumstances had changed to support the rezoning."). The *Tugwell* court found a change in circumstances of both the surrounding areas *and* the subject property *and* found that the rezoning was in the interest of public health, safety, morals, or general welfare. This showing has not been made here.

### 3. Consistency with the District Establishment Statement.

At FOF 84, the statement of intent for the R2-PRD district is recited. The Examiner underscored language stating that the intent is to facilitate a *more desirable, aesthetic and efficient use of open space* and that such districts are intended to be placed “in locations which *will not produce an adverse influence on adjacent properties.*”<sup>22</sup>

In FOF 86, the Examiner that “As applied to the present residents of the PRD, *the change sought is not more desirable from the perspective of the availability of open space. Everyone understands this . . .*”<sup>23</sup>

FOF 87 also states the obvious, that the proposal would vastly change the experience of open space by eliminating the central feature around which the PRD was planned and that the effect on adjacent would be adverse.<sup>24</sup>

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<sup>22</sup> Appendix C at p. 16.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*, p. 17.

**4. The Required Substantial Relationship Between the Proposed Modification and the Public Health, Safety, Morals, or General Welfare.**

The Examiner's Findings and Conclusions, each affirmed after independent review by the City Council and Superior Court, chronicle in great detail how the destruction of the golf course open space and subsequent implementation of Appellant's redevelopment plan are inconsistent with and detrimental to public health and general welfare.

In FOF 86, the Examiner stated that "As applied to the present residents of the PRD, the change sought is not more desirable from the perspective of the availability of open space. Everyone understands this . . ." <sup>25</sup>

FOF 87 also states the obvious, that the proposal would vastly change the experience of open space by eliminating the central feature around which the PRD was planned and that the effect on adjacent PRD residents would be adverse. <sup>26</sup>

At FOF 90, the Examiner noted that approval of Appellant's proposal "would alter the primary condition of approval for the

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<sup>25</sup> *Id.*, pp. 16-17.

<sup>26</sup> *Id.*, p. 17.

surrounding plats” which were part of the master planning process.<sup>27</sup>

Importantly, with respect to the discussion of RCW 58.17.215 in SNET’s Opening Brief herein, the Examiner further stated that “Keeping the golf course as open space was a condition of approval for the plats, as well as of the PRD rezone. The Examiner further noted that the golf course “is tied to the adjacent plats by the (original 1981) Hearing Examiner’s open space condition . . . In this sense, the golf course is part of the plats.” (FOF 91.)<sup>28</sup>

FOF 92 states that “If the presently proposed plat of the golf course property is approved, the designated open space of the surrounding plats will have been largely eliminated. Necessarily this must be viewed as modifying those surrounding plats . . .”<sup>29</sup>

Finally, in FOF 94 the Examiner made the following critical finding:

By approval of the subject Preliminary Plat, the residents of the adjacent plats would be subjected to a decision that would effectively result in a major change in those plats without their consent. The Examiner, after much

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* It is undisputed that Appellant has not applied to modify any of the plats with the North Shore PRD.

<sup>29</sup> *Id.*

reflection, is convinced that such an effect on the adjacent plats brought about by the unilateral action of a single applicant is not in the public interest.”<sup>30</sup>

By so finding, the Examiner recognized that the removal of the open space restriction would destroy the fundamental basis on which the original PRD approvals, with the active participation and agreement of the golf course owners, were obtained.

The methodical manner in which the Examiner first recited the legal standards for the review of Appellant’s request and then applied the facts to those standards belies Appellant’s arguments.

**D. The Alleged “Contravention” of Judge Hartman’s Order in the Declaratory Judgment Action.**

Appellant repeatedly asserts that by denying its applications, the City “contravened (Judge Hartman’s ruling)” in the prior Declaratory Judgment action.<sup>31</sup> Similarly, Appellant states that the “City’s Decision to deny Northshore’s Project directly contravenes the Superior Court’s prior rulings . . .”<sup>32</sup>

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<sup>30</sup> *Id.*, p. 18.

<sup>31</sup> *See* Appellant’s Opening Brief, p. 2.

<sup>32</sup> *Id.*, p. 3.

In so doing, Appellant continues to place great emphasis on language from Judge Hartman's order in the prior Declaratory Judgment action which provides as follows:

. . . [Appellant and the golf course owners] are in no different position than any other property owner within the PRD with respect to requesting to change the land use designation of and to re-develop real property within the . . . PRD. The City of Tacoma's processing of and decision in response to such a request is subject to the provisions of the City's PRD regulations as well as general land use laws, including the rules of inverse condemnation. The City must process [Appellant's] pending land use application as though it would an application from any other property within the . . . PRD, that is, consistent with the provisions which are set forth in the planned residential development ordinance.<sup>33</sup>

Elsewhere in his order, Judge Hartman made similar statements to the same effect:

. . . (Appellants) may request the City to amend, nullify or alter the land use designations set forth in the OSTA and CZA through the land use process. (Appellants) are in no different position than any other property owners within the PRD *with respect to requesting to change* the land use designation of, and to re-develop, real property within the Country Club Estates PRD. (Emphasis added.)<sup>34</sup>

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<sup>33</sup> AR 476-489 (See Appendix A, p. 7)

<sup>34</sup> *Id.*, p. 9.

Unlike its arguments made in prior proceedings, Appellant no longer argues that his order *explicitly* conferred upon Appellant a *right to redevelop*<sup>35</sup> (as opposed to a right *to apply* to redevelop) the golf course. Instead, Appellant has now repackaged the same argument in slightly less inaccurate terminology. Rather than arguing that the City's denial constitutes an unconstitutional taking of its property rights (its alleged "right to redevelop"), Appellant now contends without explanation that the denial "directly contravenes" Judge Hartman's order. This rephrased argument necessarily assumes that the order conferred some apparently implied right to approval.

The contention appears to be premised on the following false syllogism: (1) Appellant's application must be processed in the same manner as an application of any other owner within the PRD; (2) No other owner's property is subject to open space restrictions; (3) Therefore, Appellant's application must be processed as if the golf course/open space condition does not exist.

Judge Hartman said no such thing. His ruling instead confirmed that Appellant, like any other owner, had a right to request a change and to have its application reviewed under controlling land use laws.

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<sup>35</sup> AR 2341 (Petitioner's Opening LUPA Brief, p. 7).

Appellant did request a such a change which was reviewed by the City according to its normal procedures. The City determined the application met none of the required rezone standards. To suggest that the above language somehow predetermined an outcome in Appellant's favor, or that a denial, after careful review, constitutes a "contravention" of that order, is fanciful at best.

Other language from Judge Hartman's order further describes the nature of the rights held by the golf course owners to which Appellants hope to succeed. Judge Hartman explicitly found that NSGA was only able to acquire title to the golf course *because it agreed in writing and as a condition of its ability to purchase the property to:*

. . . (1) subject the Golf Course to the master planning process; (2) restrict the use of the Golf Course for such period as required by the City of Tacoma for density and open space requirements; and (3) execute all documents so that (the owner of the surrounding residential property) may use the property for density and open space and other requirements as though it were owned by (that surrounding owner). In return, NSGA obtained the option purchase rights to purchase the Golf Course . . . Upon satisfaction of its obligations . . . the Agreement was to expire and only the restrictions on the Golf Course imposed by the City of Tacoma under the master planning and development process were to remain.<sup>36</sup>

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<sup>36</sup> AR 476-489 (See Appendix A, FOF 4(a)(4), p. 6)

Thus, the golf course owners voluntarily agreed to limit their bundle of rights in return for the ability to purchase the golf course property.

The “sticks” representing an ability to redevelop the golf course were removed by agreement and by the conditions of approval to which the golf course owners consented.

As further found by Judge Hartman:

*The open space land designations regarding the Golf Course contained in the OSTA and CZA do not constitute a taking under either the state or federal constitutions because (the residential developer) and NSGA jointly offered the Golf Course property as open space necessary to obtain PRD approval of the Golf Course and surrounding property.”<sup>37</sup>*

(Emphasis added.)

Rather than somehow conferring an implied right to approval, Judge Hartman specifically found that the open space restrictions contained in the original 1981 approval and carried forward in numerous subsequent reviews, remain valid and in full force and effect.<sup>38</sup>

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<sup>37</sup> *Id.*, (FOF 4(c), p. 7)

<sup>38</sup> *Id.*, (COL 2(a), p. 8)

## V. CONCLUSION.

In FOF No. 95, the Examiner noted that “The instant proposal represents exactly the kind of thing that the Hearing Examiner was worried about when he imposed his ‘open space condition’ in 1981.”<sup>39</sup>

We have argued, on behalf of the PRD residents who based their decisions to reside in North Shore, that it is both unseemly and unconscionable that Appellant and NSGA, one of the parties to the foundational agreements on which the original PRD approval was based, sought approval to ignore NSGA’s role in those prior approvals. We have contended that it is more than troubling that these parties sought to undo NSGA’s contractual agreements upon which the PRD approval was approved and on which homes within the PRD were developed and sold to our clients.

Now, NSGA has accepted the outcome of the Superior Court ruling in its LUPA appeal and is no longer a party to this dispute. Rather, it is the Appellant alone which now wishes to appropriate for itself arguments which NSGA, as the real party in interest, lost and finally abandoned.

Despite Appellant’s fervent desire to the contrary, each of the Examiner’s Findings and Conclusions reflect the extreme care and

Examiner's Findings and Conclusions reflect the extreme care and thorough analysis undertaken in reaching his decision and recommendation. The Examiner's ruling addresses and analyzes each of the land use code's rezone modification criteria. To state that the outcome of the City's review is "based solely on public opposition" and "a massive outpouring of citizen outrage" is indefensible.

The Examiner's Findings and Conclusions were unanimously approved and adopted by the Tacoma City Council<sup>40</sup> and were fully affirmed by the Pierce County Superior Court.<sup>41</sup> Neither of these latter tribunals accepted nor heard public testimony. Their determinations were made on the merits, after a thorough review of the record and in a context free of citizen testimony or input.

Now Appellant would have this Court substitute its judgment and order the City to contravene its prior approvals, the contractual documents implementing that approval, its own exhaustive review of the current application and attendant Superior Court approval thereof, and order the destruction of the community's open space/golf course centerpiece.

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<sup>40</sup> CP 211, 224-291, 578.

<sup>41</sup> CP 2315-2319.

Appellant's request ignores the direction recently provided by our State Supreme Court in Phoenix Development v. City of Woodinville that local governments, not courts, are the appropriate entity to determine whether an application meets code-imposed standards, including specifically whether the proposal bears a substantial relationship to the public health, safety, morals, or general welfare.<sup>42</sup> Here, at each level of review, that question was answered in the negative.

In his 1981 approval, the original Examiner stated that he "believes that there must be . . . certainty . . . to insure the golf course use, which was relied upon to gain the density for this request, is clearly tied to the applicant's proposed use in perpetuity."<sup>43</sup> In 2010, the current Examiner noted that "[t]he instant proposal represents *exactly the kind of thing that the Hearing Examiner was worried about* when he imposed his 'open space condition' in 1981."<sup>44</sup>

Both in 1981 and 2010, the role of the golf course in acting as the centerpiece of this golf course community and in providing required open space were exhaustively reviewed. Appellant's application has been similarly reviewed under and measured against the City's controlling

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<sup>42</sup> Phoenix Development, 171 Wn.2d 820.

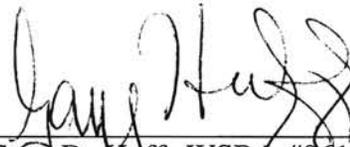
<sup>43</sup> See Appendix B, p. 13.

<sup>44</sup> See Appendix C, FOF 95, p. 18.

land use regulations, just as contemplated by Judge Hartman. The applications have been considered and denied, for all the reasons anticipated in 1981 and reaffirmed in 2010.

That is as it should be and as it should remain.

DATED this 2nd day of February, 2012.



Gary D. Huff, WSBA #06485  
Steven R. Robinson, WSBA #12999  
Jacque St. Romain, WSBA #44167  
Of Karr Tuttle Campbell  
Attorneys for Save NE Tacoma

DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that on the date set forth below, I caused true and correct copies of the Opening Brief of Appellant/Cross-Respondent SAVE NE TACOMA et. al. to be served via legal messenger on the following:

COURT OF APPEALS DIVISION II  
c/o Court of Appeals Division I  
600 University Street  
Seattle, WA 98101-1176

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Dale N. Johnson  
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Aaron M. Laing  
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US Bank Center  
1420 Fifth Avenue, Suite 3010  
Seattle, WA 98101

Attorneys for Defendant Northshore Investors, LLC

12 FEB -7 PM 2:05  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
RETURN

DATED this \_\_\_ day of February, 2012.

  
Marilyn Richter, Declarant

# APPENDIX A

Signed & sent to  
Court for filing on  
2/3/09

The Honorable Russell W. Hartman

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

THE CITY OF TACOMA, a Washington )  
municipal corporation, )  
Plaintiff, )

No. 08-2-04025-4

and )

JOHNNIE E. LOVELACE, an individual; )  
LOIS S. COOPER, an individual; and JAMES )  
V. LYONS and RENEE D. LYONS, a marital )  
community, )  
Intervenor Plaintiffs, )

ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT AND DEFENDANTS'  
JOINT MOTION FOR SUMMARY  
JUDGMENT

v. )

[PROPOSED]

NORTHSHORE INVESTORS, LLC, a )  
Washington limited liability company, )  
NORTH SHORE GOLF ASSOCIATES, )  
INC., a Washington corporation, and )  
HERITAGE SAVINGS BANK, a Washington )  
Corporation )  
Defendants. )

THIS MATTER came before the Court on Plaintiff City of Tacoma's Motion for  
Partial Summary Judgment and Defendants North Shore Golf Associates, Inc. ("NSGA")  
and Northshore Investors, LLC's ("Investors") reciprocal Motion for Summary Judgment  
pursuant to CR 56.

ORDER GRANTING IN PART AND DENYING IN PART  
PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT  
[PROPOSED] - 1

**GordonDerr**  
2025 First Avenue, Suite 500  
Seattle, WA 98121-3140  
(206) 382-9540

ORIGINAL

1 1. This Judgment affects the following described real property, commonly referred to  
2 as the North Shore Golf Course ("Golf Course"):

3 **Parcel A:**

4 Parcel B of City of Tacoma Boundary Line Adjustment  
5 Recorded September 13, 1995 under Recording Number  
6 9509130149, Records of Pierce County Auditor.

7 Excepting therefrom that portion conveyed to United  
8 Properties Linkside, Inc., by deed recorded under Recording  
9 Number 9711210225.

10 Situate in the City of Tacoma, County of Pierce, State of  
11 Washington.

12 **Parcel B:**

13 Lot 2, Pierce County Short Plat Number 8704240392,  
14 according to the plat thereof recorded April 24, 1987, Records  
15 of Pierce County Auditor.

16 Situate in the City of Tacoma, County of Pierce, State of  
17 Washington.

18 2. Plaintiff City of Tacoma and Defendants seek the following relief:

19 a. **For Plaintiff City of Tacoma.**

20 (1) A judgment that:

21 (i) The Open Space Taxation Agreement ("OSTA") between  
22 Plaintiff City of Tacoma and Defendant NSGA, dated  
23 September 21, 1981, created a non-possessory property  
24 interest for Tacoma in the North Shore Golf Course  
25 property;

(ii) The restrictions upon the Golf Course in the OSTA remain  
binding and enforceable by Tacoma unless and until  
Tacoma approves a different use of the property;

(iii) The OSTA cannot be unilaterally terminated by NSGA or  
its successors or assigns;

(iv) The R-2 Planned Residential District (R-2 PRD) rezone of  
the Golf Course and surrounding property was conditioned  
upon maintenance of the Golf Course as open space;

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(v) The North Shore Concomitant Zoning Agreement (CZA) dated November 6, 1981, implemented the legislative rezone decision and remains binding even if not signed by the Golf Course owners; and

(vi) The provision in the CZA that requires development consistent with the approved site plan is sufficient to impose the golf course use restriction.

- (2) Dismissal of Defendant NSGA's counterclaim for Inverse Condemnation.
- (3) Reserving for trial the issue of whether Defendants are estopped to deny that they and the Golf course are bound by the CZA and the issue of whether Plaintiff City of Tacoma is entitled to quiet title in an interest in real property in the Golf Course.

b. For Defendants NSGA and Investors, a judgment that:

- (1) The 1979 Agreement Concerning North Shore Golf Course has expired by its terms and does not restrict the Golf Course to open space use in perpetuity;
- (2) The 1978 Real Estate Contract between NSGA and Tacoma Land Company, Inc., has expired by its own terms and does not restrict the Golf Course to open space use in perpetuity;
- (3) The OSTA does not constitute a property interest in the Golf Course; it is a revocable agreement that does not restrict the Golf Course to open space in perpetuity;
- (4) The CZA does not constitute a property interest in the Golf Course; it is a zoning enactment that does not restrict the Golf Course to open space use in perpetuity; and
- (5) Dismissal with prejudice of all of Intervenor-Plaintiffs' claims, which request and relief shall be addressed by separate order.

3. The Court heard the oral argument of counsel for the parties at hearing on December 19, 2008. The Court considered the pleadings and files that comprise the record in this action. The Court also considered the following documents and evidence.

1 which were brought to the Court's attention before the order on summary judgment was  
2 entered:

- 3 a. Plaintiff City of Tacoma's Motion for Partial Summary Judgment;
- 4 b. Defendants North Shore Golf Associates, Inc. and Northshore Investors,  
5 LLC's Joint Motion for Summary Judgment;
- 6 c. Declaration of Dale Johnson in support of Plaintiff City of Tacoma's  
7 Motion for Partial Summary Judgment and the attachments thereto;
- 8 d. Declaration of Caroline Haynes-Castro in support of Plaintiff City of  
9 Tacoma's Motion for Partial Summary Judgment and the attachments  
10 thereto;
- 11 e. Declaration of Leonard J. Webster in support of Plaintiff City of Tacoma's  
12 Motion for Partial Summary Judgment and the attachments thereto;
- 13 f. Declaration of Jay P. Derr in support of Plaintiff City of Tacoma's Motion  
14 for Partial Summary Judgment and the attachments thereto;
- 15 g. Declaration of Jodi Marshall in support of Plaintiff City of Tacoma's  
16 Motion for Partial Summary Judgment and the attachments thereto;
- 17 h. Declaration of Richard Settle in support of Plaintiff City of Tacoma's  
18 Motion for Partial Summary Judgment and the attachments thereto;
- 19 i. Declaration of Aaron M. Laing in support of Defendants' Joint Motion for  
20 Summary Judgment and attachments thereto;
- 21 j. Declaration of James Bourne in support of Defendants' Joint Motion for  
22 Summary Judgment and attachments thereto;
- 23 k. Declaration of Dennis Hanberg in support of Defendants' Joint Motion for  
24 Summary Judgment and attachments thereto;
- 25 l. Plaintiff City of Tacoma's Response to Defendants' Joint Motion for  
Summary Judgment;
- m. Declaration of Dale Johnson in support of Plaintiff City of Tacoma's  
Response to Defendants' Joint Motion for Summary Judgment and  
attachments thereto;
- n. Declaration of Caroline Haynes-Castro in support of Plaintiff City of  
Tacoma's Response to Defendants' Joint Motion for Summary Judgment  
and attachments thereto;

ORDER GRANTING IN PART AND DENYING IN PART  
PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT  
[PROPOSED] - 4

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- o. Defendants' Response to Plaintiff City of Tacoma's Motion for Partial Summary Judgment;
- p. Declaration of Paul W. Moomaw in support of Defendants' Response to Plaintiff City of Tacoma's Motion for Partial Summary Judgment and attachments thereto;
- q. Plaintiff City of Tacoma's Reply to Defendants' Response to Plaintiff City of Tacoma's Motion for Partial Summary Judgment;
- r. Defendants' Reply to Plaintiff City of Tacoma's Response to Defendants' Joint Motion for Summary Judgment;
- s. Supplemental Declaration of Aaron M. Laing in Support of Defendants' Reply to Plaintiff City of Tacoma's Response to Defendants' Joint Motion for Summary Judgment and attachments thereto;
- t. Supplemental Declaration of James Bourne in Support of Defendants' Reply to Plaintiff City of Tacoma's Response to Defendants' Joint Motion for Summary Judgment and attachments thereto;
- u. Notice of Errata Pertaining to Plaintiff City of Tacoma's Motion for Partial Summary Judgment; and
- v. Intervenor Plaintiff's Joinder in City of Tacoma's Motion for Partial Summary Judgment.

4. Based upon the argument of counsel, the evidence presented and the pleadings and files that comprise the record in this matter, the Court finds:

- a. The undisputed factual record establishes that:
  - (1) This lawsuit pertains to a Planned Residential Development ("PRD") located in Tacoma, Washington, commonly referred to as North Shore Country Club Estates ("Country Club Estates").
  - (2) Prior to 1978, all property now included in the Country Club Estates PRD, including the Golf Course, was owned by the Tacoma Land Company ("TLC"). The zoning classification for the property was R-2, One-Family Dwelling District, until a re-zone of the property to R-2 PRD in 1981.
  - (3) In 1978, NSGA was operating a golf course on land that it leased from TLC. On November 20, 1978, TLC and NSGA entered into a Real Estate Contract in which NSGA agreed to purchase the Golf Course from TLC. However, at the time, Nu-West Pacific, Inc. ("Nu-West") and its partner Brownfield and Associates, Inc.

1 ("Brownfield"), acting through a joint venture North Shore  
2 Associates ("NSA"), already held option purchase rights to  
3 purchase the Golf Course and adjacent property from TLC.  
4 Accordingly, NSGA and TLC were not able to carry out the  
5 contract for sale of the Golf Course to NSGA without the consent  
6 of Brownfield and Nu-West.

7 (4) On May 10, 1979, Defendant NSGA entered into an Agreement  
8 Concerning North Shore Golf Course dated May 10, 1979, ("1979  
9 Agreement"), with Nu-west and Brownfield. This 1979  
10 Agreement required NSGA to (1) subject the Golf Course to the  
11 master planning process; (2) restrict the use of the Golf Course for  
12 such period as required by the City of Tacoma for density and open  
13 space requirements; and (3) execute all documents so that Nu-West  
14 may use the property for density and open space and other  
15 requirements as though it were owned by Nu-West. In return,  
16 NSGA obtained the option purchase rights to purchase the Golf  
17 Course from TLC. Upon satisfaction of its obligations under the  
18 1979 Agreement, the Agreement was to expire and only the  
19 restrictions on the Golf Course imposed by the City of Tacoma  
20 under the master planning and development process were to remain.

21 (5) On June 21, 1979, North Shore Associates, as applicant, and Nu-  
22 West and NSGA as owners, submitted to Tacoma an application for  
23 reclassification of the Country Club Estates property, including the  
24 Golf Course, from R-2 to R-2 PRD. This application included a  
25 master plan that offered the golf course for designation as open  
space as part of this PRD planning process. In addition to being  
involved as an owner in the application for the PRD  
reclassification, NSGA submitted a separate application to Tacoma  
for establishment of Open Space Current Use Classification for the  
Golf Course pursuant to RCW Ch. 84.34. On February 10, 1981,  
the PRD and open space classification applications were considered  
by the Hearing Examiner at a single combined hearing. Evidence  
considered by the Hearing Examiner included the 1979 Agreement.  
The Hearing Examiner recommended that the Golf Course should  
be designated as open space as a condition of the PRD approval.  
The City Council PRD decision included the same condition.

(6) On September 21, 1981, NSGA and duly authorized representatives  
of Tacoma executed the OSTA. The OSTA unambiguously  
provides that "[t]he use of [the Golf Course] shall be restricted  
solely to golf course and open space use. No use of such land other  
than as specifically provided hereunder shall be authorized or  
allowed without the express consent of Tacoma." The OSTA  
further provides that the "agreement shall be effective commencing  
on the date the legislative body receives the signed agreement from  
the Owner and shall remain in effect until such time as nullified by  
Tacoma."

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(7) On November 3, 1981, the Tacoma City Council adopted Rezone Ordinance No. 22364, which incorporated the conditions recommended by the Hearing Examiner. This Rezone Ordinance resulted in PRD-2 Zoning of the Golf Course and surrounding property. The legal description in this Rezone Ordinance includes the Golf Course within the boundaries of the PRD zoning.

(8) On November 6, 1981, Nu-West and duly authorized representatives of Tacoma executed the CZA. The CZA applies to certain described property, including the Golf Course. The CZA condition 2(tt) provides that "[t]o ensure the integrated development of the site, the total development shall be constructed and thereafter maintained in a united manner. Such unified development and maintenance shall be in accordance with this agreement and the approved Site Plan, irrespective of the sale or division of ownership of the site." The legal description of the property covered by the CZA includes the Golf Course. The master plan and site plans pertaining to the R-2 Planned Residential Development show the Golf Course as a golf course.

(9) NSGA and Investors have submitted applications to Tacoma for approval of permits to redevelop the Golf Course from golf course and open space use to residential use with 860 residential units. The land use process pertaining to those applications is not yet complete.

b. The restrictions to open space and golf course use placed upon the Golf Course in the OSTA and CZA subject the Golf Course to an open space land use designation. Defendants may seek the City of Tacoma's consent to alter or nullify the land use designation set forth in the OSTA and CZA to redevelop the Golf Course. NSGA and Investors are in no different position than any other property owner within the PRD with respect to requesting to change the land use designation of and to re-develop real property within the Country Club Estates PRD. The City of Tacoma's processing of and decision in response to such a request is subject to the provisions of the City's PRD regulations as well as general land use laws, including the rules of inverse condemnation. The City must process NSGA's and Investors' pending land use application as though it would an application from any other property owner within the Country Club Estates PRD, that is, consistent with the provisions which are set forth in the planned residential development ordinance.

c. The open space land designations regarding the Golf Course contained in the OSTA and CZA do not constitute a taking under either the state or federal constitutions because Nu-West and NSGA jointly offered the Golf Course property as open space necessary to obtain PRD approval of the Golf Course and surrounding property.

- 1 d. Defendants' takings claim arising out of the 1981 PRD zoning decision is
- 2 barred by the statute of limitations, pursuant to *Orion Corporation v. State*,
- 3 109 Wn.2d 621, 747 P.2d 1062 (1987).
- 4 e. To the extent necessary, the OSTA satisfies all elements of the
- 5 requirements for a deed set forth in RCW 64.04.020.
- 6 f. The CZA applies to the Golf Course, notwithstanding that Defendant
- 7 NSGA did not sign the document. NSGA and Nu-West were joint
- 8 applicants for the PRD re-zone. NSGA promised to be bound by the
- 9 master planning process in the 1979 Agreement, which provided that Nu-
- 10 West may subject the Golf Course property to the master planning process
- 11 as though it were owned by Nu-West. It is undisputed that the 1979
- 12 Agreement was presented by the parties and considered during the PRD
- 13 approval process. Accordingly, the OSTA, CZA, and 1979 Agreement
- 14 establish a legal relationship that binds the Golf Course to the land use
- 15 designation set forth in the CZA.
- 16 g. The Defendants do not have the right to unilaterally terminate the OSTA.
- 17 The express language of the OSTA provides that the use of the Golf Course
- 18 shall be restricted solely to golf course and open space use unless and until
- 19 the City of Tacoma consents otherwise. Inclusion of this restriction, which
- 20 resulted from the land use process, in the OSTA does not violate RCW Ch.
- 21 84.34 *et seq.*
- 22 h. The open space land use designation on the Golf Course property set forth
- 23 in the OSTA and CZA does not constitute a property interest held by the
- 24 City of Tacoma in the Golf Course property.

Based upon the above findings, it is hereby ORDERED, ADJUDGED and  
 DECREED that:

- 1. Plaintiff City of Tacoma's Partial Motion for Summary Judgment is GRANTED,
- in part, as set forth below.
- 2. Judgment shall be entered in favor of Plaintiff City of Tacoma as follows:
  - a. The golf course/open space land use designation in the OSTA remains
  - binding and enforceable by the City of Tacoma, unless and until the City of
  - Tacoma approves a different use of the North Shore Golf Course property
  - through the applicable land use application process;
  - b. The OSTA cannot be unilaterally terminated by North Shore Golf
  - Associates, Incorporated, or its successors or assigns;

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- c. The R-2 Planned Residential District (R-2 PRD) rezone of the North Shore Golf Course and surrounding property was conditioned upon maintenance of the Golf Course as open space. The PRD master plan land use designation for the Golf Course is open space;
- d. The North Shore Concomitant Zoning Agreement (Recording No. 811120139) (CZA) implemented the City of Tacoma legislative rezone decision and remains binding on North Shore Golf Associates, its successors and assigns;
- e. CZA condition 2(tt) requires development consistent with the approved site plan and designates the Golf Course as open space;
- f. The open space and golf course use restrictions placed upon the Golf Course in the OSTA and CZA constitute land use designations.
- g. Defendants may request that the City of Tacoma amend, nullify or alter the land use designations set forth in the OSTA and CZA through the land use process. NSGA and Investors are in no different position than any other property owner within the PRD with respect to requesting to change the land use designation of and to re-develop real property within the Country Club Estates PRD. The City of Tacoma's processing of and decision in response to such a request is subject to the provisions of the City's PRD regulations as well as general land use laws, including the rules of inverse condemnation. The City must process NSGA's and Investors' pending land use application as though it would an application from any other property owner within the Country Club Estates PRD, that is, consistent with the provisions which are set forth in the planned residential development ordinance.

3. Defendants' Joint Motion for Summary Judgment is GRANTED, as set forth above, to the extent that the legal relationship between the City of Tacoma and NSGA created by the OSTA and CZA is not a real property interest; it is an open space land use designation on the Golf Course. Defendants' Joint Motion for Summary Judgment is DENIED in all other respects not inconsistent with the remainder of this Order and the separate order regarding Defendants' request for dismissal with prejudice of all of Intervenor-Plaintiffs' claims.

1 4. Defendant NSGA's counterclaim for inverse condemnation based upon the  
2 conditions imposed upon the Golf Course in 1981, as set forth in the OSTA and CZA, is  
3 barred by the statute of limitations and is dismissed with prejudice.

4 5. Defendant NSGA's counterclaim for inverse condemnation arising out of the  
5 pending land use application is not ripe and is dismissed without prejudice.

6 6. Having determined that the City of Tacoma does not have a property interest in the  
7 Golf Course property, Plaintiff's claim to quiet title is dismissed with prejudice. Plaintiff  
8 City of Tacoma will file a Release of Lis Pendens within ten calendar days of entry of this  
9 order.

10 7. Having determined that the CZA is binding on the Golf Course owners, their  
11 successors and assigns and upon the Golf Course property, it is unnecessary to proceed  
12 with trial pertaining to Plaintiff City of Tacoma's estoppel claims. Those estoppel claims  
13 are, therefore, dismissed without prejudice.

14 DONE IN OPEN COURT this 3<sup>rd</sup> day of February, 2009.

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16 RUSSELL W. HARTMAN  
17 JUDGE RUSSELL W. HARTMAN  
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Presented by:  
GORDONDERR LLP

By: J.P. Derr 30 January 2009  
Jay P. Derr, WSBA #12620  
Dale N. Johnson, WSBA #26629  
Attorneys for City of Tacoma

Approved as to form; notice of presentation waived:

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VANDEBERG, JOHNSON & GANDARA, LLP

By: M.A. Hood  
Mark A. Hood, WSBA #20152  
Attorney for Plaintiff Heritage Bank

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By: Mark A. Hood by Mark R. O'Neil (WSBA # 7830)  
Mark A. Hood, WSBA #20152  
Attorney for Plaintiff Heritage Bank

## APPENDIX B



SUMMARY MINUTES - HEARING OF 2-10-81 (North Shore)

Robert J. Backstein, the City's Alternate Hearings Examiner, indicated he had been requested to preside over the hearing, however, he noted for the record that he has his own private law practice and has had occasion to use The Transpo Group as independent traffic consultants, as well as having had this group appear before him on other matters, as well as the fact that he is acquainted with both Tom Fishburne and Patrick Comfort, attorneys at law, and at this point inquired as to whether there were any objections to him presiding as the Hearings Examiner. No objections were offered, so Mr. Backstein presided as the Hearings Examiner and the hearing commenced as follows:

The hearing commenced on February 10, 1981, at 9:40 a.m. All parties wishing to testify were sworn.

The following exhibits were entered into the record throughout the hearing:

- Exhibit No. 1A - Draft & Supplemental Environmental Impact Statement.
- Exhibit No. 1B - Final Environmental Impact Statement.
- Exhibit No. 2A - Plan. Dept. Report - Reclassification, Site Plan and Preliminary Plat (Nos. 120.924, 127.140 & 125.238).
- Exhibit No. 2B - Plan. Dept. Report - Open Space Current Use classification (File No. 128.9)
- Exhibit No. 3 - Northeast Tacoma Plan.
- Exhibit No. 4 - Generalized Land Use Plan (GLUP).
- Exhibit No. 5 - Generalized Outdoor Recreation & Open Space Plan (1978-1990).
- Exhibit No. 6 - Project Location Sketch.
- Exhibit No. 7 - Public Works Memorandum of 2-9-81.
- Exhibit No. 8 - Rendering of Master Plan.\*
- Exhibit No. 9 - Rendering of Phase 2A Drawing.\*
- Exhibit No. 10 - Aerial Photo and Map.\*
- Exhibit NO. 11 - Annual Report of Nu-West Group Limited.
- Exhibit No. 12A - Model 9810 - a sketch of proposed single-family unit.\*
- 12B - Model 869 - a sketch of proposed single-family unit.\*
- 12C - Sketch of proposed fourplex.\*
- Exhibit No. 13 - Fiscal Impact Statement and Resume of Professor Bruce Mann.
- Exhibit No. 14 - "Resume" of SBA, Incorporated.
- Exhibit No. 15 - Memorandum from Metropolitan Park District.

\*All of these exhibits were retained in the custody of SEA personnel attending the hearing.

Subsequent to the hearing, the following exhibit was received:

- Exhibit No. 16 - Memorandum of 2-9-81 from Public Utilities.

Mr. Rod Kerslake, Land Use Administrator for the City, indicated that Mr. Kevin Foley would present the Planning Department Reports, and that Katie Mills from the Environmental Division of Planning Department was available to answer any questions regarding the EIS, and that there were members of the Public Works Department, Lynn Price and Mel Kemper, who were present, as well as there might be a representative from the Water Division of the Department of Public Utilities present, inasmuch as an issue will be raised by the applicant concerning one of the Water Division's conditions.

Due to the fact that Mr. Pat Comfort, attorney at law, was present to speak on the Open Space Current Use Classification request (File No. 128.9 - Exhibit No. 2B), Mr. Kevin Foley summarized that report first, indicating that the request was to establish an Open Space Current Use Classification for the 18-hole North shore Golf Course, which golf course is an integral feature of the concurrent PRD application, both from a required area, density and open space standpoint.

Mr. Pat Comfort, attorney at law, indicated that:

1. He is the Secretary/Treasurer of North Shore Golf Associates, Inc. (hereinafter referred to as the "Corporation"), and is the one who submitted the open space application.

2. Regarding the background of the golf course, the course was leased for many years by the resident pro; several years ago the resident pro, the greenskeeper and himself formed the Corporation to acquire the property for the golf course, however, they do not have any relationship with any other entity or with the applicant, other than they have a contractual relationship with them pursuant to the terms of the contract in the Planning Department Report (pages 4 and 5 of Exhibit 2B).

3. The Corporation is a stock corporation with 6 or 7 shareholders, with the two primary stockholders owning about 71% being the pro and groundskeeper, and he, himself, only has about 8.1% interest.

4. The Corporation is committed to operate the golf course as a recreational facility for the public pursuant to their purchase contract, however, it seemed appropriate to them that they should apply for the Open Space Current Use Classification because that is what their current use is and they cannot change that under the existing contract relationship. He thinks that maybe they could have gone to the County and asked for reassessment or protested and because of the fact that they are bound to act as a golf course and are losing money, however, felt it was best to apply for the Open Space Classification.

5. The criteria in the Ordinance and State statute relating to open space is fulfilled by the present use of the golf course and the continuing use would enhance those purposes, and there is no doubt that this would preserve the beauty of the golf course; with respect to a), when they first acquired the golf course, they constructed the second nine-hole course, which is very beautifully done, and is one of the natural resources they believe should be continued in the area; with respect to b), he does not know if they serve the purpose of protecting streams or water supplies; with respect to c), they do promote conservation of soils and wetlands, because he knows there are wet areas on the course and they are keeping the area in its natural state; with respect to d), it will enhance neighboring parks by preserving the open space; with respect to e), the most obvious purpose is that they do enhance the recreational opportunities for the area, including King County; with respect to f), he does not know if they preserve a historic site; and in balance, the general level of the citizens of Tacoma are well served by maintaining this as a golf course and the maintenance of the course in its current use, and would hope that the City would recognize this as an enhancement of the general welfare of the citizens and grant the request in order to allow them some tax relief.

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Mr. Fishburne asked Mr. Comfort if he had been made aware of the fact that Public Works Department was requesting a condition to have screening on 33rd Street (at the 7th Hole) in order to protect the public traveling thereby from golf balls? Mr. Comfort indicated yes. Mr. Fishburne requested Mr. Comfort to describe some impracticalities with this condition. Mr. Comfort indicated that he realizes it is a difficult problem when you have a highway near a hole, and inasmuch as he is a member of the Fircrest Golf Course, knows they have a hole that is about 5 feet from the green to the highway and more than likely a person here would use an iron, but they have used trees as their screening method; however, No. 7 Hole at North Shore is different, in that it is about 30' from the edge of the property line and it has an elevated tee which drops 35' below and then extends out and comes out to an elevated green, as well as a person would be driving with a wood, so there is no way that a fence could be built to stop a ball, if a ball went into that area. Mr. Comfort indicated further that he felt that what would happen if one had a ball that was so errant to go onto 33rd Street, that the ball would be coming straight down at the time it approached the roadway, so there is no way a fence would stop a ball of that nature.

The Examiner asked if the public could use the golf course? Mr. Comfort indicated yes and it would remain as such.

Mr. Lynn Price from Public Works Department, indicated that their original request for screening adjacent to Norpoint Way between the golf course and the street was based on protection to the public, and what they are looking at would be some type of screening right at the tee area, because the future roadway will be close to the tee; they will acquire some additional right-of-way from the golf course, so the roadway would be 15' closer than it is now to the golf course; and possibly some low screening maybe 10' in height, at the fairway level, might be done. (Mr. Comfort indicated that if a ball was so errant off the tee it would go onto the roadway, the ball wouldn't reach the roadway and you would have had to "heel" it, as you are facing 45° from that area, and you would have the same identical analysis for a shot on the plateau heading towards the green you would have to be going 45° away, that the problem comes with the high shot, however, he would concede that if there is a concern that the club would be liable, he would be the first to have screening in for protection.)

Mr. Fishburne asked Mr. Comfort how many years had he been playing golf? Mr. Comfort indicated since 1950.

Mr. Price suggested that Public Works could review this matter in more detail with Mr. Comfort.

Mr. Price indicated they would be submitting a supplemental memorandum to their one dated January 26, 1981, that is in the Planning Department Report (Exhibit No. 2A), which revised memorandum has some requirements for right-of-way adjacent to Norpoint Way that is adjacent to No. 7 Hole; that since the North Shore Associates are not owners of the golf course, they would like to see about getting the right-of-way dedicated as street right-of-way as part of the Open Space Classification. (Mr. Comfort indicated he wasn't sure that should be part of the Open Space Classification, however, he can advise that the owners of the property around them will have their cooperation in meeting any of the requisites, too, and he feels it wouldn't interfere with their tee.)

There was no further discussion on the Open Space Classification request.

Mr. Kevin Foley summarized the Planning Department Report with respect to the reclassification, site plan and preliminary plat requests as follows:

1. The proposed project, to be known as North Shore Country Club Estates (hereinafter referred to as "North Shore") Divisions 2, 3 and 4, consists of constructing approximately 532 single-family dwellings, 57 duplexes (114 units) and 838 condominium units on a 338.41 acre

tract of land, for a total of 1,484 units. The project also includes a completed 111.70 acre 18-hole golf course, as well as water, sewer and storm drainage systems. Formal approval is being sought for Division 2A, a 194-lot subdivision, at this time.

2. When fully developed, the single-family areas would have a density of approximately 4.0 units per acre and the condominium development would have a density of approximately 12.69 units per acre, exclusive of the land area devoted to public streets.

3. Planning notes the major areas of concern are land use, traffic, schools, parks and recreation, and water supply (for full explanation of these concerns, refer to pages 56 thru 58 of the Planning Department Report).

4. The property is a low intensity residential area.

5. Between 560 to 806 school age children anticipated when the project is completed.

6. The vast majority of the open space recreational development will occur within the condominium development (Division No. 3). The Planning Department is recommending that the applicant pay \$25.00 per lot open space assessment via Ordinance No. 21772, and in addition, also request payment of \$25.00 per unit assessment be collected for the condominium development (Division No. 3), and that the funds be specifically earmarked for further development of the two adjacent City-owned facilities.

7. The Planning Department feels that the project is consistent with existing plans.

Mr. Mel Kemper from the Public Works Department submitted their memorandum of February 9, 1981, into the record as Exhibit No. 7, and stated that when they had submitted their original memorandum, there were some disagreements between the applicant and Public Works, but since that time they feel they are now in substantial agreement on the requirements. They have submitted general requirements and feel that it should be left up to Public Works for the specific details.

Mr. Alan Medak of the Public Utilities Department, Water Division, indicated he had nothing further to add.

The Examiner indicated to Mr. Fishburne that he noted that a lot of the information was in the Environmental Impact Statements as well as a lot of the detail information was contained in the Planning Department Report, therefore, he believed that the witnesses could briefly summarize their position.

Representing the applicant was:

Mr. Tom Fishburne  
Attorney at Law  
2200 One Washington Plaza  
Tacoma, WA 98402

Mr. Fishburne questioned Mr. Foley as to his qualifications as a Planner, his length of time with the City, and whether the proposal met or exceeded the policy requirements of the PRD Ordinance. Mr. Foley indicated he has been with the Planning Department for over 5 years and that the project was consistent, and further, that the conditions have changed to meet the Parkridge test.

Mr. Fishburne indicated to Mr. Kemper that with regards to the right-of-way, it was his understanding that Public Works has agreed that in the event off-street right-of-way needs to be acquired but cannot be by the applicant that the City would make its power of eminent domain available where necessary? Mr. Kemper indicated yes. Mr. Fishburne informed the Examiner that the language didn't need to be changed but felt that some formal recognition needed to be made.

Mr. Fishburne asked Mr. Kemper if they had identified the right-of-way adjacent to the golf course section that will be required? Mr. Kemper indicated pretty close, that the strip varies, but the majority was about 16', and showed on Exhibit No. 8 where the right-of-way would be taken from.

Mr. Fishburne asked Mr. Medak of the Public Utilities Department if they had performed any studies by which they could determine what size mains are required just to serve this development? Mr. Medak indicated not specific to North Shore, but the area in general. Mr. Fishburne asked him if he could say, as an engineer, that 16" as opposed to 12" would be required to serve the needs of North Shore? Mr. Medak indicated it would depend upon the type of structures in the condominium area. Mr. Fishburne asked if he had any study data based on what he said that could tell whether they needed 16" or 12" or 24" that is described in their memorandum? Mr. Medak indicated no study requiring 16", the 16" comes about as a result of its being required to perform a portion of their distribution and network and falls within a plat, and they have made it a policy where the developer will be financially responsible for up to a 16" main. Mr. Fishburne asked even when it is proven that a 8" would be appropriate? Mr. Medak indicated yes.

The Examiner asked Mr. Medak if there was a written policy on this matter? Mr. Medak indicated no. The Examiner asked if they imposed this policy with each subdivision? Mr. Medak indicated that if a 16" is required in the vicinity, it would be required for the plat, and if large enough mains existed, they would just get by with what it took to meet their needs of that specific development.

Mr. Fishburne asked if Mr. Medak was familiar with Rainier Pacific plat which is east of Public Utilities well site? Mr. Medak indicated yes. Mr. Fishburne asked if they required that they pay for a 16" main line? Mr. Medak indicated they were working with them trying to get an easement and in exchange for the easement they have agreed to put 16" through their entire plat between their existing 16" line and King County to Hoyt line. They will build additional 16" at their expense to get the proper route near the north line of this development. Mr. Fishburne indicated that North Shore was granting Public Utilities easements, and that normal conditions require a 15' easement. Mr. Medak stated that the main is critical to the whole area and if it does not go in, they will have problems serving the area. Mr. Fishburne asked Mr. Medak if other ones were critical? Mr. Medak indicated that if they had one now they would be in better shape; the east/west line is more important than the north/south line now; and for ultimate development, they need all 16" sizing to come together.

Mr. Fishburne indicated that the Planning Department report is comprehensive and does not need to be repeated and they would try to cover the high points of the proposed development; that the applicant and owner is now Nu-West not North Shore Associates; Nu-West has no ownership interest in the golf course but does have certain contract rights; he submitted into the record Exhibits 8 thru 14; regarding the conditions, Mr. Comfort explained the difficulty with the proposed screening condition, however, they do not object to fencing the tee area although there is some doubt as to whether it would do any good, and they will present testimony regarding the 16" line and will show that it is 4" over what they need; there is quite a bit of traffic data available; and they will have various witnesses testify.

Speaking in support was:

Mr. Del Roper, Landscape Architect  
SEA, Inc.  
33811 9th Avenue S.  
Federal Way, WA 98003

Mr. Roper related his qualifications and indicated that they have done numerous projects of similar scale, including the Gold Creek project in Tacoma; the plan for North Shore has been prepared with all of the Plans and City Ordinances; he quoted the intent of the PRD

Ordinance; he noted the changes in the area since 1953, i.e., establishment of the PRD District, the new library and fire station facilities; a 6-1/2 acre park site partially developed; a plan for a 3.5 million gallon water storage facility, improvements in the transit service, establishment of the Northeast Tacoma Plan and the City's Land Use Management Plan; the plan for this development began late in 1977 and it coincided with development of the Northeast Tacoma Plan; they have tried to be as cooperative as possible to make their views known to the citizens; the proposed development and the majority area of Northeast Tacoma is in the low intensity area; part of their area seems quite suitable for multi-family development; he showed on Exhibit 8 the surrounding developments; they had originally proposed a commercial enterprise, however, Nu-West asked them to determine whether their proposed site or the one proposed by Harbor Ridge Estates would be best for a shopping center, and they concluded that the site selected by Harbor Ridge Estates was best, therefore, they dropped that proposal; they feel that recreational uses in the area could satisfy a population of 13,000 and the subject North Shore plat has a significant amount of recreational potential abutting their project; Division No. 1 is single-family; the land use and elements dictated some of their design decisions, as the center is dominated by the 18-hole golf course and they are offering significant views into the golf course; they can buffer internal and external; steep slopes have been retained in the open space; the site is heavily vegetated and the same occurs in Division 4 in the northeast corner; in the multi-family area there is more thicker vegetation for buffering; in the multi-family area they have seven (7) children play areas and a 1.2 mile exercise course, however, the single-family children will also be able to use the recreational facilities; they are proposing some major improvements to the streets in the area which will benefit the total area; the future east/west arterial known as 51st Street was originally proposed to go through the center of their property; they began to do a series of alternate studies and were fairly successful to define a corridor; regarding phasing, on the east they will develop the single-family Phase 1 with 194 single-family units, the next phase to have a portion of multi-family, the third phase would pick up the rest of the single-family and duplex units in the north, and the last phase will be the single-family and duplex area immediately abutting the shopping center, and the first phase should begin in 1981 and will occur in 5 phases and take about 5 years to complete; and Exhibit No. 8 is the overall master plan for the development.

Speaking in support was:

Mr. Joe Armis, indicated that he is the Vice President and General Manager of the Land Division of the Pacific Northwest Region of Nu-West; he has been involved in land development activities for 23 years, the last 14 in the State of Washington; he participated in the three major golf course communities, i.e., Oakbrook, Twin Lakes and Fairwood in Renton; he is a registered land surveyor; he gave the background of the Nu-West corporation, indicating that the parent company is Nu-West Group Ltd., which is headquartered in Canada, and there are two operating divisions, one in Canada and one in the United States, and in 1979 the Canada operation built and sold 4,021 units, and the U.S. one headquartered in Phoenix in 1979 built and sold 1,738 units; in 1977, Nu-West Inc. purchased United Homes, in 1978 it purchased American Pacific with both of them being merged into Pacific Northwest region; Nu-West first became involved with North Shore in December of 1977 when they joint ventured with Brownfield and Associates to form North Shore Associates with the thought of building the North Shore Golf Club Country Club Estates, but in 1979 Nu-West bought out Brownfield, therefore, they are the surviving developer; the plan for North Shore has been an ongoing thing for three years and the site plan is a unique layout to meet the topo and environment; all their development is designed with the final product in mind; there will be covenants; all multi-family units will be owned in fee as condos or townhouses at about \$50,000 to \$80,000, with the higher priced units being closer to the golf course with better views; the single-family units will be between \$75,000 to \$150,000 with the higher priced ones being the lots that back onto the golf course; Nu-West has recently built the units shown on Exhibit 12 (pictures of single-family units and a fourplex unit in Auburn) and this is what they envision the subject project to be like.

Mr. Armis continuing:

Their best estimate for construction phasing is that if this request is approved, in the second half of 1981 they plan to start the plat improvements for Division 2A which is 194 lots, and will start on the first 100 lots in the first half of 1982 and will either build or sell them to other builders, in the second half of 1982 they will start construction for the remaining 94 lots and also start construction for the 557 condos in the interior, stage 3; they expect the first owners at the end of 1982 for the single-family units; in the first half of 1983 they would finish the remaining lots in Division 2A and finish the 557 condos which will last 2 to 3 years, depending on market conditions; in the second half of 1983 they would start on the plat for the remaining 117 lots in Division 2 and in the first half of 1984 finish that; in the second half of 1984 they would start construction for half of number 4 in the northwest portion of the site -- 135 lots; in the first half of 1985 they would finish that construction and also start construction of the plan for the 153 condos along 45th Avenue (the northeast portion of the project); in the second half of 1985, they would start construction for the second half of Division 4 -- 140 lots, also finish construction of the 153 condos; in the first half of 1986 they would finish construction of the second half of Division 4 and also start construction of the 128 condos on 51st; in the second half of 1986 they would finish that construction; they expect the building program to continue into 1988 before all the inventory would be used up, however, this is based on the assumption that market conditions will improve.

In summary, he indicated that they believe the proposed site plan complies with the Northeast Tacoma Plan and its goals and policies.

Testifying in support was:

Mr. Robert Scholes indicated that he is the Vice President and Manager of SBA, Inc., he is qualified as a professional engineer in five states, including Washington; the City has acquired property on Indian Hill for installation of a water storage reservoir; looking at the requirements for this development, they feel that a 12" line would more than adequately supply the kinds of fire flow they need, not the 16" as is being required by the Water Division, which appears to be coming from an unwritten policy; they have no objections to paying what is fair, but to penalize this development by increasing expenses for the benefit of others, puts his client in a bad position, and there is no equity for it.

Testifying in support was Professor Bruce Mann who indicated that:

He had prepared the economic analysis for the proposed development (see Exhibit No. 13 which also has his resume attached) which is much like a report he submitted on behalf of the Gold Creek development, but there is a change in the last part; they anticipate that the total net additional revenue the City will realize annually from this development will be in excess of \$368,000, the total private sector benefits to Pierce County would be in excess of \$64,000,000 during construction and following that, they anticipate a yearly amount of \$3,000,000 to be generated for the life of the project.

The last part of the report, starting at page 18, is a new part entitled "Non-quantifiable Impacts" wherein they address general issues of a project of this size, i.e., two substantive ways in which the project will impact the overall area's supply of housing, one from the form of development and one relates to the increase in the housing stock, and as the housing supply in the area is increased, it has an impact on houses throughout the area, because when a new house is built, it affects a lot of people (the filtering or chain of moves effect) which means that one new house generates an average of 3 additional housing opportunities for people or 3 families will move for each new house developed.

Professor Mann continuing:

They feel the development will generate new spending and employment opportunities in the downtown area, and it will generate a homogeneous and stable neighborhood in a near downtown area which is important to a city that is trying to attract and maintain new employment opportunities.

One effect they didn't deal directly with in the report is capital improvements, but the project will provide direct capital improvements on site and offsite and also it will indirectly provide for in excess of \$10,000,000 of additional bonding capacities.

Their conclusion is that the project will bring a positive net revenue annually in excess of \$300,000 to the City, it will provide a large positive impact on the local area, and the project is consistent with the economic plans for the City.

In summary, Mr. Fishburne indicated they have agreed to the conditions, with the exceptions as noted; that although the \$25.00 per condo unit isn't a requirement, they find that acceptable; the Ordinance doesn't provide for "earmarking of funds", but they feel they should be for this area; he had a call from Dr. Davidson on behalf of the Nor Point Boosters indicating there was a move to get the funds to approve Meeker Junior High, so for that reason he doesn't want the money limited to that indicated in the staff report; they agree with the conditions listed in Exhibit No. 7 with the exception of the golf course fence; Phase 2A meets all applicable standards and urges that it be approved, subject to conditions; the difference in costs between a 16" line and a 12" line is \$23,500; and no objections to the Park District's memorandum (Exhibit No. 15).

The Examiner indicated he was somewhat concerned about the fact that the applicant proposed to utilize the golf course for open space, which wasn't owned by the applicant. Mr. Fishburne indicated that the applicant executed an agreement with North Shore Golf Associates, Inc. (part of Exhibit No. 2B) which states that the applicant may use the property as though it were owned by the applicant; Exhibit No. 8 (the Master Plan) encompasses the golf course property and the conditions imposed on the Master Plan trigger the language of Paragraph 2 of the agreement and that contract will bind it, so it is the contract together with normal conditions to the Master Plan that makes the thing come together.

The Examiner asked what happened if after awhile the owners of the golf course decided they wanted to sell it for single-family development? Mr. Fishburne indicated that if this PRD followed the normal course of approval, then the golf course would be zoned "R-2 PRD" along with the area, which means that in order to develop it, they would have to have at least preliminary plat approval and also have to have an amendment to the preliminary plat, as well as the fact the Master Plan is specific.

The Examiner asked if the golf course people had signed the request? Mr. Fishburne indicated they had initiated it.

The Examiner asked if after the project is developed with all amenities and the homes are sold, and then the golf course people say they are going out, did the applicant have the right or option to come in and take it over and is that in the Agreement? Mr. Fishburne indicated they didn't have that tie.

The Examiner indicated that he is concerned that over the fact that there are two separate ownerships and the applicant is using the golf course as part of its open space area, therefore, he is asking if the applicant is closely tied up to make sure it didn't change? Mr. Fishburne indicated he could not guarantee the economic operation of the golf course, but he felt comfortable that land sufficient in size for a golf course is dear and difficult to find and he feels that if they have to close the golf course, it will be passive open space unless somebody seeks approval to build on it.

No opposition was presented. The hearing concluded at 12:17 p.m.

FINDINGS, CONCLUSIONS, DECISION, AND RECOMMENDATIONS:

FINDINGS:

1. Based upon the evidence presented, it appears that the environmental evaluation of the Planning Department is adequate.

2. The Department of Planning Report, to the extent that it sets forth the issues, general findings of fact, applicable policies and provisions and departmental recommendations in this matter, is hereby entered as Exhibit No. 2A and is incorporated in this report by reference as if set forth in full herein.

3. This matter was heard in conjunction with the request for approval of File No. 128.9, and that decision is made a part of this file.

4. Mr. Kevin Foley, representing the Planning Department, appeared and indicated that the proposed project, to be known as North Shore Country Club Estates, consists of approximately 532 single-family dwellings, 57 duplexes (114 units), and 838 condominium units on a 338.41 acre tract of land for a total of 1,484 units. The project also is to include a completed, and now operating, 111.70 acre, 18-hole golf course as well as water, sewer, and storm drainage systems.

He stated that the overall density of the project is 4.38 dwelling units per acre with 6.5 dwelling units per acre in the residential area.

He referred to the Planning Department Report and their analysis set forth therein and concluded by recommending approval of all three requests, subject to various conditions.

5. Mr. Mel Kemper, representing the Public Works Department, submitted Exhibit No. 7 and stated that this is to be substituted for the previous memorandum from the Department, since what they have listed in this letter allows more flexibility for modifications in the future.

6. Mr. Alan Medak, of the Public Utilities Department, appeared and stated that they would require a 16-inch water main on the project.

This was confirmed by a memorandum received subsequent to the public hearing and made a part of the file as Exhibit No. 16.

7. Mr. Tom Fishburne, an attorney representing the applicant, appeared and asked questions of Mr. Foley who indicated that the present proposal meets the design criteria of the PRD Ordinance.

Mr. Fishburne asked questions of Mr. Medak who indicated that the 16-inch water main requirement is a policy that is used for some areas; however, it is not written nor is it based upon what the plat actually needs.

8. Mr. Fishburne proceeded further and stated that they will only cover the high points in the request since all of the items are part of the record.

He indicated that they accepted the report; however, with regard to the conditions, they have no objection to the screening requirement near the tee, but felt that it would not serve any purpose to place a fence all along the road.

He stated also that they felt that only a 12-inch water main is necessary and not a 16-inch main.

9. Mr. Del Roper, a Landscape Architect of SEA, Inc., appeared and submitted the landscaping plan.

He stated that there will be a new library site, Fire Department site, and park site nearby, and that there will be new water service to the area as well as new transit service.

He stated that since the proposal was first started in 1977, there have been new land use plans adopted for this area, which is a low-intensity area, and that this proposal falls within those land use limitations.

He stated that to the east of this property are single-family subdivisions, and to the north is a single-family development and Harbor Ridge, which will have single-family units, multi-family, and a shopping center.

He indicated that on the northwest is an undeveloped park site of 6½ acres and to the south of this proposal is a 40-acre school district site.

He stated that the project is laid out in order to take advantage of the topography of the site and the views of the golf course.

He indicated that the site is heavily vegetated with madrona in the single-family area and Douglas fir in the multi-family area.

He stated that they will be adding major improvements to the existing road systems as well.

By way of phasing, he stated that in the first phase there will be 194 single-family units, in the second phase part of it will be multi-family, in the third phase part of it will be single-family and duplex, and the fourth phase will be single-family and duplex adjacent to the shopping center to the north.

He stated that they are asking for an overall master plan approval concept at this time with specific site plan approval of the 194 single-family units.

10. Mr. Joe Armis, representing the applicant, appeared and stated that he has been involved in land development in Washington for the last 14 years, including the development of Oakbrook.

He stated that they are developer builders, and the first units are designed with this in mind.

He stated that all multi-family units will be owned in fee with prices of about \$50,000 to \$80,000, and that the homes will range in value from \$75,000 to \$150,000, the highest prices being for those units on the golf course.

He stated that they plan to start the plat improvements in the second half of 1981, and that they will either build themselves or sell to other builders.

He stated that the owners will be going into living units at the end of 1982 and that the proposal will develop over a period of 6 years, and it won't be until 1988 before all the inventory is used up.

11. Mr. Robert Scholes appeared and stated that a 12-inch water line will supply all the requirements of the development, and the necessity for a 16-inch line is a general and written policy which would benefit others and not the applicant. Rather, it would cost the applicant an additional \$23,500.

12. Mr. Bruce Mann appeared and stated that, after deducting all costs versus the income received to the City, the City will still net \$368,000.

He stated that the proposal will provide \$64,000,000 during construction to the local economy with \$3,000,000 per year for the life of the project.

He stated that the project will help to moderate house prices in the area by 2½ percent.

He indicated that the project will generate new shopping and employment activities for Downtown Tacoma, and that it will also generate the homogeneous and stable neighborhood near the downtown area.

He concluded by stating that the project will indirectly provide for additional bonding capacity for the City of \$10,000,000.

13. Mr. Tom Fishburne stated that they have agreed to conditions recommended by the staff with the exclusions heretofore noted regarding the fence and the water main.

However, he stated that they would like the fees collected here to be used to the Northeast Tacoma area, and this use should be flexible.

He reiterated that the plan conforms with all the goals and policies of the Land Use Ordinance.

14. Mr. Foley stated that they have no problem with their marking the money for the Northeast Tacoma area.

15. No one further spoke on the request and no one appeared in opposition to the request.

#### CONCLUSIONS:

1. It is the conclusion of the Examiner that the request for development of the North Shore Country Club Estates, as submitted, is a very attractive request for the use and development of this portion of Northeast Tacoma. The request itself has been designed in such a manner as to provide a reasonable and beneficial use of the land which would provide a variety of living units for other members of the public who desire to reside in this part of the City of Tacoma.

In addition, these uses would benefit not only the economy, but would serve to bolster the downtown portion of the City of Tacoma through the more intensive residential use, while at the same time providing convenient access for shopping for those shopping areas which now exist both in the City of Tacoma and in the Federal Way area.

2. The Examiner has reviewed in detail the Planning Department analysis as set forth on pages 56 through 63 of the Planning Department Report, Exhibit No. 2A, and this analysis is hereby adopted by the Examiner and made a part of this decision as if set forth in full herein in order to avoid needless repetition.

3. Questions were raised as to the necessity of a 16-inch vs. a 12-inch water main. In this regard, no evidence was submitted by the City Utilities Department to justify their requirement for the 16-inch water main based upon the size or nature of the project or based upon the necessity of this main. In this regard and in the absence of such evidence, the imposition of the 16-inch water main would be an unreasonable requirement if not in some way related to the use of the property by the applicant.

It is the Examiner's recommendation that the subject, however, to compliance with the applicant with the following conditions:

- A. In accordance with Ordinance No. 21772, a fee of \$25.00 per lot or \$4,850.00 (Division 2A) shall be paid in lieu of a requirement for dedication or reservation of open space or park areas within the subdivision. These funds shall be deposited prior to recording of the final plat and shall be

specifically earmarked for expenditure on either the City-owned 10-acre parcel in the vicinity of 51st Street N.E. and Nassau Avenue or at Alderwood Park, vicinity of Norpoint Way N.E. and 33rd Street N.E.

- B. The applicant shall be assessed a fee of \$25.00 per condominium unit (Division 3) for further multi-purpose park facility development at the two locations mentioned above. Special earmarking of these funds shall also occur as recommended above.
- C. The applicant shall comply with all mitigating measures identified in the Northshore Environmental Impact Statement (See ATTACHMENT NO. 1).
- D. The applicant shall comply with all of the conditions of the Public Works and Public Utilities Departments contained on ATTACHMENT NOS. 2 and 3, respectively, with the exception of the following:
  - 1. The fence required to be placed on the golf course shall only be placed close to the tee. The exact distance shall be determined by the applicant in consultation with the City department involved.
  - 2. Unless the City Utilities Department can show legal justification for the imposition of the 16-inch water main, the applicant shall only be required to construct the water main which will be sufficient to serve this property as well as that reason required to serve adjacent areas in the future.
- E. The applicant shall submit a legal agreement, which is binding upon all parties and which may be enforced by the City of Tacoma. It should provide that the property in question will maintain and always have the use of the adjacent golf course for its open space and density requirement which has been relied upon by the applicant in securing approval of this request. In this regard, the agreement attached to File No. 128.9 may be used in concept (See ATTACHMENT NO. 4). However, the Examiner believes that there must be more certainty provided to insure the golf course use, which was relied upon to gain the density for this request, is clearly tied to the applicant's proposed use in perpetuity.

DECISION:

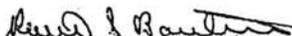
File No. 127.140 - The requested Site Plan is hereby granted, subject to conditions.

RECOMMENDATIONS:

File No. 120.924 - The requested reclassification should be approved, subject to conditions.

File No. 125.238 - The requested Preliminary Plat should be approved, subject to conditions.

ORDERED this 2nd day of March, 1981.

  
ROBERT J. BACKSTEIN, Hearings Examiner

TRANSMITTED this 2nd day of March, 1981, via certified mail to:

Mr. Thomas Fishburne, Attorney at Law, 2200 One Washington  
Plaza, Tacoma, WA 98402

TRANSMITTED this 2nd day of March, 1981, to the following:

Mr. Pat Comfort, Attorney at Law, 1031 Crestwood Lane,  
Fircrest, WA 98466  
Mr. Del Roper, Landscape Architect, SEA, Inc., 33811 - 9th  
Avenue South, Federal Way, WA 98003  
Nu-West Pacific Inc. and North Shore Golf Associates,  
P.O. Box 3047, Federal Way, WA 98003, ATTN: Joe Armis  
North Shore Golf Associates, Inc., 1611 Browns Point Blvd.,  
Tacoma, WA 98422  
Lyman Ketcham, 8717 McKinley, Tacoma, WA 98445  
Ed Wise, 1810 - 58th St. N.E., Tacoma, WA 98422  
Jerry Robinson, 5411 Hyada Blvd. N.E., Tacoma, WA 98422  
Joan Searls, 2026 Browns Point Blvd. N.E., Tacoma, WA 98422  
Kurt Veeder, 4405 - 33rd St. N.E., Tacoma, WA 98422  
Planning Department, City of Tacoma  
City Clerk, City of Tacoma  
Public Works Department, City of Tacoma  
Buildings Division  
Program Development Division  
Construction Division  
Traffic Engineering Division  
Public Utilities Department, City of Tacoma  
Fire Department, City of Tacoma

#### NOTICE

Pursuant to the Official Code of the City of Tacoma, Sections  
13.03.120, 13.03.130 and 13.06.485, a request for RECONSIDERATION  
or, alternatively, a request for APPEAL to the City Council of the  
Examiner's decision or recommendation in this matter must be filed  
in writing on or before March 16, 1981.

000048

# **Exhibit 105**

# APPENDIX C

OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

FINDINGS, CONCLUSIONS, RECOMMENDATION AND DECISIONS

APPLICANTS: Northshore Investors LLC

PROJECT: The Point at Northshore

LOCATION: Northshore Golf Course located at 4101 Northshore Boulevard NE and 1611 Browns Point Boulevard NE. The project site is located within an "R-2 PRD" One-Family Dwelling and Planned Residential Development District.

SUMMARY OF REQUESTS:

**File No. REZ2007-4000089068:** Rezone Modification - a request to modify an existing condition of approval placed on the golf course site in connection with Northshore Country Club Estates PRD in a previous rezone which occurred in 1981 and established the PRD designation for the site.

**File No. PLT2007-4000089069:** Preliminary Plat - a request to subdivide the Northshore Golf Course site into 800 lots containing 366 single-family detached homes in the southerly portion of the site and 494 attached townhomes in the northerly portion of the site. In addition, the applicant proposes 65 separate tracts to serve various uses, such as private access roads, open space, storm water facilities, slopes, and critical areas/buffers.

**File No. SIT2007-4000089067:** Site Plan Approval - a request for site plan approval for development of the golf course, accompanying the rezone request.

**File No. MLU2007-4000089065:** Variances/Reductions - a request for variances to building setback requirements, reductions to minimum lot area and minimum lot standards

**File Nos: WET 2007-40000105839 and WET2007-40000105876:** Wetland/Stream Assessments, and Wetland/Stream Exceptions - identification of regulated systems on the golf course and request for exemption of such systems from a Wetland Development Permit; request for interrupted buffers on two Category IV wetlands.

## **PUBLIC HEARING:**

After reviewing the Staff Report of the Department of Public Works, the Hearing Examiner Pro Tempore conducted a public hearing on the applications. Hearing sessions were held on four days - October 12, 13, 15 and 16, 2009. The record was held open for response by the City to conditions proposed by the applicants. The record closed on October 23, 2009.

Two hundred, seventy-six (276) exhibits were admitted. Six of these exhibits are volumes containing several hundred public comment letters.

At the hearing Aaron M. Laing and Thomas Bjorgen, Attorneys at Law, represented the applicants. The City was represented by Jay Derr, Attorney at Law. Save NE Tacoma was represented by Gary Huff, Attorney at Law. Thirty-four (34) persons presented public testimony.

## **RECOMMENDATION:**

**File No. REZ2007-40000089068:** Rezone Modification - The application should be denied.

## **DECISIONS:**

**File No. SIT2007-40000089067:** Site Plan Approval - The Site Plan approval is denied, effective on the date the City Council acts on the Rezone Modification recommendation.

**File No. PLT2007-40000089069:** Preliminary Plat - The Preliminary Plat is denied, effective on the date the City Council acts on the Rezone Modification recommendation.

**File Nos: MLU2007-40000089065, WET2007-40000105839, WET2007-40000105876:** Variances/Reductions, Wetland/Stream Assessments, Wetland/Stream Exemptions - Because of the decisions on the Site Plan Approval and Preliminary Plat these matters need not be reached.

## **FINDINGS OF FACT**

### **General Description of Proposal**

1. Northshore Country Club Estates (Country Club Estates) is an approximately 338-acre<sup>1</sup> planned residential district consisting of residential areas and an 18-hole golf course, located at 33d Street NE and Norpoint Way NE and west of 45th Avenue in the City of Tacoma.

<sup>1</sup> Different numbers have been used by the Applicants and the City. The differences are the result of the variations in historical records, GIS data, Pierce County Assessor data, property descriptions and surveys. The Examiner is using the number provided by City Staff in their Staff Report.

It is located within an "R-2 PRD" One-Family Dwelling and Planned Residential Development District.

2. The R-2 PRD zoning for the area was approved in 1981, along with general approval of Divisions 2, 3 and 4 of Country Club Estates, with specific Preliminary Plat approval of Division 2A. Since that approval, Divisions 2, 3 and 4 have been finally platted and developed around and within the golf course.

3. The golf course (Northshore Golf Course) is a privately owned 18-hole golf course which is open to the public. Since before the 1981 rezone through the present, the surrounding residential areas and the golf course area have been in separate ownership.

4. Presently, the golf course is the major green and open area in a neighborhood that is otherwise given over to housing. The fairways are bordered by mature evergreen and deciduous trees. There are six ponds which are both ornamental and a feature of the storm water drainage system.

5. The golf course sits in a kind of topographic bowl and is laid out on a north-south axis. Except at its south and southwest ends, the course is at a lower elevation than the adjacent residential developments. The single family residences around the perimeter have views into and over the golf course. Other parts of the development were built on a slightly elevated interior island which the northern portion of the golf course flows around. This area and a part of the northern perimeter contain clustered condominiums and apartments.

6. On January 29, 2007, Northshore Investors LLC (applicants) submitted an application for permits to redevelop the Northshore Golf Course by inserting 860 residential units consisting of 366 single-family detached units and 494 town home units, to be built in phases over the next six plus years. The development, called "The Point at Northshore," would also include the creation of multiple tracts which would contain open space, slopes, private access roads, utilities and recreation areas.

7. The principal matters requested in the application are approval of the Preliminary Plat of "The Point and Northshore," approval of a Rezone Modification and a Site Plan Approval. In addition multiple Variances/Reductions to development standards and Wetland/Stream exemptions or approvals are sought.

8. The golf course occupies approximately 116 acres<sup>2</sup> of the overall 338-acre PRD. The instant application, in short, proposes to fill the present golf course site with houses. To do so will require considerable grading to re-contour the rolling terrain of the course for level building sites and the installation of utilities. While perimeter trees will be retained as practical, interior trees will be removed. Landscaping, of course, will accompany the new development.

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<sup>2</sup> Several different figures have also been used for the golf course's size. The Examiner has used the number initially used by the City Staff in their Staff Report.

9. The *Comprehensive Plan* designates the site as a "Low Intensity" housing area, suitable for single-family home development. The Generalized Land Use Element provides that overall densities for a low intensity residential development can range up to 15 dwelling units per acre. The existing density at the current level of PRD build-out is approximately 3.57 units per acre. The proposed development of 860 units would produce a density of about 7.4 units per acre on the 116-acre golf course area. Thus there is no density issue either with the proposal in isolation or as it would affect the PRD as a whole.

10. The applicants have presented analyses intended to show that their proposal can be built consistent with PRD regulatory open space requirements. Their view is that private yards may be counted as "usable landscaped recreation area," a phrase which is at the core of the open space definition to which the applications are vested. Under this interpretation, even though the golf course is eliminated, the proposed development and the pre-existing developments will provide enough open space within the PRD to satisfy the definition.

11. The 1981 Hearing Examiner recommendations, adopted by the City Council, called for approval of the rezone and the Preliminary Plat of Division 2A subject to the following condition:

The applicant shall submit a legal agreement, which is binding upon all parties and which may be enforced by the City of Tacoma. It should provide that the property in question will maintain and always have the use of the adjacent golf course for its open space and density requirement which has been relied upon by the applicant in securing approval of this request. In this regard, the agreement attached to File No. 128.9 may be used in concept . . . However, the Examiner believes that there must be more certainty provided to insure the golf course use, which was relied upon to gain the density for this request, is clearly tied to the applicant's proposed use in perpetuity.

12. The restriction of the golf course to golf course (open space) use was implemented by means of an Open Space Taxation Agreement (OSTA) between the owners of the golf course and the City, as well as a Concomitant Zoning Agreement (CZA) between the developers and the City. Under the OSTA, the City must approve any change in the use of the golf course. The CZA requires adhering to the approved Site Plan which includes the golf course.

13. The current Rezone Modification application seeks to eliminate the Hearing Examiner's condition for the original PRD approval, to nullify the OSTA and to modify or remove the CZA condition that requires adhering to the approved Site Plan. In short, it asks for the City's approval to remove the golf course's open space designation. The primary asserted justification for making such a change to the original provisions of the PRD zone is that conditions have substantially changed.

14. The instant Preliminary Plat application relates solely to dividing the land on the golf course. There is no application to modify the terms of plat approval for Division 2A or any of the other Divisions of Country Club Estates.

## Historical Background

15. The area rezoned to R-2 PRD was zoned R-2 in 1953. By 1981, Division 1 of Country Club Estates had been approved and was under construction. Except for Division 1, the area around the golf course was at that time undeveloped forest area.

16. The 1981 approval of the rezone to PRD allowed the residential developments to build to a greater density than allowed under conventional R-2 zoning.

17. At the time of the 1981 reclassification, the golf course was the subject of an "Agreement Concerning North Shore Golf Course," between the North Shore Golf Associates, owners of the golf course, and the developer of the Country Club Estates residential area. The Agreement allowed the developer to include the golf course as open space and recreation area needed to obtain the R-2 PRD zoning for residential development of the surrounding Country Club Estates.

18. In connection with the rezone in 1981, a Draft and a Final Environmental Impact Statement were written. The cover of the DEIS and FEIS has a drawing of a fairway lined with trees and two greens with pin flags waving. The FEIS expressly states that the project includes an 18-hole golf course.

19. The Staff Report for the 1981 rezone and preliminary plat proposals says that after development of the whole project, approximately 33% of the site will be occupied by the golf course. The Report declares that the applicants intend to use the golf course and other small on-site recreational improvements in satisfying its open space requirement. The Report expresses a concern that the City has no guarantee that the golf course will remain in perpetuity.

20. The agreement to use the golf course as open space, the environmental review documents, and the Staff Report all evidence the basic design concept. The residential project was to be built around the golf course which was to be used for open space.

21. The Examiner's decision in 1981 contains quotations from the developers of Country Club Estates showing that the existence of the golf course as a centerpiece for the development was reflected in the prices charged for homes in the surrounding plats. Higher prices were charged for units closer to the golf course with better views of it.

22. The Hearing Examiner's condition, quoted above, reflected the understanding underlying the creation of the PRD. The decision provides no mathematical analysis of the open space provided by the golf course, nor any reference to the definition of open space used. But the golf course in its entirety, as graphically shown on the approved Site Plan, was an integral part of the design.

23. As to the golf course, the OSTA provides:

The use of such land shall be restricted solely to golf course and open space use. No use of such land other than as specifically provided here-

under shall be authorized or allowed without the express consent of the City of Tacoma.

The agreement by its terms "shall run with the land described herein and shall be binding upon the heirs, successors and assigns of the parties hereto."

24. Contingent upon the granting of Reclassification, and approval of the Site Plan and Preliminary Plat, the CZA requires the developers to comply with all CZA terms and conditions. Among the conditions is a provision that requires development and maintenance to be in accordance with the approved Site Plan.

25. In one way or another, the continued vitality of the original condition of approval was recognized by the City in the final approval of Country Club Estates Divisions 2, 3, and 4.

### **Procedural Background for the Subject Application**

26. As noted, the instant application was filed on January 29, 2007. The following day a moratorium on PRD applications became effective in the City. Initially the City advised the applicants that their application was incomplete. This determination was appealed and resulted in a Hearing Examiner's decision which reversed the City's Notice of Incompleteness. Accordingly the application vested to the Code provisions in effect on January 29, 2007, meaning that the moratorium did not affect the application.

27. On July 10, 2007, the City Council enacted an ordinance which changed the terms of the PRD requirements for open space. The definition of open space to which the application vested is the version previously in effect.

28. On December 14, 2007, the City issued a Determination of Significance (DS) under the State Environmental Policy Act (SEPA) in reference to the applicants' proposal. This too was appealed, but the outcome was a Hearing Examiner's decision, dated May 19, 2008, affirming the DS.

29. On January 2, 2008, the City filed a Complaint for Declaratory Judgment, Breach of Contract, and Quiet Title in the Pierce County Superior Court against the applicants and the golf course owners. The complaint sought a determination by the court of the respective rights of the City and the defendants under the OSTA and the CZA.

30. The complaint alleged, among other things, that: (1) the OSTA prohibits use of the golf course for other than open space and golf course use without Tacoma's consent; (2) the OSTA remains in effect until Tacoma agrees to its nullification; (3) the OSTA runs with the land and is binding on the current golf course owners and all subsequent owners thereof; (4) the golf course is bound by restrictions imposed in the master planning and development process, including the restrictions set forth in the CZA; (5) that the defendants were estopped to deny that they and the golf course were bound by the CZA; and (6) that the CZA requires all development in the Country Club Estates PRD to be consistent with the approved Site Plan under which the golf course must be maintained as a golf course.

31. On February 3, 2009, the Court ruled that: (1) the golf course/open space land use designation in the OSTA remains binding and enforceable by the City of Tacoma, unless and until the City approves a different use of the golf course property through the applicable land use application process; (2) the OSTA cannot be unilaterally terminated by the golf course owners or their successors or assigns, (3) the R-2 PRD rezone of the golf course and surrounding property was conditioned upon maintenance of the golf course as open space and the PRD master plan land use designation of the golf course is open space; (4) the CZA was implemented by the City's legislative rezone decision and remains binding on the golf course owners and their successors and assigns; (5) CZA condition 2(tt) requires development consistent with the approved site plan and designates the golf course as open space; (6) the open space and golf course use restrictions placed upon the golf course in the OSTA and CZA constitute land use designations; and (7) the defendants may request the City to amend, nullify or alter the land use designations set forth in the OSTA and CZA through the land use process, and that the applicants and golf course owners are in no different position than any other property owners within the PRD with respect to requesting to change the land use designation of, and to re-develop, real property within the Country Club Estates PRD. The Court also ruled that the City's processing of, and decision in response to, such a request is subject to the provisions of the City's PRD regulations as well as general land use laws, including the rules of inverse condemnation.

32. As a result of the DS scoping process, Draft and Final Supplemental Environmental Impact Statements were issued on May 4, 2009 (Draft) and August 17, 2009 (Final). These impacts statements were supplemental to the original draft and final statements for Northshore Country Club Estates issued in August 1979 and January 1981. An appeal of the adequacy of the supplemental impact statements was filed by the citizen's group Save NE Tacoma and several individuals, but the appeal was subsequently withdrawn.

33. The DSEIS contained an exhaustive discussion of various possible ways to evaluate the amount of open space needed to satisfy the definition of open space in former *TMC* 13.06.140(F)(6). That definition reads:

Usable open space. A minimum of one-third of that area of the site not covered by buildings or dedicated street right-of-way shall be developed and maintained as usable landscaped recreation areas. , , ,

34. In the FSEIS, Staff determined that approximately 75.07 acres of open space within the PRD shall be maintained per the "usable open space" requirement. Applying the scenario of "average building footprint," where each lot (existing and proposed) constructs to an average footprint, open space of 172.73 acres would be provided if you count private yards. Only 44.55 acres would be provided if private yards are not included. Thus, the minimum of 75.07 acres of "usable open space" is not achieved if private yards are excluded.

35. In addition to evaluating the applicants' proposal, the FSEIS analyzed the environmental impacts of an alternative residential design (EIS Alternative) for the golf course involving larger lots and fewer units. The EIS Alternative proposal was intended to come close to achieving the applicants' objectives while lessening the environmental impact. No layout for the alternative was provided, but it contemplated 670 dwelling units (340 single family homes

and 330 townhouses.) It included an open space transition area (buffer) between the new buildings in the proposal and the adjacent developed areas. A pathway around the exterior of the new development would be placed in this transition area.

36. In paragraph 1.3 of its Summary, the FSEIS described the impacts of the applicants' proposal on land use compatibility and aesthetics under the heading "unavoidable significant adverse impacts (after mitigation)" The FSEIS stated:

The golf course area will be replaced with residential development. The impacts will vary based on the final location of the various elements of the development. The provision of open space transition zones will reduce but not eliminate the level of significance.

The FSEIS reached the same conclusion as to the EIS Alternative. Thus no mitigation was identified that would reduce the adverse impact of replacing the golf course to below the level of "significance."

37. Following issuance of the FSEIS, hearings on the application were scheduled and held on October 12, 13, 15 and 16, 2009.

### **Conduct of the Hearing**

38. The public hearings were conducted in the standard manner for pre-decision permit matters. The City Staff presented an overview of the project and summarized its Staff Report. The applicants made their presentation introducing a redesign of the proposal that it called the "Perfect Alternative." Public testimony was taken from 34 citizens, most of them residents of Country Club Estates. Included in the public testimony was a presentation by counsel on behalf of Save North East Tacoma, a neighborhood group organized in opposition to the proposal. Argument was heard from both the City and the applicants.

39. The Staff Report consisted of 118 pages devoted to describing the project, giving the history of the site, providing the regulatory framework for the application, and analyzing the proposal under the relevant Code provisions. The Staff found some areas of inconsistency with applicable standards, but overall provided no recommendation for action by the Hearing Examiner.

40. If the Examiner were to approve the applicants' requests, the Staff spelled out some 120 recommended conditions of approval. Many of these conditions reflect actions the Staff concluded the applicants should take in mitigation of the impacts of the proposal.

41. Evidence was presented of mitigation agreements acceptable to the City with regard to traffic (City of Federal Way) and schools (Tacoma School District). With appropriate conditions, the Staff was satisfied that adequate mitigation can be implemented for impacts from earthwork and grading and from impacts to storm water management and critical areas.

42. A mitigation agreement with the Metropolitan Parks District had not yet been

concluded as of the dates of hearing. The applicants are offering a payment of \$250 per unit in addition to the established \$25 per unit impact fee. The Parks District has a concern with the timing of the payments, i.e., at the time of building permit issuance.

43. The applicants presented the "Perfected Alternative" as a proposal designed to approach the reduced impact of the EIS Alternative, but without shrinking the development to the same extent. This would be achieved by positioning larger lots to the perimeter and smaller lots to the interior, reorienting buildings in relation to open space and adjacent uses, adding 7,900 lineal feet of trails, and providing variable buffers around the perimeter on the recommendation of a landscape architect with site-specific planting screens and fences.

44. The applicants' view is that the "Perfected Alternative" better approximates the original proposal's objectives than does the EIS Alternative. The "Perfected Alternative" includes 804 residential lots, resulting in a density for the golf course area of 6.9 dwelling units per acre. This is 56 lots fewer than the original proposal, equating to an eight percent reduction. The perimeter transition zone (buffer) areas would be 22.9 acres, in comparison to 24.7 acres in the EIS alternative. A total of 3.2 acres in park and landscape tracts is offered.

45. The record and testimony supports a finding that the applicants' proposal and revised proposal would, with associated infrastructure, be adequate to accommodate the impacts of the development on public facilities. Public water, sewer and roads systems, as improved, would have adequate capacity for this development.

46. During the course of the hearings, the applicants and Staff offered and responded to several iterations of proposals for project conditions. Ultimately, concerns with roads, cul-de-sacs and turnarounds were resolved. The applicants withdrew some variance requests, but persisted in asking for five foot side yard setbacks and reduction to minimum lot size and width.

47. The public testimony at the hearing covered a vast array of objections, including impacts on schools, aesthetics, trees, views, and mental health. Some felt the golf course was priced too high and that it could be sold as a golf course. Others questioned the adequacy of the proposed facilities to handle reasonably anticipated storm water in this glacial till environment. A recurring perception was that the City in accepting the golf course as the open space for Country Club Estates had made a commitment to the people who invested in homes there to preserve it as open space. It is apparent that many, if not most, of the people who bought into Country Club Estates did so because of the green open space provided by the golf course. Petitions of protest with thousands of signatures were introduced. Volumes of letters were submitted. There was not, in all of this, the faintest whiff of public support for the proposal.

#### **Criteria for Approval**

##### 48. Rezone Modification

A rezone modification, under the Tacoma Municipal Code (*TMC*), is treated like a permit modification. The applicants seeks to eliminate a condition from the zoning approval that created the R-2 PRD district. The subject request, therefore, constitutes a major modification

(See *TMC* 13.05.080) and the standards for original approval apply. The relevant criteria are set forth in *TMC* 13.06.650, as follows:

- (1) That the change of zoning classification is generally consistent with the applicable land use intensity designation of the property, policies and other pertinent provisions of the comprehensive plan.
- (2) That substantial changes in condition have occurred affecting the use and development of the property that would indicate the requested change of zoning is appropriate. If it is established that the rezone is required to directly implement an express provision or recommendation set forth in the comprehensive plan, it is unnecessary to demonstrate changed conditions supporting the requested rezone. (Emphasis added.)
- (3) That the change of the zoning classification is consistent with the district establishment statement for the zoning classification being requested. (Emphasis added.)
- (4) That the change of the zoning classification will not result in a substantial change to an area-wide rezone action taken by the City Council in the two years preceding the filing of the rezone application. Any application for rezone that was pending and for which the Hearing Examiner's hearing was held prior to the adoption date of an area-wide rezone, is vested as of the date the application was filed and is exempt from meeting this criteria.
- (5) That the change of zoning classification bears a substantial relationship to the public health, safety, morals, or general welfare. (Emphasis added.)

A PRD zone, originally or as modified, must meet the relevant standard for open space. The standard to which the subject application is vested is for "usable open space." As set forth at former *TMC* 13.06.140(F)(6), the definition, in pertinent part, reads:

Usable open space. A minimum of one-third of that area of the site not covered by buildings or dedicated street right-of-way shall be developed and maintained as usable landscaped recreation areas.

#### 49. Site Plan Approval

Under *TMC* 13.06.140(B), an application for site plan approval shall accompany a request for reclassification to a PRD District. In acting upon such a request the Hearing Examiner shall consider, but not be limited to, the following criteria:

1. The site development plan shall be consistent with the goals and policies of the comprehensive plan.
2. The plan shall be consistent with the intent and regulations of the PRD

district and any other applicable statutes and ordinances. (Emphasis added.)

3. The proposed development plan for the PRD District is not inconsistent with the health, safety, convenience or general welfare of persons residing or working in the community. The findings of the Hearing Examiner . . . shall be concerned with, but not limited to, the following:

- a. The generation of noise or other nuisances . . .
- b. Availability and/or adequacy of public services . . .
- c. Adequacy of landscaping, recreation facilities, screening, yard setbacks, open spaces, or other development characteristics necessary to provide a sound and healthful living environment and mitigate the impact of the development upon neighboring properties and the community.
- d. The compliance of the site development plan with any conditions to development stipulated by the City Council at the time of the establishment of the PRD District. (Emphasis added.)

#### 50. Preliminary Plat

The request to subdivide the golf course area into residential parcels within the R-2 PRD District is subject to the general criteria for approval of preliminary plat set forth at TMC 13.04.100(E). The preliminary plat shall not be approved unless it is found that:

1. Appropriate provisions are made for made for the public health, safety, and general welfare, and for open spaces; drainage ways; streets or roads; alleys; other public ways; bicycle circulation; transit stops; potable water supplies; sanitary wastes; parks and recreation, playgrounds; schools and school grounds' and all other relevant facilities, including sidewalks and other planning features which assure safe walking conditions for students who walk to and from school and for transit patrons who walk to bus stops or commuter rails stations. (Emphasis added.)
2. The public use and interest will be served by platting of such subdivision and dedication. (Emphasis added.)

#### Environmental Impact

51.. The applicants throughout the permit process have proceeded on the assumption that a commitment to appropriate mitigation measures could and would reduce the environmental impact of this proposal to below the level of "significance."

52. The applicants' position is that the various mitigation efforts it has offered or agreed to implement, as expressed through the "Perfected Alternative" plan and through its latest

response to the City's proposed conditions, represent a reduction of impacts to a level lower than "significance."

53. In most areas, the City and the applicants agreed that the mitigation offered will eliminate significant adverse impacts.

54. In terms of adverse impacts, the "Perfected Alternative" lies somewhere in between the applicants' proposal and the EIS Alternative. As noted, the FEIS concluded that, in the category of land use compatibility and aesthetics, neither the applicants' proposal nor the EIS Alternative would reduce the adverse impacts of replacing the golf course with residential development to a non-significant level.

55. "Significant" under WAC 197-11-794 means "a reasonable likelihood of more than a moderate adverse impact on environmental quality." It involves context and intensity and does not lend itself to a quantifiable test. The context may vary with the physical setting. Intensity depends on the magnitude and duration of the impact. Severity should be weighed along with the likelihood of occurrence.

56.. If the application were granted, replacing the golf course with residential development would be absolutely likely to occur. The impact would occur in a physical context where the change would radically alter the setting from green open space to housing, with attempts at screening and buffering. From higher elevations, much of what now appears as trees, grass and open vista would be replaced by roofs. The duration would be, more or less, permanent. The magnitude of the change would be profound. Simply put, the people living in and around the golf course would be looking at and experiencing adjacent land use that is quite different from the present.

57. The applicants contend that the various housing types, sizes and groupings contemplated by the proposal would be compatible with surrounding development. Even if so, this is not the appropriate comparison here. This is not a case of infill on a vacant lot where development is allowed and anticipated by the land use regulatory regime. Here the golf course is subject to a condition, purporting to guarantee that it remains as open space -- a condition that has been a critical factor in determining the character of the environment as perceived by those who live in the adjacent developed areas. To eliminate this open space raises a compatibility problem that cannot be resolved by residential design, housing scale or housing arrangement. The proposal and its variation are incompatible with the original design concept and, in context, this is a significant impact.

58. The quality of a significant impact is a matter of judgment, rather than objective measurement. Based on the record, the Examiner is not able to say that the FEIS evaluation of the impacts the proposal and the EIS Alternative on land use compatibility and aesthetics is in error. The impacts would be more than moderate and, again in the particular context, they would be adverse. Further, the Examiner finds that the "Perfected Alternative", as conditioned and revised, would not reduce the level of adverse impact below the level of "significance."

59. However, the SEPA process is about informed decision making. SEPA does not require that all significant adverse impacts be mitigated or, if such impacts exist, that a project be denied. The existence of significant adverse impacts is simply a factor to be considered in the evaluation process. Denial of a project must be based on some independent provision of adopted law or policy.

### **Comprehensive Plan**

60. The DSEIS contains a comprehensive compilation of applicable *Comprehensive Plan* policies filling some 20 pages. In summary, the proposal was found to be consistent with many *Comprehensive Plan* policies or would be consistent with such policies if recommended mitigation were implemented. The Staff Report lists a number of policies with which the project might be considered inconsistent, including several policies from the neighborhood element for Northeast Tacoma

61. The *Comprehensive Plan* itself is a melange of policies both encouraging growth and promoting the protection of established neighborhoods. Those policies with which Staff finds the project arguably inconsistent tend to be in the latter category, as well as directed toward the preservation of natural values and open space. The policies, in general, speak in precatory rather than mandatory terms.

62. The proposal and the "Perfected Alternative" are both clearly consistent with the land use intensity designation of the *Comprehensive Plan*. Looking at the entire list of applicable *Comprehensive Plan* policies, the project does not appear on balance to be so contrary to the spirit of the planning document that it should be found to be inconsistent with it for regulatory purposes.

### **Definition of Open Space**

63. The applicants' proposal is predicated on the assumption that private yards may be counted as "usable landscaped recreation area," under the former definition of "usable open space" quoted above. (See former *TMC* 13.06.140(F)(6)). This is the definition to which the applicants vested. Under this interpretation, the minimum open space requirements for the PRD can be satisfied without even using the golf course.

64. However, the development concept on which the 1981 rezone was based was that the golf course would supply the open space needed for the PRD. Exactly how this worked out in terms of the minimum required open space was not addressed. It was apparently assumed that including the golf course would provide enough open space and that it was needed for that purpose.

65. Whether private yards could be included as open space was not addressed in the 1981 decision. From the manner in which the golf course was then treated, it can be inferred that no one considered the use of private lawns.

66. In the years between 1981 and 2007 there was apparently an evolution in the thinking of Staff about what could be considered to satisfy the requirement for open space. Over time, the City allowed the open space requirement to be satisfied both through the provision of common open space and through the use of private yard and road areas. In recent years, new PRD developments have provided relatively small amounts of common open space and have relied heavily on private roads and private yards to meet the requirement.

67. In the summer of 2007, after the instant application became vested, the open space definition was changed to "clarify" that, among other things, private yards are not to be counted in open space calculations. In the amended definition, the term "usable open space" is no longer used, nor is the formulation "usable landscaped recreation area." Instead, the open space requirement is expressed as "common open space," meaning space open to all owners or to the public generally.

68. Further, under the amended definition, the minimum required for "common open space" is a significantly larger area than formerly needed for "usable open space." Under the prior definition open space was 1/3 of whatever was left after buildings and public streets were subtracted, necessarily an area less than 1/3 of the whole. Under the 2007 amendment the minimum open space needed is now 1/3 of the gross site area of the PRD District.

69. There is nothing in the former definition that limits its applicability to "common" or "public" use. The Examiner is not persuaded that by including private lawns and roads the Staff was, under the past definition, making a mistake. The former language was broad enough to encompass the interpretation that Staff made.

70. The 2007 amendment changed both the descriptive language and the minimum size of required open space. The "common" or "public" use limitation was not required by the plain meaning of the prior definition. The Examiner concludes that the post-vesting definition must be seen as a change in the law, not as simply an explanation of what the law meant all along.

71. In the instant case, however, the question of what minimum open space was required under the prior definition is germane only if reducing the PRD's open space is somehow necessary. The golf course was designated as open space and that land use designation was by the conditions of approval to remain in perpetuity. The open space for the PRD whatever its size, is what it is. The setting aside of more open space than the minimum does not, ipso facto, require or imply that the excess should be converted to another use.

### Changed Circumstances

72. The change in zoning sought by the applicants is, in effect, a request to be free of the condition imposed by the Hearing Examiner in 1981. The Examiner, then, wanted certainty to be provided that the golf course use was tied to the adjacent residential use in perpetuity. Under the OSTA, the golf course owners and their successors may not use the golf course for another use without the express consent of the City. The City is now being asked to consent to using the golf course for another purpose on the basis that "substantial changes in conditions affecting the use and development of the property" has occurred.

73. The applicants showed that the golf course, while initially successful, has been less so for a number of years. The number of rounds played there annually has been going down.

74. At the same time, there is evidence that the North Shore course has declined in terms of upkeep and quality over time. While it is expensive to run a golf course, there was no showing of any vigorous effort to upgrade the facility.

75. Evidence was presented of a decline in the national popularity of playing golf. However, the experience in this State may be to the contrary. The record shows that a number of new golf courses have opened in the local region in recent years. No specific information was given on how these newer golf course operations are faring.

76. Overall, the record is unclear as to whether the decline in popularity of the North Shore Golf Course is the result of implacable market forces or self-induced. The course's exact financial status is not known. Moreover, there was no analysis of what an infusion of investment in the quality of the course might do to improve its financial fortunes.

77. The golf course ownership has not changed. Now the owners want to retire. By a recent letter, the owners said that they had no intention of perpetually operating a golf course on the property. But, there is no record of any such sentiment being expressed in 1981. Then, they agreed be part of the PRD and to use the golf course as open space. They did not appeal the rezone. They registered no objections to the conditions of approval for the PRD.

78. The golf course owners have been trying to sell the property as a golf course for about a decade, but very little is known about the marketing effort. Whether the owners have been asking an appropriate price is not known. The record discloses the successful sale of a golf course in neighboring Kitsap County in 2003. The Examiner was not convinced that the property cannot not be sold as a golf course.

79. There was no evidence of any efforts to sell the golf course for any other kind of open space use. There is a need for athletic fields and park lands in the area.

80. As to the surrounding neighborhood, there has been no change in circumstances since the original rezone. The area has simply become what was envisioned in 1981. Country Club Estates was designed as and remains a residential development around a golf course. No new or different uses have been introduced nearby. The golf course continues to function as the open space centerpiece of the development.

81. There has been no change in public opinion as to the appropriateness of the use to which the golf course has been put. The sentiment of those who live in the vicinity is overwhelmingly in favor of keeping the golf course as open space. Many neighboring homeowners feel that the City made a promise of permanence to the residents of Country Club Estates in designating the golf course as open space for the surrounding residential development.

82. The Staff Report states the following:

Staff is unaware of any substantial changes in conditions that have occurred affecting the use and development of the golf course site that would indicate the requested modification to the zoning is appropriate. Specifically, in the general vicinity of the golf course, no major actions such as arterial street improvements, rezones, or significant development other than the development of the adjacent residential homes to the golf course have occurred. The *Northshore Country Club Estates* development (Disivison 2, 3 and 4) were constructed fairly consistent with the 1981 rezone, subsequent miscellaneous modification permits and the EIS. While the development may have been built at a somewhat lesser density than what was originally permitted, nonetheless, it was developed to surround an 18-hole golf course. . . . During the 1981 rezone, the golf course was identified throughout the rezone process and environmental documents as being relied upon as an integral component of the overall development for density, open space and a significant feature of the proposed neighborhoods.

83. The Hearing Examiner concurs with and adopts the above Staff finding.

#### **PRD Intent**

84. The district establishment statement for the R2-PRD district is set forth in *TMC* 13.06.140 (A), as follows:

Intent. The PRD Planned Residential Development District is intended to: provide for greater flexibility in large scale residential developments; promote a more desirable living environment than would be possible through the strict regulations of conventional zoning districts; encourage developers to use a more creative approach in land development; provide a means for reducing the improvements required in development through better design and land planning; conserve natural features; and facilitate more desirable, aesthetic and efficient use of open space. (Emphasis added.)

The PRD District is intended to be located in areas possessing the amenities and services generally associated with residential dwelling districts, and in locations which will not produce an adverse influence on adjacent properties. (Emphasis added.)

85. The context here is not of a proposed new PRD development being inserted into a conventional zoning environment. It is rather of a proposed change to an existing PRD development designed around a golf course. The question, then, is whether this particular PRD as modified will achieve the more desirable living environment such districts are intended to create.

86. As applied to the present residents of the PRD, the change sought is not more desirable from the perspective of the availability of open space. Everyone understands this. It accounts in large measure for the outcry about this proposal. But the sense of what would be lost

is very difficult to articulate. Solid objects would occupy much of what is now air. Some sense of what this would mean was presented by the City's visual consultants, in the array of blocks they inserted into views of the landscape. Intervening vegetation can provide some masking. Modest buffers can provide some relief for the closeness of structures. Narrow view corridors can preserve some semblance of vistas. But, if the project goes forward, over 800 houses will occupy the golf course and they are not there now. Regardless of efforts at mitigation, this would make a profound difference in the sense of the openness of the surroundings for those in adjacent homes. The feeling of being closed in would be particularly acute for those in the clustered developments in the middle of the golf course.

87 The proposed development would vastly change the experience of open space by eliminating the central feature around which the PRD was planned. The effect on adjacent properties would be adverse.

88. In this application for change, compliance with conditions that were set forth in the establishment of the original PRD must be considered in the evaluating the new Site Plan. Of course, the whole point this application exercise is to get rid of the key condition of PRD approval. So, in a circular fashion, approval of the proposed Site Plan is dependent on meeting the criteria for revising the PRD. Unless those can be met, the original condition will still apply and that condition, of course, cannot be complied with by a Site Plan for residential development of the golf course.

### **Public Interest**

89. The plat proposed here would only divide land within the golf course property. If the golf course is looked at in isolation, as though it were an island, then (if the requested variances were approved) the proposal would meet the dimensional requirements for the R2-PRD zone, including the requirements of the open space definition to which the application vested.

90. However, in this case, the application of such standards to the golf course property is not the only relevant inquiry. This is because the effect of approving the proposed plat would be to alter the primary condition of approval for the surrounding plats. The approval of the plats was a part of the master planning process. Keeping the golf course as open space was a condition of approval for the plats, as well as of the PRD rezone.

91. While the golf course was not subdivided, it was tied to the adjacent plats by the Hearing Examiner's "open space" condition. The open space designation for the plats is the area of the golf course. In this sense, the golf course is part of the plats. The fact of different ownership of the residential areas and the golf course does not change this.

92. If the presently proposed plat of the golf course property is approved, the designated open space of the surrounding plats will have been largely eliminated. Necessarily this must be viewed as modifying those surrounding plats. That this open space might represent more open space than was needed when the plats were approved is immaterial. They were approved with the golf course as their designated open space.

93. To be sure, no application for the modification of the adjacent plats is presented for determination here. What we have instead is an application that, if approved, would indirectly have that effect.

94. By approval of the subject Preliminary Plat, the residents of the adjacent plats would be subjected to a decision that would effectively result in a major change in those plats without their consent. The Examiner, after much reflection, is convinced that such an effect on the adjacent plats brought about the unilateral action of a single applicant is not in the public interest

### **General Discussion**

95. The instant proposal represents exactly the kind of thing that the Hearing Examiner was worried about when he imposed his "open space condition" in 1981.

96. Assuming that the City cannot contract away its police power, the "in perpetuity" language of the Hearing Examiner probably expresses a concept beyond the City's ability to guarantee. Thus, the OSTA, represents a reasonable implementation of what the Hearing Examiner tried to do. It requires the golf course to remain as open space until the City gives permission for it to be used another way. Nonetheless, the "in perpetuity" language serves to emphasize that maintaining the golf course in open space was pivotal in the Examiner's decision to create the PRD zone.

97. The discussion of the mathematics of the former open space definition diverts attention from the function of the golf course in the original development concept. Certainly, as a provider of open space, the golf course was important in securing approval to the increased density allowed in the residential areas by PRD zoning status. But it also provided a visual and physical amenity for the residents that was a significant part of the inducement to live there. Country Club Estates got its name from the golf course. Developments that grew up there have names like "The Links" and "On the Green." Streets have names such as "St. Andrews Place," "Fairwood," and "Pinehurst." All of this underscores the essential qualitative function of the golf course in the very concept of the development.

98. The City is now being asked to abandon the original intent of behind the creation of Country Club Estates. The City is being asked to do this over the opposition of those who live in the developments that grew up in response to the idea of living on or near a golf course. This is not the casual opposition of a few. It is a massive outpouring of citizen outrage.

99. The overarching question here is whether circumstances are such now that "perpetuity" should be terminated by the City. Based on the entire record, the Examiner finds no compelling reason for doing so.

100. Any conclusion herein which may be deemed a finding is hereby adopted as such.

## CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the subject matter of these proceedings.
2. Notice of the hearings was provided as required by law.
3. The procedural requirements of SEPA have been met.
4. Because of the decisions on the Preliminary Plat and the Site Plan approval the Variances/Reductions, Wetland/Stream Assessments, Wetland/Stream Exemptions need not be decided and are not reached.
5. Counsel for Save North East Tacoma argues that the provisions of RCW 58.17.215 should be brought into play here. This is the subsection of the State platting statute that spells out the procedures for altering subdivisions. It provides that if a subdivision is the subject of restrictive covenants filed at the time of approval of the subdivision, and the application would result in the violation of such a covenant, the application must contain an agreement by all parties subject to the covenant that the covenant may be terminated or altered to accomplish the purpose of the subdivision change sought.
6. The Hearing Examiner declines to address this argument. First, whether the OSTA is a restrictive covenant or operates like one, is a question for judicial determination. Second, there is no application here to alter any of the adjacent plats. The only plat-related request is the application to plat the golf course.
7. However, the Examiner reaches a similar result by a different route. The effect of approving the subject plat would be to eliminate the designated open space in adjacent plats. It is contrary to the public interest to allow any applicant to achieve such a result unilaterally. The interests of too many others are left out of the decisional equation. The Examiner concludes that the Preliminary Plat should be denied because the public interest will not be served by the platting of the subdivision applied for. *TMC* 13.04.100(E), RCW 58.17.110. Ultimately this may mean that requests to alter the adjacent plats need to be made and approved before the subject application can be approved.
8. The question of whether the project's inconsistency with the *Comprehensive Plan* can form the basis for rejecting the subject application for Rezone Modification under *TMC* 13.06.650(1) is not presented in this case, because no inconsistency with the *Comprehensive Plan* for regulatory purposes was found.
9. Denial of a proposal based on SEPA is limited to the application of policies, plans or rules formally adopted as the basis for the exercise of substantive SEPA. See *TMC* 13.22.660. If violation of the *Comprehensive Plan* is enumerated among such policies, an alternative means for using the *Comprehensive Plan* for regulatory purposes is established. Here, notwithstanding the existence of significant adverse environmental impacts Tacoma's *Comprehensive Plan* does not provide a basis for denial of this particular project through SEPA.

10. The complex and convoluted discussion of the mathematics of the open space requirements for the PRD are essentially beside the point. As a matter of initial intent, the golf course was designated as open space for the PRD and it is performing that function. The issue is not about the minimum number of acres of open space the regulations require, but whether the open space designation of the golf course, whatever its size, should be eliminated. To conclude that this should happen requires some independent justification for departing from the original design concept.

11. The critical question here is whether conditions have so changed that the Rezone Modification is appropriate. *TMC 13.06.650(2)*. The issue of "substantial changes in condition" requires a broader consideration of factors than just the financial viability of the present use of the particular parcel under consideration.

12. At least three factors are relevant: (1) changed public opinion, (2) changes in the land use patterns in the area, and (1) changes in the property itself. See *Bjarnson v. Kitsap County*, 78 Wn.App. 840(1995).

13. As to public opinion, there has been an unusually large outpouring of it here. It is all emphatically in opposition to getting rid of the golf course. So public opinion has not changed at all. If anything, it has hardened. The applicants quote cases saying that "community displeasure" should not be the basis for denial. But in rezone cases it is a recognized factor to be considered. The public sentiment expressed in this case is primarily from people who have a genuine and substantial interest in the outcome. There is little point in having public hearings, if such interested public sentiment counts for nothing.

14. As to changes in the land use patterns in the area, none have been brought to the Examiner's attention. No significant new infrastructure has been built in the vicinity. The only development has been the development of the Country Club Estates according to its original design.

15. The condition of the property itself is a matter of dispute. There have been no significant physical changes. The golf course is still a golf course. The problem is with the viability of that use or some other open space use. The Examiner was not convinced that the golf course cannot make it as a golf course or that some other reasonable open space use cannot be found.

16. On review of the factors listed in *Bjarnson*, the Examiner concludes that the "substantial changes in condition" necessary for Rezone Modification were not proven.

17. The applicants here have labored mightily to create a development that would mitigate all environmental impacts to below the level of significance. Despite all efforts, there is really no way to hide the insertion of over 800 new homes into an area where they do not now exist. And there is really no artfulness of design that can make such a development a less than significant change in the perception of open space by those living in the adjacent plats. The proposed development is well and thoughtfully designed, but given the history and physical context of this particular PRD, it is in the wrong place.

18. Therefore, the Examiner further concludes that the proposed rezone would not be "consistent with the district establishment statement." *TMC* 13.06.650(3). It was not proven that the rezone will facilitate a more desirable use of open space. Further, it will not avoid an adverse effect on adjacent properties. In this regard, the FEIS determination that there will be unmitigated adverse environmental impacts on land use compatibility and aesthetics is a relevant consideration.

19. The inability to approve the Rezone Modification, makes approval of the Site Plan impossible. Because the rezone is inconsistent with the district establishment statement, it is inconsistent with the intent of the PRD district. *TMC* 13.06.140(B)(2). Similarly the failure to demonstrate sufficient changes in condition removes any basis for modifying or removing the CZA condition requiring adherence to the original Site Plan. See *TMC* 13.140(B)(3)(d).

20. Any finding herein which may be deemed a conclusion is hereby adopted as such.

**RECOMMENDATION**

The Hearing Examiner recommends that the Rezone Modification be denied.

**DECISIONS**

The Preliminary Plat is denied.

The Site Plan approval is denied.

**SO ORDERED**, this 7<sup>th</sup> day of January, 2010.

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**Wick Dufford, Hearing Examiner Pro Tempore**