

NO. 42490-8-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

FILED-8 03/11/18
STATE OF WASHINGTON
BY: *[Signature]*
DEPUTY

NORTHSHORE INVESTORS, LLC, a Washington limited liability
company, and NORTH SHORE GOLF ASSOCIATES, INC., a
Washington corporation,

Petitioners / Appellants / Cross-Respondents,

vs.

CITY OF TACOMA, a Washington municipal corporation,

Respondent / Appellee / Cross-Appellant.

OPENING BRIEF OF
APPELLANT NORTHSHORE INVESTORS, LLC

Aaron M. Laing, WSBA #34453
Averil B. Rothrock, WSBA #24248
SCHWABE, WILLIAMSON & WYATT, P.C.
U.S. Bank Centre
1420 Fifth Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone 206.622.1711
Fax 206.292.0460
*Attorneys for Plaintiff/Appellant/Cross-Respondent
Northshore Investors LLC*

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	3
III. ISSUE STATEMENTS	4
IV. STATEMENT OF THE CASE.....	5
A. Northshore’s Rezone Modification Application.....	5
1. The Golf Course’s economic conditions have changed dramatically for the worse.....	8
2. The Golf Course suffers from ongoing flooding.....	12
B. Northshore’s Related Project Applications.....	15
C. Initially Receptive, the City Turned Hostile and Attempted to Stop the Project.....	17
D. The Superior Court Previously Declared Northshore’s Right to Seek Redevelopment of the Golf Course.....	20
E. Despite Finding that the Project “Is Well and Thoughtfully Designed,” the City Denied Northshore’s Applications based on “A Massive Outpouring of Citizen Outrage.”.....	21
F. The Trial Judge Denied Northshore’s LUPA Petition.....	23
IV. STANDARD OF REVIEW	23
V. ARGUMENT AND AUTHORITY	24
A. This Court Should Reverse and Require Approval of the Rezone Modification Application.....	26

1.	The Rezone Modification Application Satisfies the Criteria of TMC 13.06.650.....	29		
	a.	Approval was proper under TMC 13.06.650(B)(2) where the record contains substantial evidence of changes.....	30	
		i.	The declining economic viability of the Golf Course establishes the right to a rezone modification.	31
		ii.	The flooding of the Golf Course is a substantial change supporting a rezone.....	33
	b.	Approval was also proper under TMC 13.06.650(B)(2) to implement the Comprehensive Plan.	34	
	c.	Approval was proper under TMC 13.06.650(B)(3) and (5) where the application is consistent with the PRD and meets the public interest.....	40	
B.	This Court Should Reverse because the Decision is Contrary to the Declaratory Judgment.....	43		
C.	This Court Should Reverse because the City Violated the Appearance of Fairness Doctrine.	45		
D.	This Court Should Reverse the Decision and Require Approval of the Preliminary Plat Application, Site Plan, and Wetland / Stream Assessments and Exemption and Two Variance Applications.	46		
VI.	CONCLUSION.....	48		

APPENDIX

- A. Land Use Decision
- B. TMC 13.06.650
- C. February 4, 2009 and February 25, 2009 Superior Court
Declaratory Judgment Orders
- D. November 2010 Court of Appeals Affirmance

TABLE OF AUTHORITIES

STATE CASES

<i>Carlson v. Beaux Arts Village</i> , 41 Wn. App. 402, 704 P.2d 663 (1985)	47
<i>City of Tacoma, et ano v. Northshore Investors, LLC, et al.</i> , 2010 Wash. App. LEXIS 2551 (Wash. Ct. App. Nov. 16, 2010)	22, 23
<i>Collinson v. John L. Scott, Inc.</i> , 55 Wn. App. 481, 778 P.2d 534 (1989)	42
<i>Indian Trail Property Owner's Association v. City of Spokane</i> , 76 Wn. App. 430, 886 P.2d 209 (1994)	26
<i>Isla Verde International Holdings, Inc. v. City of Camas</i> , 146 Wn.2d 740, 49 P.3d 867 (2002)	25
<i>J.L. Storedahl & Sons, Inc. v. Clark County</i> , 143 Wn. App. 920, 180 P.3d 848 (2008), <i>review denied</i> , 152 Wn.2d 1015 (2008)	25, 27, 45
<i>Kenart & Associates v. Skagit County</i> , 37 Wn. App. 295, 680 P.2d 439, <i>review denied</i> , 101 Wn.2d 1021 (1984)	27
<i>Lakeside Industrial v. Thurston County</i> , 119 Wn. App. 886, 83 P.3d 433 (2004), <i>review denied</i> , 152 Wn.2d 1015 (2004)	25
<i>Magula v. Department of Labor & Industrial</i> , 116 Wn. App. 966, 69 P.3d 354 (2003)	45
<i>Maranatha Mining, Inc. v. Pierce County</i> , 59 Wn. App. 795, 801 P.2d 985 (1990)	26
<i>Parkridge v. City of Seattle</i> , 89 Wn.2d 454, 573 P.2d 359 (1978)	26

<i>Pease Hill Comm'ty Group v. County of Spokane,</i> 62 Wn. App. 800, 816 P.2d 37 (1991).....	41
<i>Plum Creek Timber Co. v. Washington State Forest Practices Appeals Boards,</i> 99 Wn. App. 579, 993 P.2d 287 (2000).....	42
<i>Sleasman v. City of Lacey,</i> 159 Wn.2d 639, 151 P.3d 990 (2007).....	31
<i>Sunderland Family Treatment Services v. City of Pasco,</i> 127 Wn.2d 782, 903 P.2d 986 (1995).....	26, 33, 34
<i>Tugwell v. Kittitas County,</i> 90 Wn. App. 1, 951 P.2d 272 (1997).....	26, 28, 29, 30
<i>Wells v. Whatcom County Water District No. 10,</i> 105 Wn. App. 143, 19 P.3d 453 (2001).....	24
<i>Wenatchee Sportsmen Association v. Chelan County,</i> 141 Wn.2d 169, 4 P.3d 123 (2000).....	25

STATE STATUTES

RCW 36.70B.030-.060	48
RCW 36.70C.020(1)	3, 6, 7
RCW 36.70C.040(3)	24
RCW 36.70C.130(1)	passim
RCW 36.70C.130(1) (b), (c)&(d)	43, 48

FEDERAL CASES

<i>Eubank v. City of Richmond,</i> 226 U.S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (1912).....	27
<i>Washington ex rel. Seattle Title Trust Co. v. Roberge,</i> 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928).....	27

MISCELLANEOUS

id., Finding No. 53).....42
id., Finding No. 94).....44
id., Conclusion No. 7).....47

TACOMA MUNICIPAL CODE

TMC 13.06.650.....4, 18, 22, 26, 29, 30, 31, 34, 40, 48

APPELLATE RULES

RAP 2.2(d)15
RAP 10.1(g)44

OTHER AUTHORITIES

Webster’s Third New International Dictionary, Unabridged
(Merriam-Webster 2002)19

I. INTRODUCTION¹

This is a LUPA appeal of the City of Tacoma's decision to deny Appellant Northshore Investors, LLC's (Northshore) several interrelated applications to modify a conditional rezone of the North Shore Golf Course (Golf Course) located in a planned residential development (PRD) to redevelop the Course. Northshore seeks relief from the City's denial (hereinafter, the Decision).

The entire PRD is zoned for residential development. The Golf Course was designated open space in 1981 when the PRD was established through a rezone. The Golf Course has been prone to flooding since the 1990's and is failing economically. Its elderly owners will soon retire. Consistent with the existing zoning, Northshore proposes to redevelop portions of the Golf Course as residences and the remaining portion as public parks, trails and open space (the Project).

The matter was considered in a hearing before the City's Hearing Examiner, who adopted findings of fact and conclusions of law. At the hearing and otherwise, the Project faced significant opposition from surrounding property owners. The Examiner yielded to this opposition, denying two of Northshore's applications and recommending that the City Council deny the central application to modify a condition of the 1981 rezone (Rezone Modification). The Council acquiesced and adopted the

¹ Citations to the Clerk's Papers are designated CP ____ with parenthetical descriptions of the cited material. Citations to the Administrative Record are designated AR ____ followed by a bracketed [] reference to the document (exhibit), page and (where applicable) page or line numbers.

Examiner's findings and conclusions and recommendation. In doing so, the City violated Washington land use laws and contravened an earlier Superior Court ruling involving the same controversy, which ruling this Court upheld.

The earlier Pierce County Superior Court proceeding remains relevant to this appeal. That proceeding involved claims to quiet title and for declaratory relief to determine the respective rights in the Golf Course of the City, Northshore, the Golf Course owners and surrounding property owners (organized as Save NE Tacoma). *See* CP 2734-2735 (Decision, Finding Nos. 29-31); AR 415-506 [Ex. 25 (Joint Statement Pertaining to Status of Litigation)]. In its ruling on, the trial court stated:

. . . [Northshore 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 [their] pending land use application as though it would an application from **any other property owner** within the [] PRD, that is, **consistent with the provisions which are set forth in the planned residential development ordinance.**

See CP 2734-2735 (Decision, Findings Nos. 29-31); AR 415-506 [Ex. 25, Ex. D, February 25, 2009 Order at 7:15-22 (emphasis added); *see also id.*, Ex. E, February 25, 2009 Order at 4:1-10]. All parties except Save NE Tacoma accepted this ruling, which became the law of the case. Save NE

Tacoma appealed, but this Court held that the individuals had no standing to assert an alleged property interest held by the City. *See id.*

The City's Decision to deny Northshore's Project directly contravenes the Superior Court's prior rulings and is otherwise contrary to applicable law. The Decision is based on the premise that the Golf Course's "open space" designation should persist "in perpetuity" and ignores current circumstances and applicable regulations. The City failed to judge the Project on its merits under the law, relying instead on past events and citizen opposition. This Court should reverse.

II. ASSIGNMENTS OF ERROR

The City² committed the following errors:

1. denial of the Rezone Modification Application.
2. denial of the Site Plan and Preliminary Plat Applications; and
3. denial of the ancillary wetland stream exemptions and variances.

The Hearing Examiner made 100 Findings of Fact and drew 20 Conclusions of Law to support his decision to deny the Site Plan and Preliminary Plat applications and his recommendation that the City Council to deny the Rezone Modification. The Council adopted them all, without revision. CP 2728-49. Northshore assigns error to certain of the findings and conclusions highlighted in the attached Decision at Appendix A.

² The Hearing Examiner had final authority over the Site Plan, Preliminary Plat and ancillary applications, and he made a recommendation on the Rezone Modification to the City Council. CP 2728-49. The City Council was the final decision maker with the highest authority to approve or deny the Rezone Modification application. *See id.*; RCW 36.70C.020(1). Northshore appeals all of the City's decisions concerning the Project.

III. ISSUE STATEMENTS

1. Should the Rezone Modification have been approved because acknowledged or otherwise uncontroverted evidence in the record demonstrated that the requirements of TMC 13.06.650(B)(2) had been satisfied? Specifically, (a) did substantial evidence in the record unequivocally demonstrate the declining economic value of the Golf Course, its inability to be sold as a golf course, and its owners'/operators' advancing age, thereby establishing a substantial change sufficient to support the rezone request; (b) did substantial evidence unequivocally demonstrate annual, rampant flooding of the Golf Course since the 1990's due to inadequate stormwater infrastructure, thereby establishing a substantial change sufficient to support the rezone request, and/or (c) is the Project required to directly implement multiple provisions of the City's Comprehensive Plan? (Assignment of Error 1).
2. Should the Rezone Modification have been approved as consistent with the PRD and in the public interest pursuant to this Court's precedential decisions in *Tugwell v. Kittitas County* and *Henderson v. Kittitas County*, where the modification furthers the Comprehensive Plan in a PRD already zoned for residential use and is consistent with open space requirements, and where neighborhood opposition alone may not be the basis of denial? (Assignment of Error 1).
3. Should this Court reverse the land use decisions because they contravene the Superior Court's February 2009 ruling in the declaratory judgment in this same case? (Assignments of Error 1, 2 and 3).
4. Should this Court reverse the land use decisions based on violations of the appearance of fairness doctrine, and require that, upon any remand, the Deputy Mayor not participate? (Assignments of Error 1, 2 and 3).
5. Should this Court reverse the denial of the Site Plan and Preliminary Plat Applications because they satisfied the objective criteria and were ripe for decision, the denial contravenes the Superior Court judgment, and/or based upon the Appearance of Fairness Doctrine? (Assignment of Error 2).
6. Should this Court reverse either reverse or reverse and remand the denial of the Wetland Stream and Variance Applications because they satisfied the objective criteria and were ripe for decision and/or based upon the Appearance of Fairness Doctrine? (Assignment of Error 3).

IV. STATEMENT OF THE CASE

The North Shore Golf Course (Golf Course) in Northeast Tacoma is zoned R2-PRD for “planned residential development.” *See* CP 2730-32, 2741. The City’s Comprehensive Plan recognizes the Golf Course’s R2-PRD zoning. *See id.* The City’s and Pierce County’s Buildable Lands reports both list the Golf Course residentially-zoned buildable land in their inventories. *See* AR 5590-5603, 5782-85 [Exs. 149 & 153-155]; *see also* AR 5250-5366 [Ex. 119, Staff Report, at 7].

In January 2007, Northshore and the Golf Course owners applied to the City to redevelop the Golf Course consistent with the existing zoning, including a Rezone Modification application to modify the Golf Course’s “open space” designation in the PRD. *See* CP 2731. Northshore simultaneously filed related applications to subdivide the Golf Course, including applications for a Site Plan, Preliminary Plat and ancillary wetland/stream approvals and setback variances (collectively, the Project). *Id.* The City’s denial of these land use applications is the subject of this LUPA appeal.

A. Northshore’s Rezone Modification Application.

Northshore submitted a complete application package for the Point at Northshore on January 29, 2007. *See* CP 2731. The Rezone Modification application asks the City to change the Golf Course’s 1981 designation as “open space” in the existing PRD. *See* CP 2732. The City’s acknowledges that this change still would leave the PRD with sufficient “open space” as required under the regulations applicable to the Project.

See CP 2737 & 2741-42. Designation of the *entire* golf course as “open space” was not and is not necessary to provide the requisite amount of open space in the PRD, per to applicable regulations. *Id.*; see also AR 5431-42 & 6180-87 [Exs. 136 & 192].

The Point at Northshore project would convert the private, pay-to-play, 116-acre Golf Course into a residential community with nearly 50 acres of open space for active and passive recreation, as described in the following testimony:

The Point at Northshore is going to provide parks, recreation areas, and trails that are available for all residents at no fee. [These amenities] are going to be available not only to residents in the area, [] but the new residents.

...

The other important item to consider, too, is that this development is going to provide circulation and connections between those existing facilities, the Norpoint Center, Dash Point and Alderwood Park. So not only through the trail system, but also through vehicular circulation. There will be access for these residents and others to get to current facilities, as well as the facilities that we're proposing.

So if the course were to stay as it is, remain as existing as a golf course; you have a pay to play course. It's currently [serving] and it will serve only golfers, . . . less than 10 percent of the population. . . .

With the redeveloped neighborhood offering, you'll have an additional 7,900 linear feet of pedestrian trails. You'll have bike paths, nine new pocket parks, a large 2.5 acre park with multiple amenities, as well as play structures, sport courts. All of these benefit not only, again, the

surrounding community, but the proposed residents. 5,000 in total. They can walk. They can bike and jog. You know, connecting all these [amenities] throughout their neighborhood as well as others.

And in our design, we're also proposing the additional amenity of additional landscape plantings. . . . There will be landscaped corridors, you know, buffer areas, open spaces with closed in and open vistas. So from an aesthetic standpoint, there will be value added in addition to just the recreation opportunities. . . .

But in a neighborhood where you have small children, having [play structures] close in are something that are key to the success of the community. Pavement games such as hopscotch and four square. Frisbee disc golf, which can be played in a linear format throughout the open spaces and using the trail system. Tetherballs. And again, the trail system, the 7,900 lineal feet of additional trail system.

See CP 815-817 (Reader Test., Oct. 12, 2009 Hr'g Tr. at 168:12-169:25); *see also* AR 6333-6557 [Ex. 207].

The Project will also provide safe walking paths to area schools where no such paths exist. *See* CP 755 (Ebsworth Test., Oct. 12, 2009 Hr'g Tr. at 107:1-6); AR 6333-6557 [Ex. 207, Slides 24, 80 & 84]. It will provide a long-planned pedestrian and bicycle linkage to connect Alderwood Park, Dashpoint State Park and the community center at Norpoint Park, linking three of Northeast Tacoma's key community amenities and addressing noted deficiencies in such amenities. *See* CP 750 (Ebsworth Test., Oct. 12, 2009 Hr'g Tr. at 102:1-4); CP 813-17 (Reader Test., Oct. 12, 2009 Hr'g Tr. at 165:6-169:25); AR 6333-6557 [Ex. 207, Slides 83 & 84], *and* AR 1412-14 & 754-7585 [Exs. 77, 78, & 276 at 7A-10A].

1. The Golf Course's economic conditions have changed dramatically for the worse.

The Golf Course has become economically unviable. The owners are in their late 70s (one just turned 80) and seek to retire. *See* AR 6254-57 [Ex. 196]. For over a decade, the owners sought to sell the Golf Course as a course, including offers to the City and County, but no one would purchase it as such. *See id.* They have operated the golf course for half a century, and they have seen a precipitous decline in the number of rounds played annually since the early 1990s. *See id.* In explaining the Golf Course's declining viability, the owners pointed to several factors:

There is negative growth in the number of rounds played not only in the Northwest, but also nationally. Furthermore, 15 to 20 new courses have been built in our trading area. Private golf courses cannot fill their memberships and many are accepting public play as well as soliciting corporate events. Expenses continue to increase as revenue decline.

See id. Statistically, golf is enjoyed primarily by a relatively small segment of the population—less than 10%. *See* CP 813-815 (Reader Test., Oct. 12, 2009 Hr'g Tr. at 165:6-167:14) *and* AR 6333-6557 [Ex. 207, Slides 28, 80-84]. “Seventy-eight percent are male. . . . The average age is forty-six.” *See id.*

The declining golf industry, both nationally and regionally, began well before Northshore approached the Golf Course owners in mid-2006 to acquire the Course for residential re-development. *See* AR 6254-57 [Ex. 196]; CP 813-815 (Reader Test., Oct. 12, 2009 Hr'g Tr. at 165:6-167:14); *see also* AR 6333-6557 [Ex. 207, Slides 28, 80-84]. With specific regard

to the Golf Course, the number of rounds played annually since 2000 has dropped off by about 25,000 rounds, down from about 65,000 rounds to just over 39,000 rounds. *See* CP 1192 (Stone Test., Oct. 16, 2009 Hr’g Tr. 94:5-10) & AR 6254-57 [Ex. 196].

The owners’ business records show a steady decline since 1990 at a rate of about 5% every three years over that period, based on the average number of rounds played over a three-year period. *See* AR 6254-57 [Ex. 196]. Since the late-1990s (*i.e.*, 1997-1999), the average number of annual rounds played has dropped by 12,443 rounds per year—a 23% drop. *See id.* Over that same time, income has dropped from an average of about \$250,000 per year to losses averaging about \$215,000 per year—a nearly half million dollar swing. *See id.*

Mr. Ted Stone, real estate broker for the owners, described at length the nearly 15-year, unsuccessful efforts to sell the Golf Course as a golf course. *See* CP 1184-1192 (Oct. 16, 2009 Hr’g Tr. at 86:14-94:17). Mr. Stone explained that the owners’ efforts “began in 1996 with another broker. And then [he] took on that task in 2004 where [they] made a several year effort to sell the course to the county, the City, the Metro Parks department, three Indian tribes, and numerous golf investment groups [and] that [they] were not able to complete that sale and get it marketed and sold as a golf course. . . . It was well settled that the golf course had been for sale for well over a dozen years.” *See* CP 1187 (*id.* at 89:11-24).

Mr. Stone confirmed that the owners made significant efforts to sell the Course as a golf course well-prior to seeking to redevelop it, stating:

That's true. And actually that – they sought to have it professionally marketed for at least a decade. Prior to that, I think they may have, you know, talked about selling it; but professionally it, you know, that's been going on for a dozen years or more.

. . . I personally never approached a developer. They came to us. And we were unable to successfully put together a purchase and sale agreement for it as a golf course. This marketing of the golf course took place when the golf industry was doing quite well, at the time. And since, there's been a decline in the industry.

If we were to try to give this golf course away today as a golf course, it would be very difficult to do. . . .

See CP 1190-1191 (Oct. 16, 2009 Hr'g Tr. at 92:16-93:7).

The owners have invested millions of dollars in the Golf Course and continue to invest over a half million dollars per year just to maintain the landscaping. CP 1186-1187 (*id.* at 88:23-89:9). Mr. Stone explained that the Golf Course was facing some significant upcoming capital expenditures as things like the golf carts and irrigation system were reaching their life expectancy. *See* CP 1186-1187 (*id.* at 93:16-25).

The neighbors and community have no financial obligations to the Course. “North Shore Golf Course is entirely supported by green fees, memberships, and other revenues coming directly from people who come to play golf at the golf course. None of the surrounding homeowners or homeowner associations pay fees to keep the golf course in operation.”

See AR 6254-57 [Ex. 196]. Mr. Stone confirmed that there is no financial link between the golf course and the surrounding neighborhoods:

And there's basically no agreement with any of the property owners around the golf course to pay any kind of a fee there at the golf course. Nobody participates in any kind of mortgage payments or tax bills or anything like that. .

See CP 1187-1188 (Oct. 16, 2009 Hr'g Tr. at 89:25-90:4); *see also* AR 6254-57 [Ex. 196]; CP 1188-1190 (Oct. 16, 2009 Hr'g Tr. at 91:13-92:10). The community has very little involvement in the Golf Course, which cannot function indefinitely:

I want to say one thing that this expense that is ongoing with the maintenance and up keep and expenses of running the golf course, it's not going to go on forever with the numbers that we have in the golf industry right now.

You know it's just not able to be supported by the community. And you know, the sales are declining. The community around the golf course does not – they're not patrons of the golf course in great numbers.

See CP 1190 (Oct. 16, 2009 Hr'g Tr. at 92:11-20).

In 2008 to 2009, a task force investigated the state of the Golf Course and produced a report summarizing its research and analysis to “explore allowable uses of Northshore Golf Course property and open space that aligns with community and agency interest.” *See* AR 7568-73 [Ex. 275]. The Task Force, which included the City's Metro Parks, found that the facility was well-cared for and in good though aging condition, noting:

- “The declining rounds are typical of other Pierce County Golf Facilities.” ¶ 3.1
- “The overall impression of the facility was positive; the facility appeared well-cared for by staff members. The Clubhouse grounds were clean; the landscape beds were free of weeds. . . merchandise was displayed well. The counter person was friendly and helpful. The catch phrase ‘It’s always a Great Day at Northshore’ was still being conveyed by the shop staff. . . The gas golf cart was older but clean. . . .” ¶ 4.1
- “The overall condition of the golf course was good. The course has continuous paved cart paths that are in good condition. The Green complexes were interesting and in excellent condition. . . .” ¶ 4.2
- “The food quality was good.” ¶ 4.4
- “The overall course was fun to play.” ¶ 4.5

See id. (emphasis added). Notwithstanding these positive findings about the owners’ efforts to keep up the Course, the Task Force report concluded that “operation of the Northshore Golf Course is feasible [only] if alternate funding could be found for the purchase and long term capital needs of the facility.” *See id.*, ¶ 6.1. (emphasis added).

The only known recent sale of a golf course in the immediate area was the 2005 sale of the Lipoma Firs Golf Course near Puyallup for residential redevelopment into approximately 1,800 residences. *See* AR 6220-49 [Ex. 194].

2. The Golf Course suffers from ongoing flooding.

The project will solve ongoing community flooding issues. The Golf Course began to experience seasonal flooding in the 1990s as adjacent properties within the PRD were developed. *See* CP 1049-1052

(Lovelace Test., Oct. 15, 2009 Hr’g Tr. at 165:12-168:3). Mr. John Lovelace—long-time neighbor, golfer and project opponent—explained that additional, planned development in the PRD around the Golf Course caused the flooding:

And in fact, from 1980 until the Tuscany housing development came in, Northshore Golf Course was one of the best in the area in the Northwest to play, especially in the winter. Northshore is where you made your tee time. The golf course was well-maintained. The greens were near perfect.

There was literally no standing water whether it was raining or not. After the Tuscany development, all the lower holes, that would be 1 through 9 and 14 and 15 became soft and swampy during the late fall, winter and early spring.

See CP 1049 (Oct. 15, 2009 Hr’g Tr. at 165:12-22). Mr. Lovelace further testified, “I know that one inch of rain turns Northshore Golf Course into a swampy bog. Two inches floods almost all greens and drifts across Northshore Parkway, which at times is impassible. This is quite common during the fall, winter and spring months.” CP 1051-1052 (*id.* at 167:24-168:3).

Mr. Gene Foster, neighbor and project opponent, testified at length as to the flooding observed on the Golf Course, noting that “The escapement is limited to Joe’s Creek in the north, which is currently served by an undersized culvert . . . to the south, which has limited capacity. There are no emergency escapements available in the event of a major storm. The effect of these two conditions is that the Northshore

[golf course] captures [all] of the stormwater resulting from local storms.” See CP 962-965 (Oct. 15, 2009 Hr’g Tr. at 78:8-81:21); see also AR 172-414, 942, & 5466-97 [Exs. 21-24 (Petitioners’ Conceptual Drainage Reports)], 60, & 141 (SEPA 96-00074 MDNS for upgrade to stormwater facilities in late 1990s)].

Mr. Foster also submitted written comments, including a 156-page report on the Golf Course’s flooding issues titled “Lessons Learned from the Flooding of the Northshore Golf Course or the Saga of a Soggy Bottom,” revised June 2009. See AR 4683-4821 [Ex. 99]. Mr. Foster’s report contains many compelling photographs of flooding on the Golf Course and chronicles the flooding issues since they began in the 1990s. See *id.* As noted in this report, “The net effect is that the golf course serves as the stormwater catch basin for the surround[ing] community with an area almost three times that of the golf course. . . . Because of its limited outfall capacity, the golf course is at a high level of risk of flooding given any major storm.” See *id.* at 11, ¶ 7.

The Project is designed to solve ongoing community flooding issues. Ms. Merita Trohimovich Pollard, the City’s Surface Water and Waste Water Engineer in its Environmental Services Science and Engineering Division, reviewed the Projects preliminary stormwater treatment plan, and confirmed new facilities would be “sized to handle both the on-site flows from the proposed development and the off-site flows that are currently directed onto the site.” See CP 680-683 (Pollard Test., Oct. 12, 2009 Hr’g Tr. at 33:24-34:2); see also AR 170-414 [Exs.

19-24]. “The existing flooding conditions on the site will be alleviated with the new facilities, as they will be sized to handle the 24-hour 100-year event as required by the Surface Water Management Manual.” *See* CP 682 (Pollard Test., Oct. 12, 2009 Hr’g Tr. at 34:3-9) (emphasis added).

Additionally, pesticide-laden stormwater currently collects on the course and then flows untreated into a protected stream, Joe’s Creek. *Compare* AR 6254-57 [Ex. 196] *with* AR 6333-6557 [Ex. 207, Power Point presentation, Slides 9-20, 24-28, 37-40, 47-53, 70-75, & 80-85]; *see* CP 750-754 (Ebsworth Test., Oct. 12, 2009 Hr’g Tr. at 102:1-106:15); CP 813-817 (Reader Test., Oct. 12, 2009 Hr’g Tr. at 165:6-169:25). Ms. Trohimovich Pollard stated the Project would solve this problem through compliance with the 2003 City of Tacoma’s Surface Water Management Manual and concluded the stormwater plan would provide “enhanced treatment” of runoff discharging into Joe’s Creek and eventually the Puget Sound. *See* CP 680-683 (Oct. 12, 2009 Hr’g Tr. at 32:9-35:4) & AR 6555 [Ex. 221]; AR 170-414 [Exs. 19-24]; AR 7574-85 (Ex. 276 at 2A).

B. Northshore’s Related Project Applications.

As part of the Project, Northshore submitted additional land use applications. Northshore applied for Wetland / Stream Assessment and Wetland / Stream Exemption permits to assess potential onsite wetlands and streams, establish buffers and obtain an exemption for portions of the buffer interrupted by the golf cart path. *See* AR 71-171 [Exs. 13-20 (Petitioners’ application materials)] *and* AR 6333-6557 [Ex. 207, Slides 70-75]; *see also* CP 673-679 (Kluge Test., Oct. 12, 2009 Hr’g Tr. at

25:20-31:18) & AR 922-37 [Ex. 58]. The Hearings Examiner chose not to address these permits, having decided to recommend denial of the Rezone Modification, which in turn led to his denial of the Preliminary Plat and Site Plan applications. *See* CP 2747-2749 (Decision, Conclusion Nos. 4, 11, 18 & 19, Recommendation and Decisions). The Hearing Examiner did not address at all the two variances proposed by Northshore. *See id.*

With regard to the wetland permits, the City's Senior Environmental Specialist Carla Kluge recommended conditional approval of the two permits and provided the Examiner with the condition itself. *See* CP 678-679 (Kluge Test., Oct. 12, 2009 Hr'g Tr. at 30:23-31:18) & AR 6555 [Ex. 221]; *see also* CP 758-759 (Browder Test., Oct. 12, 2009 Hr'g Tr. at 110:24-111:21) *and* AR 6333-6557 [Ex. 207, Slides 70-75]. Based on her review of the proposed stormwater facilities, Ms. Trohimovich Pollard also recommended conditional approval of the Project. *See* CP 682-683 (Pollard Test., Oct. 12, 2009 Hr'g Tr. at 34:15-35:4); *see also* AR 754-7585 [Ex. 276 at 2A]. Thus, the City concurred with Northshore as to appropriate conditions of approval that would allow the Examiner to grant the Wetland / Stream Assessment and Exemption permits. *See* AR 170 [Ex. 19, Staff Report, at 104-105] & AR 754-7585 [Ex. 276 at 2A].

The Hearings Examiner also failed to address two variances sought by Northshore. *See* CP 2737 & 47 (Decision, Finding No. 46 & Conclusion No. 4). These variances would allow Petitioners to reduce the mandatory side yards from 7 ½ feet to the City's standard 5-foot side-yard

setbacks adopted in 2008—the standard now applied to all projects—and to allow some reduction in minimum lot sizes for modulation. *See* CP 873-877 (Hanberg Test., Oct. 12, 2009 Hr’g Tr. at 225:3-229:12); CP 764-770 (Hanberg Test., Oct. 16, 2009 Hr’g Tr. at 116:10-122:12; 148:20-149:23) CP 796-797 & AR 7559-60 [Ex. 272]; *see also* AR 6333-6557 [Exs. 207, Slides 35 & 173], & AR 7273-75, 7277-78, & 7552-57 [Exs. 252, 254, 269 & 270].

Ample testimony and evidence addresses the benefits of granting the sideyard and lot size variances, reiterating that such variances allowed more design flexibility, home modulation, avoid “cookie cutter” streetscapes, and increase public as opposed to private open space within the development by nearly four acres. *See id.*; *see also* CP 753-757 (Browder Test., Oct. 12, 2009 Hr’g Tr. at 105:17-106:1 & 107:12-109:23); CP 832-834 (Hanberg Test., Oct. 12, 2009 Hr’g Tr. at 184:19-186:3); CP 747-751 (Wilson Test., Oct. 16, 2009 Hr’g Tr. 99:14-103:20); CP 833-834 (Hanberg Test., Oct. 12, 2009 Hr’g Tr. at 185:21-186:3) (explaining City typically grants side-yard variances permitted by the Code since 2008, which are common urban elements)). City staff reviews such requests on a “case-by-case” basis, and voiced no opposition to these variances. *See* AR 7574-85 [Ex. 276 at 11A].

C. Initially Receptive, the City Turned Hostile and Attempted to Stop the Project.

Northshore first approached the City in 2006 to determine whether any documents or code requirements would preclude residential

redevelopment of the golf course. *See* AR 5367-76, 5380-82, 5448 & 5498 [Exs. 121-128, 130, 138 & 142]. After months of review, the City confirmed that there was available density in the Northshore PRD and that nothing precluded such redevelopment. *See id.* The City outlined a process by which the Northshore would apply to modify the Northshore PRD. *See id.* Northshore then commenced preparing and submitting the various applications now on appeal. *See id.*

The day after Northshore submitted its complete application package, the City imposed a moratorium on PRD development. *See* AR 5448 [Ex. 138]; CP 2734 (Decision, Finding No. 26). Unbeknownst to Northshore, then-and-current City Councilmember Jake Fey had initiated an effort to find a way to “affect / prevent / delay” the Northshore project. *See* CP 1464-1466 (Laing. Decl., Ex. A, January 23, 2007 email and partial transcript of January 30, 2007 City Council Study Session; Apr. 13, 2010 City Council Hr’g Tr. at 6-12); AR 5377-79 & 5448 [Exs. 129 & 138].

On January 23, 2007, Peter Huffman, Manager of the City’s Planning Division, sent an interdepartmental email stating:

[Council Member/Deputy Mayor] Fey has contacted me and has requested information regarding potential legislative land use actions that the City Council could consider to **affect/prevent/delay** the redevelopment of the Northshore Golf Course located in Northeast Tacoma My staff and staff from BLUS and Legal have met to discuss what options are available to affect or prevent the development of the golf course and have determined that the land use mechanism available is the use of the moratoria provisions of TMC 13.02.055. Under these provisions, the City Council could enact a moratorium on

the modification of existing Planned Residential Development (PRD's) [sic] in which the golf course is currently zoned.

See CP 1464-1466 (Laing. Decl., Laing Decl., Ex. A (emphasis added)).

In July 2007, during the moratorium, the City amended its PRD code, changing the definition of “open space” applicable to PRDs. *See* AR 6188-6219 [Ex. 193]; *see also* CP 2734 (Decision, Finding Nos. 26 & 27). Because Petitioners submitted the application one day before the effective date of the moratorium, the Point at Northshore project vested under the pre-moratorium ordinances. *See id.*

Councilmember Fey nonetheless continued his political efforts against the proposal by suggesting during a council meeting that, if the application were deemed “incomplete,” Northshore’s rights would not have vested, stating:

I would say at the outset with respect to the developers’ rush to beat me to the punch so to speak by getting his application in earlier than anticipated, that if that application is not sufficient, deemed to be not sufficient it would be subject to the moratorium.

See CP 1464-1466 (Laing. Decl., Ex. A). The City then notified Northshore that the application was incomplete. CP 2734 (Decision, Finding Nos. 26 & 27). When Northshore appealed, the Hearings Examiner reversed, holding that the applications were complete and vested under the pre-moratorium rules. *See id.* & AR 5845 [Ex. 162]. Thereafter, Councilmember Fey distributed campaign materials, stating, “I stood with you, the residents of Northeast Tacoma, when developers tried to pave

over our golf course and disrupt our quality of life.” *See* CP 1481-1482 (Laing. Decl., Ex. D).

D. The Superior Court Previously Declared Northshore’s Right to Seek Redevelopment of the Golf Course.

The City brought a declaratory judgment action in January 2008 to prevent the Project. The City asserted it had a non-possessory property interest in the Golf Course that would allow it to preclude residential redevelopment of the course. Neighboring property owners intervened, asserting substantially identical causes of action. *See* AR 415-506 [Ex. 25, Ex. D, February 25, 2009 Order at 7:15-22 (emphasis added); *see also id.*, Ex. E, February 25, 2009 Order at 4:1-10]; CP 2734-2735 (Decision, Finding Nos. 29-31).

On February 4, 2009, the Pierce County Superior Court rejected the City’s and neighbors’ claims of a property interest and ruled that the Northshore and the owners could apply to remove the open space designation from the Golf Course, and that they would be in no different position than any other property owner within the PRD. *See id.* The trial court declared that the City must process Northshore’s pending land use application “consistent with the provisions which are set forth in the planned residential development ordinance.” *Id.* Finally, the trial court rejected the claims by neighbors that they had any enforceable right regarding the Golf Course. *Id.*

The City and Northshore did not appeal the court’s decision, but some of the opposing neighbors did. *See id.* On November 16, 2010, this

Court affirmed the trial court's decision. *See* CP 1470-1479 (*City of Tacoma, et ano v. Northshore Investors, LLC, et al.*, 2010 Wash. App. LEXIS 2551 (Wash. Ct. App. Nov. 16, 2010)0. The Superior Court's decision became the law of the case respecting the use of the Golf Course.

E. Despite Finding that the Project “Is Well and Thoughtfully Designed,” the City Denied Northshore’s Applications based on “A Massive Outpouring of Citizen Outrage.”

The Hearing Examiner denied the Site Plan Approval and Preliminary Plat applications and recommended the City deny the Rezone Modification Application. *See* CP 2730, 2747 & 2749 (Decision, 19 & 20). The Examiner's decision followed a four-day public hearing. CP 2730. The record consisted of 276 exhibit and testimony from 34 individuals. *Id.* The Hearing Examiner stated 100 “Findings of Fact.” *See* CP 2730-2746.

The conclusory section of the decision from Findings 84 to 100, focuses on the prior history of the PRD, what Examiner characterized as the “PRD Intent,” the 1981 agreements at issue in the declaratory action, and certain “in perpetuity” language used by the original Hearing Examiner when the PRD was established. *See* CP 2744-2746 (Decision).

The Hearing Examiner re-stated the issue before him regarding the Rezone Modification as asking “whether this particular PRD as modified will achieve the more desirable living environment such districts are intended to create.” *See* CP 2744 (Decision, Finding No. 85). Under that self-created standard, the Hearing Examiner focused on the effect the

proposed changes would have on neighbors “without their consent” based on “the unilateral action of a single applicant.” *See* CP 2746 (Decision, Finding No. 94). He remarked that “the ‘in perpetuity’ language serves to emphasize that maintaining the golf course in open space was pivotal” to the creation of the PRD. *See* CP 2746 (Decision, Finding No. 96).

Although the Examiner conceded that the “in perpetuity” phrase “probably expresses a concept beyond the City’s ability to guarantee,” *id.*, he in fact relied on that phrase to reject the Project. *See* CP 2746 (Finding No. 96). Notably, the Examiner recognized what he viewed as a “massive outpouring of citizen outrage” confronting the Project. *See* CP2746 (Finding No. 98).

While acknowledging that the Project “is well and thoughtfully designed,” the Examiner found it “in the wrong place” “given the history and physical context of this particular PRD” in that the development would change the “perception of open space by those living in the adjacent plats.” CP 2733 (Finding No. 17) (emphasis added). At the same time, the Examiner held that the project is not inconsistent with the Comprehensive Plan, satisfying TMC 13.06.650(1). *See* CP 2740, 2747 (Decision, Conclusion Nos. 8 & 9). The City Council adopted the Hearing Examiner’s recommendations, adopted his findings and conclusions, and affirmed his denials. *See* CP 2728 (City Council’s Apr. 15, 2010 decision).

F. The Trial Judge Denied Northshore’s LUPA Petition.

The trial court declined to reverse the City’s decisions after reviewing the briefing and holding a hearing. *See* CP 2315-2319 (Superior Court order). Northshore timely appealed pursuant to RCW 36.70C.040(3). *See* CP 2320-2327 (Northshore’s Notice of Appeal).

V. STANDARD OF REVIEW

Under LUPA, an appellate court “stand[s] in the shoes of the superior court and review[s] the hearing examiner’s action *de novo* on the basis of the administrative record.” *Wells v. Whatcom County Water Dist. No. 10*, 105 Wn. App. 143, 150, 19 P.3d 453 (2001). “The proper focus of our inquiry is therefore the [decision by the local jurisdiction], rather than the trial court’s decision.” *Id.*

Reversal is required if a petitioner meets its burden of proving that one of the following standards has been met, as provided in RCW 36.70C.130(1):

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) The land use decision is an erroneous interpretation of the law after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by the evidence that is substantial when viewed in light of the whole record before the court;
- (d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

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

See Lakeside Indus. v. Thurston County, 119 Wn. App. 886, 894, 83 P.3d 433 (2004), *review denied*, 152 Wn.2d 1015 (2004). “Standards (a), (b), (e), and (f) present questions of law that [the] court reviews *de novo*. Standard (c) concerns a factual determination that this court reviews for substantial evidence. And finally, the clearly erroneous test under (d) involves applying the law to the facts.” *J.L. Storedahl & Sons, Inc. v. Clark County*, 143 Wn. App. 920, 928, 180 P.3d 848 (2008) (internal citations omitted), *review denied*, 152 Wn.2d 1015 (2008).

A land use decision must be supported by “substantial evidence.” *See* RCW 36.70C.130(1)(c). Evidence is substantial when there is sufficient quantity of evidence in the record to persuade a reasonable person that the declared premise is true. *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002); *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

A decision is clearly erroneous when the reviewing court is “left with the definite and firm conviction that a mistake [has been committed].” *See Lakeside Indus.*, 119 Wn. App. at 894.

VI. ARGUMENT AND AUTHORITY

This Court should grant Northshore relief and reverse. The City’s conclusions are both factually and legally erroneous. The City’s decision

on the Rezone Modification Application also contradicts the Superior Court’s declaratory judgment affirmed by this Court, resulting in further legal error. The declaratory judgment required the City to consider Northshore’s land use planning applications under the existing code and regulations as if Northshore were any other applicant. The City did not. The City instead impermissibly relied on the past “open space” designation and the language in the 1981 documents regarding “perpetuity” to lock the property into its prior designation. The City also focused on lack of community support for—actually, “a massive outpouring of citizen outrage” against—the Project and denied it to appease the community. Per the applicable regulations and based on the record before the Examiner, the Project should have been approved.

The City’s decision to deny the Project violates longstanding precedent. Washington courts have repeatedly admonished that “a zoning decision must relate to legal requirements.” *See, e.g., Indian Trail Property Owner’s Ass’n v. City of Spokane*, 76 Wn. App. 430, 439, 886 P.2d 209 (1994). Washington law is unequivocal that “neighborhood opposition alone may not be the basis of a land use decision.” *See Tugwell v. Kittitas County*, 90 Wn. App. 1, 8-9, 15, 951 P.2d 272 (1997) (citing *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 797, 788, 903 P.2d 986 (1995), and *Indian Trail Property Owner’s Ass’n v. City of Spokane*, 76 Wn. App. 430, 439, 886 P.2d 209 (1994)); *see also Parkridge v. City of Seattle*, 89 Wn.2d 454, 462, 573 P.2d 359 (1978), *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 805, 801

P.2d 985 (1990) and *Kenart & Assocs. v. Skagit County*, 37 Wn. App. 295, 303, 680 P.2d 439, review denied, 101 Wn.2d 1021 (1984)). Land use approval cannot be conditioned on the community's consent. *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 118-19, 49 S. Ct. 50, 73 L. Ed. 210 (1928); *Eubank v. City of Richmond*, 226 U.S. 137, 143-44, 33 S. Ct. 76, 57 L. Ed. 156 (1912).

This Court should reverse the City's decision and remand it with instructions that the Rezone Modification application be granted, along with the Site Plan and Preliminary Plat Application and related Wetland Stream and Variance applications.

A. This Court Should Reverse and Require Approval of the Rezone Modification Application.

Based on the record and the applicable regulations, the Rezone Modification application should have been approved. A rezone modification, under the Tacoma Municipal Code (TMC), is treated as a permit modification to an approved permit subject to TMC 13.05.080. The Project must satisfy the applicable criteria contained in TMC 13.06.650. It does. "As a quasi-judicial decision, the [City] must evaluate site-specific rezone requests under legislatively established criteria, including the comprehensive plan policies and other development regulations, and those criteria constrain the [City's] discretion." *J.L. Storedahl*, 143 Wn. App. at 931. Under this standard, the Rezone Modification should have been approved. The City denied the application based on impermissible considerations.

This Court's decisions *Tugwell v. Kittitas County*, *supra*, and *Henderson v. Kittitas County*, 124 Wn. App. 747, 753, 100 P.3d 842 (2004), *review denied*, 154 Wn.2d 1028 (2005), provide a strong framework for reversal. In *Tugwell v. Kittitas County*, this Court recognized that changes in zoning in the surrounding area and the resulting intensification—even *potential intensification*—of uses through regulatory changes can support a request of rezone. 90 Wn. App. at 9 (holding rezone application supported by demonstrated intensification of zoning and uses over preceding decade since original rezone).

In *Tugwell*, opponents of the modification argued that the rezone was not supported by substantial evidence of changed circumstances nor was it in the public interest. *Id.* at 3-5. This Court rejected the arguments both as to what constitutes substantial evidence of a change in circumstances that supports rezoning, and whether public opinion alone is an adequate basis for denial, stating:

The City relies heavily on what it claims is a lack of evidence that public opinion or the circumstances on the Snowdens' own property had changed since 1980. It is true that a majority of the speakers at the public hearings opposed the rezoning. However, neighborhood opposition alone may not be the basis of a land use decision. 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.

Id. at 9-10 (Emphasis added.)

In *Tugwell*, this Court also found substantial evidence that the rezoning was in the interest of the public health, safety, morals, or general welfare, because the rezone met both a “fundamental objective” of the County’s comprehensive plan and furthered two related policies related to preserving farmland and limiting development to “already partially subdivided and/or developed areas.” *Id.* at 9-10. The Point at Northshore Project at issue here similarly meets the objectives of the City’s Comprehensive Plan and a myriad of land use planning policies.

To show changed circumstances, the property owners in *Tugwell* submitted evidence showing their farm had been “a marginal operation for quite some time.” *Id.* at 10. This evidence showed that for four years the farm had operated at a net loss due to marginal soil, an unreliable water supply, and higher than average costs of operation. *Id.* at 10-11. This Court agreed the rezone was in the public’s interest, stating, “In light of this evidence that the property was poorly suited for agricultural use coupled with the County’s policy favoring this type of property for residential development, the Board properly concluded the rezoning was in the public’s interest.” *Id.* at 11. The same conclusion is supported by the present record. The Golf Course property has become poorly suited for golf course use, whereas the proposed residential development complies with City policy for infill development and numerous other planning objectives. Under *Tugwell*, approval was warranted.

Similarly, in *Henderson v. Kittitas County*, *supra*, this Court affirmed the county’s grant of a rezone application based both on evidence

of changes from “largely agricultural to residential” uses and on a showing that the proposal implemented two comprehensive plan policies aimed at reducing “urban sprawl.” *Id.* at 754-56. The Court found a substantial change in circumstances. *Id.* at 754. The Court also noted, “Because the proposed rezone here from forest and range 20-acre minimum lot sizes to agricultural 3-acre minimum lot sizes implements the express policy of the comprehensive plan, this fact alone would justify the rezone.” *Id.* at 755-56 (emphasis added). The *Henderson* court found the public interest met because the additional “tax money to provide additional services to the community is a benefit to the public health, safety, and welfare” and the rezone furthered the goals of the comprehensive plan by decreasing sprawl. *Id.* at 756. These same benefits, and more, obtain from Northshore’s project.

Under *Tugwell* and *Henderson*, on this record the Court should reverse the City’s denial of the Rezone Modification.

1. The Rezone Modification Application Satisfies the Criteria of TMC 13.06.650.

The City misapplied the requirements of TMC 13.06.650 and ignored substantial evidence supporting the Rezone Modification. The conclusion that TMC 13.06.650(B)(2) was not satisfied is legally erroneous, unsupported by substantial evidence, and/or clearly erroneous. This Court should reverse under RCW 36.70C.130(1)(b), (c) and (d).

TMC 13.06.650 sets forth the criteria for the Rezone Modification Application. Its full text is attached as Appendix B. “The basic rule in

land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit.” *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007). “Land-use ordinances must be strictly construed in favor of the landowner.” *Id.* at 643, n. 4. The ordinance must be construed in favor of Northshore.

There is no dispute that the Rezone Modification meets the first and fourth criteria under TMC 13.06.650. *See* CP 2737-2738 (Decision, Finding No. 48); *accord* CP 2748-2749 (*id.*, Conclusion Nos. 11-20). With regard to the remaining three criteria, the City incorrectly concluded they were not met.

a. Approval was proper under TMC 13.06.650(B)(2) where the record contains substantial evidence of changes.

Northshore established substantial changes to the Golf Course property supporting the rezone modification under TMC 13.06.650(B)(2). Reversal is proper under RCW 36.70C.130(1)(b), (c) and (d).

This Court first should conclude that the decision incorrectly focuses on the alleged lack of evidence of changes to the *surrounding area*, whereas the code focuses on substantial changes in conditions affecting the use and development of the *subject property*. *See* TMC 13.06.650(B)(2). *Cf.* CP 2732, CP 2743-2744, CP 2748 (Decision, Finding Nos. 13, 81-83 & Conclusion Nos. 11, 13-16). In fact, the Decision states—contrary to the express, unambiguous language of TMC 13.06.650(B)(2)—that “‘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.*” See CP 2748 (Decision, Conclusion No. 11) (emphasis added). TMC 13.06.650(2), however, expressly and unambiguously limits the analysis to conditions affecting the “use and development of [the particular parcel under consideration].” This is a clearly erroneous interpretation and application of the law, so the decision to deny the Rezone Modification application must be reversed. See RCW 36.70C.130(1)(b).

i. The declining economic viability of the Golf Course establishes the right to a rezone modification.

Substantial evidence demonstrates that the Golf Course is failing, cannot currently be sold as a golf course and cannot continue to be operated as a golf course. This is a substantial change sufficient in circumstances affecting the Golf Course to support the Rezone Modification. The Hearing Examiner’s contrary recommendation, and the City’s Council adoption of it, are unsupportable on this record.

Northshore’s evidence regarding the economic downturn of the Golf Course, its elderly owners nearing retirement, and the inability of the owners to sell the Golf Course as a golf course is detailed at Section IV.A.1, above. This evidence show, *inter alia*, that the number of annual rounds has decreased by about 40% since 2000 and continues to decrease. The owners’ records demonstrate a 5% decline in revenues every three since 1990; they now operate in the red. Large capital expenditures will soon be needed for aging equipment.

Significantly, an independent Task Force that included the City's Metro Parks district evaluated the viability of the Golf Course and found that, despite the owners' efforts, continued operation of the Golf Course was only "feasible" if "alternate funding" could be found "for purchase and long term capital needs." There is no evidence in the record, either direct or by inference, of "alternate funding" being available. To the contrary, the evidence shows no one is interested in operating this failing golf course.

To support the Decision, the Hearing Examiner concluded that he "was not convinced that the property cannot be sold as a golf course," alluding to the sale of a nearby golf course but failing (ironically) to acknowledge that the sale was for residential redevelopment, not ongoing golfing. *See* CP 2743 (Decision, Finding Nos. 74-78); *see also* AR. 6220-49 [Ex. 194]. Unsubstantiated, speculative comments are not "competent and substantial evidence" to uphold a decision to deny a land use permit application. *See Sunderland*, 27 Wn.2d at 797. Lacking either competent evidence a rationale beyond the purest speculation for these conclusions, the decision to deny the Rezone is improper and should be reversed. *Id.*

Contrary to the Superior Court ruling by which it is bound, the City apparently would have the elderly owners defy nature and the reality of age by continuing to operate the Golf Course "in perpetuity" due to the fact that in 1981 they failed to state they could not do so. *See* CP 2743 (Decision, Finding No. 77). The owners' advancing age and failed efforts to sell the financially challenged operation are changed circumstances.

Thirty years later, the Golf Course property should not be locked into a use that is demonstrably unfeasible.

These substantial changes in circumstances are ineluctably established by the record and are of a type that supports a rezone, as demonstrated by *Tugwell* and *Henderson*. The City's Decision fails to point to either evidence or a logically defensible rationale to refuse to accept it. As such, the City's decision to deny the Rezone Modification applications is unsupported by substantial evidence, is a clearly erroneous application of the law to the facts and should be reversed. *See* RCW 36.70C.130(1)(b)-(d); *see also Sunderland*, 27 Wn.2d at 797.

ii. The flooding of the Golf Course is a substantial change supporting a rezone.

Substantial—in fact *all* of the—evidence in the record shows that rampant, annual flooding of the Golf Course began in the 1990's and, as a result, the property has become ill-suited to use as a golf course. This is a substantial physical change affecting the subject property that clearly establishes a right to the requested Rezone Modification.

Evidence regarding the rampant, annual flooding of the Golf Course is detailed at Section IV.A.2, above. The evidence demonstrates that, due to additional development within the PRD, the Golf Course has become “a swamp bog” during the fall, winter and spring, capturing all of the stormwater in the area. Untreated stormwater flows directly from the Golf Course into the protected stream, Joe's Creek. This evidence is not

only unrebutted, it is provided in part and supported by the testimony of the City's environmental Staff and neighboring property owners.

Such facts require the Rezone Modification. When the Golf Course was denominated "open space" in 1981, the flooding conditions did not exist. Ironically, the build-out of the PRD has contributed to if not caused the flooding. These conditions are antithetical to continued operation of the Golf Course. The Golf Course has become the catch-basin of the PRD community due to inadequate infrastructure such as undersized culverts and no emergency escapements, despite decades of increased development in the area.

The Hearing Examiner (and, hence, the City) concluded that such changed circumstances did not satisfy TMC 13.06.650(B)(2). *See* CP 2732, CP 2743-2744, CP 2748 (Decision, Finding Nos. 13, 81-83 & Conclusion Nos. 11, 13-16). Under *Tugwell* and *Henderson*, these changed circumstances support the Rezone Modification. The City's Decision is legally erroneous, unsupported by substantial evidence, and a clearly erroneous application of the law to the facts, so it should be reversed. *See* RCW 36.70C.130(1)(b)-(d).

b. Approval was also proper under TMC 13.06.650(B)(2) to implement the Comprehensive Plan.

Northshore established that the modification is required to directly implement numerous provisions of the City's Comprehensive Plan. This is an alternative ground to permit modification under TMC 13.06.650(B)(2). Reversal is proper under RCW 36.70C.130(1)(b), (c)

and (d). The Project will provide infill development, address severe ongoing flooding issues, provide much-needed facilities and park impact fees, improve the transportation network, and offer open space open to all not just golfers, all of which are objectives under the Comprehensive Plan. As *Tugwell* and *Henderson* demonstrate, any one of these would support approval. Here, the myriad of provisions implemented by the Project strongly supports approval.

As part of their January 2007 application materials, Northshore submitted an analysis of the project vis-à-vis the City's PRD rezone criteria, including an analysis of how the project would implement the City's Comprehensive Plan goals and policies. *See* AR 5431-42 [Ex. 136]. In November 2007, the City generated a list of Comprehensive Plan Policies that it deemed to be most applicable to the project. *See* AR 5910-25, 6028-33 [Exs. 174 & 179]. Northshore created and submitted an analysis to show how the project was both consistent with and necessary in order to implement dozens of the City's Comprehensive Plan policies. *See* AR 5975-6017, 6034-37 [Exs. 178 & 180].

Before the Examiner, the Project team provided lengthy analysis and testimony to show how the Project met the PRD rezone modification criteria, including directly implementing the City's Comprehensive Plan policies and providing for the public health, safety and welfare. *See* CP 744-771 (Ebsworth Test., Oct. 12, 2009 Hr'g Tr. at 96:9-123:25); CP 785-787 (Hanberg Test., Oct. 12, 2009 Hr'g Tr. at 137:7-139:21); *see also* AR 6333-6557 [Ex. 207, Slides 38-67].

For example, Mr. Hanberg provided the Hearings Examiner with a summary highlighting the bases and evidence supporting the request for the Rezone Modification pursuant to the Comprehensive Plan. *See* CP 1252-1253 (Oct. 16, 2009 Hr'g Tr. at 154:20-155:6) & AR 7561-65 [Ex. 273]. Northshore identified approximately 50 Comprehensive Plan goals and policies that the Point at Northshore project would implement and that the City agreed were consistent with the project. *See* CP 761-771 (Ebsworth Test., Oct. 12, 2009 Hr'g Tr. at 113:23-123:25); *see also* Ex. AR 6333-6557 [Slides 38-67]; *see also* AR 5250-5366 [Ex. 119, Staff Report, at 77-98].

The record demonstrates the Project is required to directly implement at least the following express planning goals and policies:

Infill Housing. The Project directly implements the City's Comprehensive Plan Housing Element Policy for Neighborhood Infill Housing, H-NQ-2, which seeks "infill housing . . . compatible with abutting housing styles and with the character of the existing residential neighborhood." This policy also seeks to achieve additional housing "within areas identified for residential growth," such as the PRD. *See* AR 5975-6017 [Ex. 178] & AR 6333-6557 [Ex. 207, Slides 92-172]; CP 818-841 (Reader Test., Oct. 12, 2009 Hr'g Tr. at 170:1-193:23); *see also* CP 785-787 (Hanberg Test., Oct. 12, 2009 Hr'g Tr. at 137:7-139:21).

Capital Facilities. With regard to stormwater, transportation, sewer and park facilities, the Project is necessary to directly implement that City's Capital Facilities Policy, CF-APFS-1, which states "Maintain level of service standards for each type of public facility and provide capital improvements needed to achieve and maintain the standards for existing and future populations." (Emphasis added.) *See* AR 5975-6017 [Ex. 178] & AR 6333-6557 [Ex. 207, Slides 48-75] *and* CP 767-768 (Ebsworth Test., Oct. 12, 2009 Hr'g Tr. at 119:11-120:23); CP 788-791 (Hanberg Test., Oct.

12, 2009 Hr'g Tr. at 140:19-143:21); *see also* AR 7574-85 [Ex. 276 at 7A-10A].

Strengthen Habitat Connections. The Project's new stormwater facilities—which resolve community flooding issues and provide enhanced stormwater treatment—are necessary to implement the City's Environmental Policy, E-FW-9, Strengthen Habitat Connections, which provides “Encourage actions which protect and improve natural resources in both the upper and lower areas of the Puyallup River watershed and strengthen connections within and between them.” *See* AR 5975-6017 [Ex. 178] & AR 6333-6557 [Ex. 207, Slides 70-75]; CP 750-754 (Ebsworth Test., Oct. 12, 2009 Hr'g Tr. at 102:1-106:15); CP 962-965 (Foster Test., Oct. 15, 2009 Hr'g Tr. at 78:8-81:2); AR 4478-4821 [Ex. 99]; *see also* AR 172-414, 942, & 5466-97 [Exs. 21-24 (Petitioners' Conceptual Drainage Reports)], 60, & 141 (SEPA 96-00074 MDNS for upgrade to stormwater facilities in late 1990s)]; CP 793 (Hanberg Test., Oct. 12, 2009 Hr'g Tr. at 145:14-19).

Recreation and Open Space- Changing Needs. The Project also directly implements the City's Comprehensive Plan Recreation and Open Space Element's overarching goal to “Acquire, develop and improve the optimum variety and number of recreation and open space facilities consistent with the changing needs of the community.” *See* CP 767-768 (Ebsworth Test., Oct. 12, 2009 Hr'g Tr. at 119:11-120:23); CP 798-800 (Hanberg Test., Oct. 12, 2009 Hr'g Tr. at 150:9-152:25); *see also* Ex. AR 6333-6557 [Slides 48-52], & AR 5910-25, 5975-6037, & 7574-85 [Exs. 174, 178-180 & 276 at 7A-10A]. While the private golf course is declining and unused by the community, the Project would provide open space actually “open” to the public.

Recreation and Open Space- Trails & Neighborhoods. The Project implements the Northeast Tacoma Subarea Plan's Recreation and Open Space Elements NET 4.2 (Trails) and 4.4 (Recreational Opportunities). *See id.* The Project is clearly necessary to implement Policy NET 4.2, which provides “Support the development of a trail system for walking and bicycling which would connect the schools, parks, steep slope and other open space amenities in Northeast Tacoma.” Without the Project, the desired connections to Norpoint and Alderwood parks will not exist. *See*

id. Likewise, it is also necessary to implement neighborhood-level goals Neigh-21 & -22, which state:

. . . Improvements to key recreational facilities such as Norpoint Community Center and Alderwood Park need to be completed as soon as possible. Also a trail system needs to be developed for walking and bicycling that would link Northeast Tacoma to other systems in Tacoma, Federal Way, Fife, Browns Point and Dashpoint. . . .

See AR 7339-40 [Exs. 256]; AR 7574-85 [Ex. 276 at 7A-10A].

Recreation and Open Space- Linkages. The Project will also directly implement the City’s Recreation and Open Space Policy, ROS-G-7 and ROS-AC-10, which call for physical connections and linkages among neighborhoods, centers and other open spaces, all of which are lacking and all of which are provided by the Project. *See* AR 6333-6557 [Slides 48-52], & AR 5910-25, 5975-6037, & 7574-85 [Exs. 174, 178-180 & 276 at 7A-10A]. ROS-G-7 is particularly applicable, as it states “Encourage the development of pedestrian, bicycle or equestrian linkages wherever possible, appropriate within and between recreation and open space sites.” *See id.*

Recreation and Open Space: New Corridors/Separate Bike Paths. The Project is also necessary to directly implement the City’s Recreation and Open Space Policies, ROS-PB-1 & 2, which respectively seek to “Locate and develop bicycle and pedestrian facilities that provide on- and off-road recreation for the community” and “Develop new corridors for bicycle/pedestrian trails and take advantage of available corridors such as existing park trails, greenbelt areas, railroads, pipelines, power lines and street rights-of-way.” Without the project, these “new” bicycle/pedestrian connections, including the desired linkages between Norpoint, Dashpoint and Alderwood parks, will not be realized. Additionally, the facilities provided by the project will meet policies ROS-PB-5 & -6, the former of which provides “Develop bike paths that are separate from motorized traffic wherever appropriate to a trail system,” and the latter of which encourages development of facilities that “provide direct access to

recreation areas to complement the recreational and educational activities of the area.” *See id.*

Recreation and Open Space- Compatible Uses and Increased LOS. The Project will replace a failing, flooded, pay-to-play Golf Course seldom used by the community with a regional park and trail system open to everyone. *See* AR 6333-6557 [Ex. 207]. Recreation and Open Space Policy ROS-G-6 provides “Encourage compatible, multiple use of open space and recreation facilities.” *See* AR 5975-6017 [Ex. 178]. Perpetuation of the failing, private golf course unused by the community is inimical to the City’s overarching goal to “Acquire, develop and improve the optimum variety and number of recreation and open space facilities consistent with the changing needs of the community.” Notably, the project would bring an existing deficiency in the level of service (LOS) for pathways and trails from a shortage of about one-third mile to a level well-above the LOS standard. *See* AR 7574-85 [Ex. 276 at 7A-11A].

Impact Fees/Funds. The Project will provide additional impact fees to address the needed improvements, and it will provide the trail system called out in the City’s plans. *See* CP 1193 (Wilson Test., Oct. 16, 2009 Hr’g Tr. at 95:13-20); AR 6333-6557, 6285-91, [Exs. 207, 200 & 207; *see also* AR 1412-1414 & 7574-85 [Exs. 77, 78 & 276 at 7A-10A]. The City’s General Recreation and Open Space policies, ROS-10 & 11, further state “Obtaining funds for recreation and open spaces acquisition, development, improvement is necessary to maintain and enhance existing facilities.” *See* AR 5975-6017 [Ex. 178]. Northshore will *voluntarily* provide additional impact fees to address needed improvements. Tacoma’s Capital Facilities Policy, CF-APFS-1, which states “Maintain level of service standards for each type of public facility and provide capital improvements needed to achieve and maintain the standards for existing and future populations.” The project will provide much-needed facilities and impact fees to address existing and anticipated deficiencies, address severe ongoing flooding issues, and improve the transportation network.

Development Planning. Denying the project is at odds with City planning policy ROS-AC-8, which states “Balance the public desire for open space areas with the need to provide for private

development.” *See* AR 5975-6017 [Ex. 178] & AR 6333-6557 [Ex. 207] (emphasis added). Rejection of the project, which admittedly serves numerous Comprehensive Plan objectives, fails to achieve this balance.

The record amply demonstrates that the Project is necessary to implement dozens of the City’s Comprehensive Plan policies and goals, per TMC 13.06.650(B)(2). This Court should reverse under RCW 36.70C.130(1)(b), (c) and (d).

c. Approval was proper under TMC 13.06.650(B)(3) and (5) where the application is consistent with the PRD and meets the public interest

Northshore established that the application is consistent with the PRD and meets the public interest. TMC 13.06.650(B)(3) and (5) were satisfied as a matter of fact and law. Reversal is proper under RCW 36.70C.130(1)(b), (c) and (d). The decision demonstrates legal error in contravening the declaratory judgment (*see infra* VI.A.2), basing denial on public opinion, and mis-stating the standard. The decision demonstrates factual error in concluding that the project is not consistent with the PRD and does not meet the public interest. Substantial evidence does not support those conclusions, and/or the City misapplied the law to the facts.

The City erred in concluding that the Rezone Modification was not consistent with the PRD establishment statement. *See* CP 2744-49 (Decision, Finding Nos. 86-88, 99 & Conclusion Nos. 17-19). *See* TMC 13.06.140(A). The Rezone Modification meets the intent of the R-2 PRD district, TMC 13.06.140(A), by facilitating “desirable, aesthetic and efficient use of open space” without producing “an adverse influence on

adjacent properties.” The Golf Course presently is zoned for residential use and identified as such in both the City’s Comprehensive Plan and zoning documents. Infill residential development that provides sufficient open space is consistent with the R-2 PRD district.

The Decision ignores that the Project does not create a new PRD district. *The Project proposes additional residential development in a PRD already zoned for residential development!* The Project implements dozens of policies of the Comprehensive Plan. It provides infill development with identical housing types. It preserves remaining open space in a form accessible to the entire public, not select, middle-aged men from other communities who play golf in declining numbers. The open space will actually be “open” to the whole public for a variety of recreational uses. The Project provides open space for the PRD consistent with and *in excess* of the code requirements. The Rezone Modification is consistent with the PRD.

The Project also furthers the public interest. The sole adverse impact from the Project is the aesthetic impact of the loss of private golf course views. The decision captures this point, noting, “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.” *See* CP 2740 (Decision, Finding No. 56). “The law does not require that all adverse impacts be eliminated; if it did, no change in land use would ever be possible.” *Pease Hill Comm’ty Group v. County of Spokane*, 62

Wn. App. 800, 808-09, 816 P.2d 37 (1991). The loss of golf course views does not support the City's conclusion that the public interest is not met.

The City correctly concluded that no SEPA basis supports denial of the project. *See* CP 2747 (Decision, Conclusion 9). In reaching this conclusion, the City notes that, "In most areas, the City and [Northshore] agreed that the mitigation offered will eliminate significant adverse impacts." *See* CP 2740 (*id.*, Finding 53). Despite these findings, the decision concludes that converting a flooding, failing, pay-to-play private golf course into needed parks, trails and homes for the whole community was a not "a more desirable use of open space" and that it would "not avoid an adverse [aesthetic] effect on adjacent properties." *See* CP 2749 (*id.*, Conclusion No. 18). This demonstrates error both because whether the project is a "more desirable use of open space" is not the inquiry, and because the single adverse impact does outweigh the numerous advantages and benefits of the project. That people have come to enjoy even a pristine forested parcel does not give them an entitlement to have it remain so. *See Plum Creek Timber Co. v. Washington State Forest Practices Appeals Boards*, 99 Wn. App. 579, 594, 993 P.2d 287 (2000).

In sum, on substantially similar records and asserted grounds, this Court held *Tugwell* and *Henderson* that the public interest was satisfied by the proposed projects. That same holding is proper here. There are no common law view easements or other entitlements to view preservation. *See Collinson v. John L. Scott, Inc.*, 55 Wn. App. 481, 488, 778 P.2d 534 (1989). The City's considerations were not proper. The primary benefit

of the rezone, similar to in *Henderson*, is the myriad of goals in the Comprehensive Plan that will be furthered. The Project is consistent with the PRD and meets the public interest. The City's contrary findings and conclusions are unsupported by substantial evidence in light of the whole record, a clearly erroneous interpretation of the law and/or a misapplication of the law to the facts. This Court should reverse under RCW 36.70C.130(1)(b), (c)&(d).

B. This Court Should Reverse because the Decision is Contrary to the Declaratory Judgment.

This Court should reverse as a matter of law because the City's decision disregards and contravenes the Superior Court's February 2009 declaratory judgment rejecting the City's and neighbor's assertions of a property right in the Golf Course. This legal error tainted all of the material findings and conclusions and requires reversal pursuant to RCW 36.70C.130(1)(b)&(d).

The Superior Court required the City to evaluate Northshore's land use applications as it would any other applicant's, and rejected the proposition that the 1981 Hearing Examiner decision on the original rezone imposed a perpetual use restriction on the Golf Course. Despite those rulings, the City denied the Rezone Modification Application based on the thirty-year-old open space designation in order to achieve its view of "fairness" to the neighbors rather than on the Project's legal merits.

The foregoing is evident throughout the "Findings of Fact" adopted by the City, which frequently reference the circumstances of the

original “open space” designation. *See* CP 2732-2734 (Decision, Finding Nos. 11, 12, 15-25). Numerous findings reflect on the intended permanence of the open space condition and its use as open space “in perpetuity.” *See* CP 2737-2746 (*id.*, Finding Nos. 47, 71 (“The golf course was designated as open space and that land use designation was by the conditions of approval to remain in perpetuity.”), 72, 81 (“Many neighboring homeowners feel that the city made a promise of permanence to the residents of the Country Club Estates in designating the golf course as open space for the surrounding residential development.”),³ 87, 88, 90, 92, 94, 95, 96 (“[T]he ‘in perpetuity’ language serves to emphasize that maintaining the golf course in open space was pivotal to the Examiner’s decision [in 1981] to create the PRD zone.”), 99. The City concluded change could not be pursued by “the unilateral action of a single applicant.” CP 2746 (*id.*, Finding No. 94).

Despite the declaratory judgment instructing to the contrary, the present land use Decision rests on the notion that the surrounding landowners and City have a right to keep the golf course as open space forever, and that without their consent a modification should not be permitted. The Decision elevates the 1981 rezone beyond the legal effect that the Superior Court judged it to have. The City emphasizes the historical “in perpetuity” language and the expectation of the surrounding

³ This statement demonstrates complete disregard of the Superior Court’s holding that the neighbors had no rights, legal or equitable, in the Golf Course property or any other based to assert claims of this sort.

landowners that the use of the Golf Course “open space” designation could never change. The Superior Court rejected those very same premises. The Superior Court’s prior ruling is the law of this case, and the City is bound by it. This Court should reverse the denial of the Rezone Modification (and the Site Plan and Preliminary Plat Application), which is contrary to the declaratory judgment. *See* RCW 36.70C.130(1)(b)&(d).

C. This Court Should Reverse because the City Violated the Appearance of Fairness Doctrine.

LUPA permits reversal where procedural violations in decision-making occur. *See* RCW 36.70C.130(1)(a). Here, the City violated the appearance of fairness doctrine based on Deputy Mayor Fey’s evident personal bias against the project and refusal to recuse himself from participating in the City’s quasi-judicial decision. *See supra*, IV.C.

“The appearance of fairness doctrine applies to administrative tribunals acting in a quasi-judicial capacity.” *Magula v. Dep’t of Labor & Indus.*, 116 Wn. App. 966, 972, 69 P.3d 354 (2003); *see also J.L. Storedahl*, 143 Wn. App. at 928. “A party asserting an appearance of fairness claim must show evidence of actual or potential bias to support that claim.” *Id.* “The test is whether a reasonably prudent and disinterested observer would conclude [that the claimant] obtained a fair, impartial, and neutral trial.” *Id.* Here, no reasonable observer could conclude that Northshore obtained a fair, impartial, and neutral decision in light of Deputy Mayor’s blatant and improper efforts to derail the project and subsequent participation in denial of the project.

Northshore was subjected to an unlawful, prejudicial process initiated by the Deputy Mayor's communication with City staff when he spurred the City's efforts to "affect / prevent / delay" the project, which the City then did through (1) its moratoria (*see* CP 1464-1466); (2) its wrongful determination that the application was incomplete, as suggested by the Deputy Mayor but rejected by a City hearing examiner (*see* CP 1464-1468); and (3) the City's declaratory action (*see* CP 1464-1468). This prejudicial process culminated in the Deputy Mayor's prejudicial participation in the decision-making. His post-decision comments boasting about his successful effort to stop the project is a straightforward acknowledgment of his bias. *See* CP 1481-1482.

Based on the foregoing, this Court should hold that the City violated the appearance of fairness doctrine and that the City's Decision to deny the Project is invalid under RCW 36.70C.130(1)(a).

D. This Court Should Reverse the Decision and Require Approval of the Preliminary Plat Application, Site Plan, and Wetland / Stream Assessments and Exemption and Two Variance Applications.

The City's errors of law and fact affecting the decision on the Rezone Modification Application controlled its disposition of the other pending land use applications for Site Plan approval, Preliminary Plat approval, the Wetland / Stream Assessment & Exemption and the two variances. If this Court reverses the denial of the Rezone Modification application, it also should reverse those actions as well and remand with instructions that the City approve of these related permits.

The City denied the Site Plan solely because it had denied the Rezone Modification. *See* CP 2749 (Decision, Conclusion 19 (“The inability to approve the Rezone Modification, makes approval of the Site Plan impossible.”) Reversal of the City’s decision to deny the Rezone Modification should result in approval of the Site Plan.

Northshore’s Preliminary Plat application meets all applicable regulations, so it was error to deny it for want of meeting the public interest. *See* CP 2747 (*id.*, Conclusion 7). *See, e.g., Carlson v. Beaux Arts Village*, 41 Wn. App. 402, 408-09, 704 P.2d 663 (1985) (holding it is error to deny a plat application on public interest grounds when it meets all other objective criteria); *see also* RCW 36.70C.130(1)(b)-(d). The City’s Decision that Northshore’s Preliminary Plat should not be approved based on the “unilateral” action of the applicant (*see* CP 2747 (Decision, Conclusion 7), suffers the same defects as the denial of the Rezone Modification. The City’s Decision that Northshore had to request, or “may” have to request, to alter *adjacent plats* in order to win approval (*see id.*) is unsupported by the law and contravenes the Superior Court’s declaratory judgment. *See* RCW 36.70C.130(1)(b)-(d).

There is nothing further to do with regard to these Wetland / Stream Assessment and Exemption permits. *See* AR 5250-5366 & 7574-85 [Ex. 119 (Staff Report, at 104-105) & Ex. 276 at 2A]. Nevertheless, the Examiner failed to conditionally approve the Wetland / Stream Assessment and Exemption and two variance applications. These land use decisions were ripe for decision under the City’s land use and

administrative codes and Washington law. *See* RCW 36.70B.030-.060 & .120 (stating “final decision must include all project permits being reviewed through the consolidated permit review process.”); *see also* TMC 13.05.030 & .060 (requiring consolidated permit review of permits at issue); *see also* TMC 1.23.120 (same); TMC 13.11.230 & .250 (wetland / stream permit processing). By failing to make a conditional decision, and concluding he had no obligation to do so (*see* CP 2747, Decision, Conclusion No. 4)), the Examiner engaged in an unlawful procedure and erred as a matter of law. *See* RCW 36.70C.130(1)(a), (b)&(d). These errors support reversal.

In sum, at the close of the hearing the City agreed to conditions to allow approval of the Wetland / Stream Assessment and Exemption applications, and made no objection to the variances. Substantial evidence cited at Section IV.B. supports granting the permits, so this Court should approve them or order the City to do so on remand. *See* RCW 36.70C.130(1)(c).

VII. CONCLUSION

Washington law does not put use of private property to public vote; it's not majority rules. Northshore created a vibrant proposal for residential redevelopment of a failing, flooding golf course in a PRD zoned for such development. The Project preserves sufficient open space to comply with the law. The City became politically committed to killing the Project under the leadership of an antagonistic Councilmember. The

City's bias against and maltreatment of Northshore is born up by the record.

Substantial evidence demonstrates substantial changes that support the Rezone Modification application. Substantial evidence also demonstrates that the Project is necessary to implement provisions of the Comprehensive Plan, is consistent with the PRD and meets the public interest. Under the applicable regulations, the Rezone Modification and related applications should be approved.

The City improperly relied on the "in perpetuity" language in the 1981 rezone decision to deny the Project, not on the merits of Northshore's proposal. This contravenes the declaratory judgment. The Superior Court ruled the Golf Course is not contractually or equitably bound to remain a golf course, yet the City insisted that it was. The City's Decision is based on public opposition. The City admittedly refuses to allow the Project without the consent of surrounding residents.

If this Court accepts the City's decision, the property will be fixed "in perpetuity" as open space, despite the Superior Court's contrary ruling. The failing Golf Course, however, will not exist in perpetuity. The few residents who presently enjoy golf course views—but contribute nothing to its upkeep and expenses—have no attendant right to its continuing existence. The aging owners cannot continue to operate the Golf Course. The governing criteria for the change of the Golf Course's "open space" designation were met. This Court should reverse.

Respectfully submitted this 3rd day of January, 2012.

A handwritten signature in black ink, appearing to be "Aaron M. Laing", written over a horizontal line.

Aaron M. Laing, WSBA #34453
Averil B. Rothrock, WSBA #24248
SCHWABE, WILLIAMSON & WYATT, P.C.
1420 Fifth Ave., Suite 3010, Seattle, WA 98101-
2339
*Attorneys for Plaintiff / Appellant / Cross-
Respondent Northshore Investors, LLC*

CERTIFICATE OF SERVICE

12 JUN -8 PM 9:10

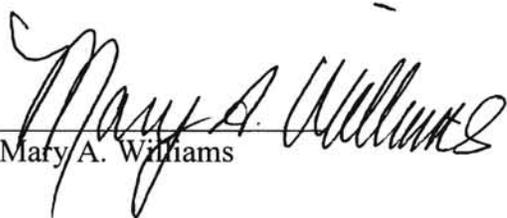
STATE OF WASHINGTON

I hereby certify that on the 3rd day of January, 2012, I caused to be served via Legal Messenger the foregoing OPENING BRIEF OF APPELLANT NORTSHORE INVESTORS, LLC on the following parties at the following addresses:

Gary D. Huff
Steven D. Robinson
Karr Tuttle Campbell
1201 Third Avenue, Suite 2900
Seattle, WA 98101
Telephone: (206) 223-1313
Facsimile: (206) 682-7100
Email: ghuff@karrtuttle.com
Email: sdrobinson@karrtuttle.com
Attorneys for Petitioner Save NE Tacoma

Paul W. Moomaw
Christopher Brain
Tousley Brain Stephens PLLC
1700 7th Avenue, Suite 2200
Seattle, WA 98101
Telephone: (206) 682-5600
Facsimile: (206) 682-2992
Email: pmoomaw@tousley.com
Attorney for Petitioner North Shore Golf Associates, Inc.

Jay P. Derr
Dale N. Johnson
Duncan M. Greene
GordonDerr LLP
2025 First Avenue, Suite 500
Seattle, WA 98121-3140
Telephone: (206) 382-9540
Facsimile: (206) 626-0675
Email: jderr@gordonderr.com
Email: djohnson@gordonderr.com
Attorneys for Respondent City of Tacoma


Mary A. Williams

APPENDICES

APPENDIX I

TMC 13.06.650

(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.

(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.

APPENDIX

- A. Land Use Decision
- B. TMC 13.06.650
- C. February 4, 2009 and February 25, 2009 Superior Court
Declaratory Judgment Orders
- D. November 2010 Court of Appeals Affirmance

(Corrected) APPENDIX - A



City of Tacoma
Legal Department - City Clerk's Office

RECEIVED

April 15, 2010

APR 16 2010

Schwabe Williamson
& Wyatt

NOTICE OF APPEAL RESULTS

Please be advised that on Tuesday, April 13, 2010, the Tacoma City Council heard the appeal of Schwabe, Williamson & Wyatt, P.C. representing the Appellants Northshore Investors, LLC and North Shore Golf Associates, Inc. on the recommendation of the Hearing Examiner regarding the request to modify an existing condition of approval placed on the golf course site in connection with Northshore Country Club Estates Planned Residential Development District in a previous rezone which occurred in 1981 and established the PRD designation for the site. (Northshore Investors, LLC; File No. REZ2007-40000089068)

At that time the City Council moved to concur with the Findings, Conclusions and Recommendation of the Hearing Examiner and denied the appeal.

Doris Sorum
City Clerk

Notice sent to parties of record:

Aaron M. Laing Attorney at Law	1420 5 th Avenue, Suite 3010	Seattle, WA	98101
Jay Derr Attorney at Law	2025 First Avenue, Suite 500	Seattle, WA	98121
Gary D. Huff Attorney at Law	1201 Third Avenue, Suite 2900	Seattle, WA	98101
Thomas R. Bjorgen Attorney at Law	1235 Fourth Avenue E, Suite 200	Olympia, WA	98506
Paul W. Moomaw Attorney at Law	1700 Seventh Avenue, Suite 2200	Seattle, WA	98101

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. REZ2007-40000089068: 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. PLT2007-40000089069: Preliminary Plat - a request to subdivide the Northshore Golf Course site into 860 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. SIT2007-40000089067: Site Plan Approval - a request for site plan approval for development of the golf course, accompanying the rezone request.

File No. MLU2007-40000089065: 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-acre¹ 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.

¹ 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 rezoning 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 acres² 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.

² 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 I of Country Club Estates had been approved and was under construction. Except for Division I, 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 as 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 rezoning. 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 rezoning. 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 (3) 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 7th day of January, 2010.

ELECTRONIC COPY

Wick Dufford, Hearing Examiner Pro Tempore

12 JAN 12 PM 3:44

SUPPLEMENTAL CERTIFICATE OF SERVICE

STATE OF WASHINGTON

BY APPELLANT NORTSHORE

BY _____
DEPUTY

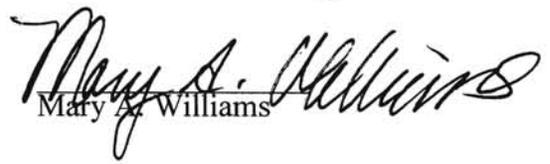
I hereby certify that on the 12th day of January, 2012, I caused to be served via Legal Messenger Appellant Northshore's January 12, 2012 correspondence with the Clerk of Division II requesting filing of Northshore's Corrected Appendix A, and the Corrected Appendix A to Opening Brief of Appellant Northshore Investors, LLC, on the following parties at the following addresses:

Gary D. Huff
Steven D. Robinson
Karr Tuttle Campbell
1201 Third Avenue, Suite 2900
Seattle, WA 98101
Telephone: (206) 223-1313
Facsimile: (206) 682-7100
Email: ghuff@karrtuttle.com
Email: sdrobinson@karrtuttle.com
Attorneys for Petitioner Save NE Tacoma

Paul W. Moomaw
Christopher Brain
Tousley Brain Stephens PLLC
1700 7th Avenue, Suite 2200
Seattle, WA 98101
Telephone: (206) 682-5600
Facsimile: (206) 682-2992
Email: pmoomaw@tousley.com
Attorney for Petitioner North Shore Golf Associates, Inc.

Jay P. Derr
Dale N. Johnson
Duncan M. Greene
GordonDerr LLP
2025 First Avenue, Suite 500
Seattle, WA 98121-3140
Telephone: (206) 382-9540
Facsimile: (206) 626-0675
Email: jderr@gordonderr.com
Email: djohnson@gordonderr.com
Attorneys for Respondent City of Tacoma

PDX/117426/155180/AAR/8766344.1


Mary A. Williams

APPENDIX I

TMC 13.06.650

- (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.
- (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.

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

The Honorable Russell W. Hartman

FEB 04 2009

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

THE CITY OF TACOMA, a Washington)
municipal corporation,)
Plaintiff,)
and)
JOHNNIE E. LOVELACE, an individual;)
LOIS S. COOPER, an individual; and JAMES)
V. LYONS and RENEE D. LYONS, a marital)
community,)
Intervenor Plaintiffs,)
v.)
NORTHSHORE INVESTORS, LLC, a)
Washington limited liability company,)
NORTH SHORE GOLF ASSOCIATES,)
INC., a Washington corporation, and)
HERITAGE SAVINGS BANK, a Washington)
Corporation)
Defendants.)

No. 08-2-04025-4

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

[PROPOSED]

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;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(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;

- 1 o. Defendants' Response to Plaintiff City of Tacoma's Motion for Partial
2 Summary Judgment;
- 3 p. Declaration of Paul W. Moomaw in support of Defendants' Response to
4 Plaintiff City of Tacoma's Motion for Partial Summary Judgment and
5 attachments thereto;
- 6 q. Plaintiff City of Tacoma's Reply to Defendants' Response to Plaintiff City
7 of Tacoma's Motion for Partial Summary Judgment;
- 8 r. Defendants' Reply to Plaintiff City of Tacoma's Response to Defendants'
9 Joint Motion for Summary Judgment;
- 10 s. Supplemental Declaration of Aaron M. Laing in Support of Defendants'
11 Reply to Plaintiff City of Tacoma's Response to Defendants' Joint Motion
12 for Summary Judgment and attachments thereto;
- 13 t. Supplemental Declaration of James Bourne in Support of Defendants'
14 Reply to Plaintiff City of Tacoma's Response to Defendants' Joint Motion
15 for Summary Judgment and attachments thereto;
- 16 u. Notice of Errata Pertaining to Plaintiff City of Tacoma's Motion for Partial
17 Summary Judgment; and
- 18 v. Intervenor Plaintiff's Joinder in City of Tacoma's Motion for Partial
19 Summary Judgment.

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

- 22 a. The undisputed factual record establishes that:
 - 23 (1) This lawsuit pertains to a Planned Residential Development
24 ("PRD") located in Tacoma, Washington, commonly referred to as
25 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.”

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

18 Based upon the above findings, it is hereby ORDERED, ADJUDGED and

19 DECREED that:

- 20 1. Plaintiff City of Tacoma's Partial Motion for Summary Judgment is GRANTED,
21 in part, as set forth below.
- 22 2. Judgment shall be entered in favor of Plaintiff City of Tacoma as follows:
- 23 a. The golf course/open space land use designation in the OSTA remains
24 binding and enforceable by the City of Tacoma, unless and until the City of
25 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:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

- 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. 8111120139) (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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

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

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

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

DONE IN OPEN COURT this 3rd day of February, 2009.

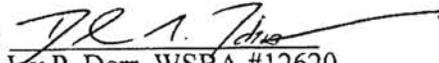
RUSSELL W. HARTMAN

JUDGE RUSSELL W. HARTMAN

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

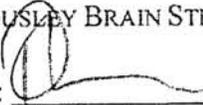
Presented by:

GORDONDERR LLP

By:  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:

TOUSLEY BRAIN STEPHENS PLLC

By: 
Christopher I. Brain, WSBA #5054
Paul W. Moomaw, WSBA #32728
Attorneys for Plaintiff North Shore Golf Associates, Inc.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: _____
Aaron M. Laing, WSBA #34453
Matthew Turetsky, WSBA #23611
Attorneys for Plaintiff Northshore Investors, LLC

KARR TUTTLE CAMPBELL, PSC

By: _____
Steven D. Robinson, WSBA #12999
Gary D. Huff, WSBA #6185
Attorneys for Intervenor-Plaintiffs

VANDEBERG, JOHNSON & GANDARA, LLP

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Presented by:

GORDONDERR LLP

By: _____
Jay P. Derr, WSBA #12620
Dale N. Johnson, WSBA #26629
Attorneys for City of Tacoma

Approved as to form; notice of presentation waived:

TOUSLEY BRAIN STEPHENS PLLC

By: _____
Christopher I. Brain, WSBA #5054
Paul W. Moomaw, WSBA #32728
Attorneys for Plaintiff North Shore Golf Associates, Inc.

SCHWABE, WILLIAMSON & WYATT P.C.

By:  _____
Aaron M. Laing, WSBA #34453
Matthew Turetsky, WSBA #23611
Attorneys for Plaintiff Northshore Investors, LLC

KARR TUTTLE CAMPBELL, PSC

By: _____
Steven D. Robinson, WSBA #12999
Gary D. Huff, WSBA #6185
Attorneys for Intervenor-Plaintiffs

VANDEBERG, JOHNSON & GANDARA, LLP

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

GordonDerr

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Presented by:

GORDONDERR LLP

By:

Jay P. Derr, WSBA #12620
Dale N. Johnson, WSBA #26629
Attorneys for City of Tacoma

Approved as to form; notice of presentation waived:

TOUSLEY BRAIN STEPHENS PLLC

By:

Christopher I. Brain, WSBA #5054
Paul W. Moomaw, WSBA #32728
Attorneys for Plaintiff North Shore Golf Associates, Inc.

SCHWABE, WILLIAMSON & WYATT, P.C.

By:

Aaron M. Laing, WSBA #34453
Matthew Turetsky, WSBA #23611
Attorneys for Plaintiff Northshore Investors, LLC

KARR TUTTLE CAMPBELL, PSC

By:


Steven D. Robinson, WSBA #12999
Gary D. Huff, WSBA #6185
Attorneys for Intervenor-Plaintiffs

VANDEBERG, JOHNSON & GANDARA, LLP

By:

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Presented by:

GORDONDERR LLP

By:

Jay P. Derr, WSBA #12620
Dale N. Johnson, WSBA #26629
Attorneys for City of Tacoma

Approved as to form; notice of presentation waived:

TOUSLEY BRAIN STEPHENS PLLC

By:

Christopher I. Brain, WSBA #5054
Paul W. Moomaw, WSBA #32728
Attorneys for Plaintiff North Shore Golf Associates, Inc.

SCHWABE, WILLIAMSON & WYATT, P.C.

By:

Aaron M. Laing, WSBA #34453
Matthew Turetsky, WSBA #23611
Attorneys for Plaintiff Northshore Investors, LLC

KARR TUTTLE CAMPBELL, PSC

By:

Steven D. Robinson, WSBA #12999
Gary D. Huff, WSBA #6185
Attorneys for Intervenor-Plaintiffs

VANDEBERG, JOHNSON & GANDARA, LLP

By: *Mark A. Hood by Mark R. Potter (WSBA # 7830)*

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

RECEIVED

The Honorable Russell W. Hartman

09 MAR -2 AM 11:14

TOUSLEY BRAIN
STEPHENS PLLC

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

THE CITY OF TACOMA,

Plaintiff,

and

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

Intervenor-Plaintiffs,

v.

NORTH SHORE GOLF ASSOCIATES,
INC., a Washington corporation;
NORTHSHORE INVESTORS, LLC, a
Washington Limited Liability Company; and
HERITAGE SAVINGS BANK, a Washington
corporation,

Defendants.

NO. 08-2-04025-4

[PROPOSED] ORDER GRANTING
DEFENDANTS NORTH SHORE GOLF
ASSOCIATES, INC. AND
NORTHSHORE INVESTORS, LLC'S
JOINT MOTION FOR SUMMARY
JUDGMENT DISMISSAL OF
INTERVENOR-PLAINTIFFS' CLAIMS
AND DENYING MOTION TO STRIKE

[Clerk's Action Required]

THIS MATTER came before the Court on Defendants North Shore Golf Associates,
Inc. ("NSGA") and Northshore Investors, LLC's ("Investors") Joint Motion for Summary
Judgment and Defendants' Motion to Strike Declaration of John Weaver & References
Thereeto. 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.

[PROPOSED] ORDER GRANTING DEFENDANTS NORTH
SHORE GOLF ASSOCIATES, INC. AND NORTHSHORE
INVESTORS, LLC'S JOINT MOTION FOR SUMMARY
JUDGMENT DISMISSAL OF INTERVENOR-PLAINTIFFS'
CLAIMS AND DENYING MOTION TO STRIKE - 1

4639/001/224085.2

ORIGINAL

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206.682.5600 • FAX 206.682.2992

1 The Court also considered the following documents and evidence, which were brought to the
2 Court's attention before the order on summary judgment was entered:

3 1. Defendants North Shore Golf Associates, Inc. and Northshore Investors, LLC's
4 Joint Motion for Summary Judgment;

5 2. Declaration of James Bourne in Support of Defendants' Motion for Summary
6 Judgment;

7 3. Declaration of Dennis Hanberg in Support of Defendants' Motion for Summary
8 Judgment;

9 4. Declaration of Aaron M. Laing in Support of Defendants' Motion for Summary
10 Judgment;

11 5. Intervenor-Plaintiffs' Memorandum in Opposition to Defendants' Motion for
12 Summary Judgment;

13 6. Declaration of John. W. Weaver in support of Intervenor-Plaintiffs'
14 Memorandum in Opposition to Defendants' Motion for Summary Judgment;

15 7. Declaration of Lois C. Cooper in Support of Motion to Intervene;

16 8. Declaration of James V. Lyons in Support of Motion to Intervene;

17 9. Declaration of Johnnie E. Lovelace in Support of Motion to Intervene;

18 10. Defendants' Reply in Support of Motion for Summary Judgment;

19 11. Defendants' Motion to Strike Declaration of John Weaver & References

20 Thereeto;

21 12. Defendants' Motion for Leave to Shorten Time for Hearing Motion to Strike
22 Declaration;

23 13. Supplemental Declaration of Aaron M. Laing in Support of Defendants' Reply
24 to Plaintiff City of Tacoma's Response to Defendants' Joint Motion for Summary Judgment
25 and attachments thereto;

26 14. Supplemental Declaration of James Bourne;

27 [PROPOSED] ORDER GRANTING DEFENDANTS NORTH
SHORE GOLF ASSOCIATES, INC. AND NORTHSORE
INVESTORS, LLC'S JOINT MOTION FOR SUMMARY
JUDGMENT DISMISSAL OF INTERVENOR-PLAINTIFFS'
CLAIMS AND DENYING MOTION TO STRIKE - 2
4639/001/224085.2

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

1 15. Order Granting Plaintiff's Motion for Partial Summary Judgment and Denying
2 Defendants' Motion for Summary Judgment; and

3 16. The Court records, pleadings, and files herein.

4 Based on the foregoing, and the Court having been fully advised in these matters, the
5 Court FINDS AND CONCLUDES AS FOLLOWS:

6 1. There are no material facts that need to be adjudicated, and the rights of the
7 parties can be declared as a matter of law based on the record before the Court.

8 2. The Court orally granted Defendants' Motion for Leave to Shorten Time for
9 Hearing Motion to Strike Declaration on December 19, 2008.

10 3. Paragraphs 9 through 12 of the Declaration of John Weaver contain legal
11 conclusions. To the extent that the testimony in these paragraphs could be considered under
12 the Rules of Evidence, the Court gives no weight to the opinion evidence in paragraphs 9-12 of
13 the Declaration of John Weaver because Professor Weaver did not review the Agreement
14 Concerning North Shore Golf Course between North Shore Golf Associates, Inc. and Nu-West
15 Pacific, Inc. dated May 10, 1979 ("1979 Agreement"), which is a central part of the legal
16 relationships that were created and the subject of Professor Weaver's covenant analysis.

17 4. The 1979 Agreement did not create any third-party beneficiary rights on the
18 part of any third-parties, including, specifically, Intervenor-Plaintiffs.

19 5. The Open Space Taxation Agreement between North Shore Golf Associates,
20 Inc. and the City of Tacoma, dated September 21, 1981 ("OSTA"), did not create any third-
21 party beneficiary rights on the part of any third-parties, including, specifically, Intervenor-
22 Plaintiffs.

23 6. The North Shore Concomitant Zoning Agreement between Nu-West, Inc. and
24 the City of Tacoma, dated November 6, 1981 ("CZA"), did not create any third-party
25 beneficiary rights on the part of any third-parties, including, specifically, Intervenor-Plaintiffs.
26

1 7. As set forth in the Court's Order Granting Plaintiff's Motion for Partial
2 Summary Judgment and Denying Defendants' Motion for Summary Judgment, the restrictions
3 to open space and golf course use placed upon the Golf Course in the OSTA and CZA subject
4 the Golf Course to an open space land use designation, not a property interest on the part of the
5 City of Tacoma. The legal relationship between the City of Tacoma and NSGA arising from
6 the OSTA and CZA is a land use designation. NSGA and Intervenors may seek the City of
7 Tacoma's consent to alter or nullify the land use designation set forth in the OSTA and CZA to
8 redevelop the Golf Course. NSGA and Investors are in no different position than any other
9 property owner within the PRD with respect to requesting to change the land use designation
10 of and to re-develop real property within the Country Club Estates PRD.

11 8. The land use designation set forth in the OSTA and CZA does not constitute,
12 create or result in a common plan of development, or any other right or restriction, enforceable
13 by Intervenor-Plaintiffs or any other private third-parties as an equitable servitude, restrictive
14 covenant, property interest or otherwise.

15 9. None of the plats which were approved within the Country Club Estates PRD
16 contains any dedication of open space or other use restrictions that affect the Golf Course
17 property owned by North Shore Golf Associates, Inc. that is the subject of this action.

18 NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

19 1. Defendants' Motion to Strike Declaration of John Weaver & References
20 Thereto is DENIED. However, because Professor Weaver did not review the 1979 Agreement
21 in reaching his conclusions, paragraphs 9 through 12 of the Weaver Declaration and all
22 references thereto are given no weight by the Court.

23 2. Defendants North Shore Golf Associates, Inc. and Northshore Investors, LLC's
24 Joint Motion for Summary Judgment against Intervenor-Plaintiffs is GRANTED. All of
25 Intervenor-Plaintiffs' claims in this matter are hereby dismissed with prejudice.

26
27 [PROPOSED] ORDER GRANTING DEFENDANTS NORTH
SHORE GOLF ASSOCIATES, INC. AND NORTHSHORE
INVESTORS, LLC'S JOINT MOTION FOR SUMMARY
JUDGMENT DISMISSAL OF INTERVENOR-PLAINTIFFS'
CLAIMS AND DENYING MOTION TO STRIKE - 4

4639/001/224085.2

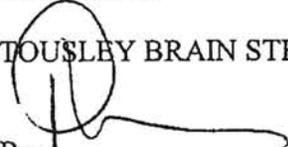
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.882.5600 • FAX 206.882.2992

1 DATED this 25 day of February, 2009.

2
3
4 
HONORABLE RUSSELL W. HARTMAN

5 Presented by:

6 TOUSLEY BRAIN STEPHENS PLLC

7 
8 By: _____
9 Christopher I. Brain, WSBA #5054
10 Paul W. Moomaw, WSBA #32728
11 *Attorneys for Defendant North Shore Golf Associates, Inc.*

12 SCHWABE, WILLIAMSON & WYATT, P.C.

13 By: _____
14 Aaron M. Laing, WSBA #34453
15 *Attorneys for Defendant Northshore Investors, LLC*

16 Copy Received; Approved as to Form; Notice of Presentation Waived By:

17 KARR TUTTLE CAMPBELL

18
19 By: _____
20 Steven D. Robinson, WSBA #12999
21 *Attorneys for Intervenor-Plaintiffs*

22 GORDONDERR LLP

23
24 By: _____
25 Dale N. Johnson, WSBA #26629
26 *Attorneys for Plaintiff City of Tacoma*

27 [PROPOSED] ORDER GRANTING DEFENDANTS NORTH
SHORE GOLF ASSOCIATES, INC. AND NORTSHORE
INVESTORS, LLC'S JOINT MOTION FOR SUMMARY
JUDGMENT DISMISSAL OF INTERVENOR-PLAINTIFFS'
CLAIMS AND DENYING MOTION TO STRIKE - 5

4639/001/224085.2

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206.682.5600 • FAX 206.682.2992

1 DATED this _____ day of February, 2009.

2
3
4 HONORABLE RUSSELL W. HARTMAN

5 Presented by:

6 TOUSLEY BRAIN STEPHENS PLLC

7
8 By: _____

9 Christopher I. Brain, WSBA #5054
10 Paul W. Moomaw, WSBA #32728
11 *Attorneys for Defendant North Shore Golf
Associates, Inc.*

12 SCHWABE, WILLIAMSON & WYATT, P.C.

13 By: _____

14 Aaron M. Laing, WSBA #37453
15 *Attorneys for Defendant Northshore
Investors, LLC*

16 Copy Received; Approved as to Form; Notice of Presentation Waived By:

17 KARR TUTTLE CAMPBELL

18
19 By: _____

20 Steven D. Robinson, WSBA #12999
21 *Attorneys for Intervenor-Plaintiffs*

22 GORDONDERR LLP

23
24 By: _____

25 Dale N. Johnson, WSBA #26629
26 *Attorneys for Plaintiff City of Tacoma*

27 [PROPOSED] ORDER GRANTING DEFENDANTS NORTH
SHORE GOLF ASSOCIATES, INC. AND NORTSHORE
INVESTORS, LLC'S JOINT MOTION FOR SUMMARY
JUDGMENT DISMISSAL OF INTERVENOR-PLAINTIFFS'
CLAIMS AND DENYING MOTION TO STRIKE - 5
4639/001/224085.2

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.882.5800 • FAX 206.882.2992

1 DATED this _____ day of February, 2009.

2
3
4 HONORABLE RUSSELL W. HARTMAN

5 Presented by:

6 TOUSLEY BRAIN STEPHENS PLLC

7
8 By: _____

9 Christopher I. Brain, WSBA #5054
10 Paul W. Moomaw, WSBA #32728
11 *Attorneys for Defendant North Shore Golf
Associates, Inc.*

12 SCHWABE, WILLIAMSON & WYATT, P.C.

13 By: _____

14 Aaron M. Laing, WSBA #34453
15 *Attorneys for Defendant Northshore
Investors, LLC*

16 Copy Received; Approved as to Form; Notice of Presentation Waived By:

17 KARR TUTTLE CAMPBELL

18
19 By: 

20 Steven D. Robinson, WSBA #12999
21 *Attorneys for Intervenor-Plaintiffs*

22 GORDONDERR LLP

23
24 By: _____

25 Dale N. Johnson, WSBA #26629
26 *Attorneys for Plaintiff City of Tacoma*

27 [PROPOSED] ORDER GRANTING DEFENDANTS NORTH
SHORE GOLF ASSOCIATES, INC. AND NORTSHORE
INVESTORS, LLC'S JOINT MOTION FOR SUMMARY
JUDGMENT DISMISSAL OF INTERVENOR-PLAINTIFFS'
CLAIMS AND DENYING MOTION TO STRIKE - 5
4639001/224085.2

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206.682.5600 • FAX 206.682.2692

1 DATED this _____ day of February, 2009.

2
3
4 HONORABLE RUSSELL W. HARTMAN

5 Presented by:

6 TOUSLEY BRAIN STEPHENS PLLC

7
8 By: _____

9 Christopher I. Brain, WSBA #5054
10 Paul W. Moomaw, WSBA #32728
11 *Attorneys for Defendant North Shore Golf
Associates, Inc.*

12 SCHWABE, WILLIAMSON & WYATT, P.C.

13 By: _____

14 Aaron M. Laing, WSBA #34453
15 *Attorneys for Defendant Northshore
Investors, LLC*

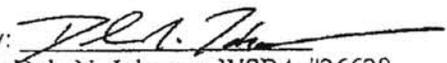
16 Copy Received; Approved as to Form; Notice of Presentation Waived By:

17 KARR TUTTLE CAMPBELL

18
19 By: _____

20 Steven D. Robinson, WSBA #12999
21 *Attorneys for Intervenor-Plaintiffs*

22 GORDONDERR LLP

23
24 By:  9 FEB 09

25 Dale N. Johnson, WSBA #26629
26 *Attorneys for Plaintiff City of Tacoma*

27 [PROPOSED] ORDER GRANTING DEFENDANTS NORTH
SHORE GOLF ASSOCIATES, INC. AND NORTSHORE
INVESTORS, LLC'S JOINT MOTION FOR SUMMARY
JUDGMENT DISMISSAL OF INTERVENOR-PLAINTIFFS'
CLAIMS AND DENYING MOTION TO STRIKE - 5

4639/001/224085.2

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206.682.5600 • FAX 206.682.2992

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

VANDEBERG, JOHNSON & GANDARA, LLP



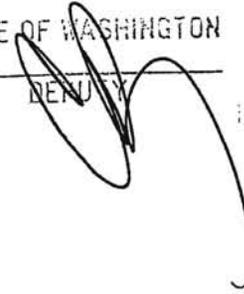
By: _____
Mark A. Hood, WSBA #20152
Attorney for Defendant Heritage Bank

[PROPOSED] ORDER GRANTING DEFENDANTS NORTH SHORE GOLF ASSOCIATES, INC. AND NORTSHORE INVESTORS, LLC'S JOINT MOTION FOR SUMMARY JUDGMENT DISMISSAL OF INTERVENOR-PLAINTIFFS' CLAIMS AND DENYING MOTION TO STRIKE - 6

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.6800 • FAX 206.682.2952

FILED
COURT OF APPEALS
DIVISION II

10 NOV 16 AM 8:57

STATE OF WASHINGTON
BY 

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE CITY OF TACOMA, a Washington
municipal corporation,

Respondent,

And

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

Appellants,

v.

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

Respondents.

No. 38941-0-II

UNPUBLISHED OPINION

ARMSTRONG, J. — Johnnie Lovelace, Lois Cooper, and James and Renee Lyons intervened in a declaratory judgment action between the City of Tacoma, North Shore Golf Associates, Inc., and Northshore Investors, LLC. Lovelace, Cooper, and Lyons appeal (1) the trial court's ruling that a taxation agreement between the City and North Shore Golf Associates

No. 38941-0-II

did not convey a property interest in the North Shore Golf Course to the City, and (2) the trial court's order dismissing all of their claims with prejudice. Because Lovelace, Cooper, and Lyons do not have standing to challenge the City's alleged property interest and the trial court properly dismissed all of their claims on summary judgment, we affirm.

FACTS

The North Shore Golf Course is part of the North Shore Country Club Estates, a planned residential development (PRD) in Tacoma, Washington. In 1979, North Shore Golf Associates purchased the golf course property from Tacoma Land Company and Nu-West Pacific, Inc. purchased the property surrounding the golf course. Nu-West and North Shore Golf Associates agreed to use the golf course property to fulfill the open space and density requirements for the PRD planning process and to restrict the golf course to open space use "for such period as is required by the City of Tacoma." Clerk's Papers (CP) at 24-25.

Nu-West and North Shore Golf Associates submitted an application to the City to reclassify the golf course and surrounding property from R-2, a one-family dwelling district, to R-2 PRD, a planned residential development district. The application included a master plan offering the golf course for designation as open space. North Shore Golf Associates also submitted a separate application to the City to classify the golf course as open space under chapter 84.34 RCW.¹

¹ Under chapter 84.34 RCW, land owners may apply to designate qualifying property as open space land. See RCW 84.34.030. The property's value, for tax purposes, is then assessed based on its current use as open space, rather than its potential use, such as developing the property for commercial or residential uses. See RCW 84.34.060; *Van Buren v. Miller*, 22 Wn. App. 836, 837-38, 592 P.2d 671 (1979). The purpose of this classification scheme is to "maintain, preserve, conserve and otherwise continue in existence adequate open space lands for the production of food, fiber and forest crops, and to assure the use and enjoyment of natural

No. 38941-0-II

In 1981, the City and North Shore Golf Associates executed an Open Space Taxation Agreement (Tax Agreement). The Tax Agreement provides, in relevant part, that use of the North Shore Golf Course "shall be restricted solely to golf course and open space use," that the agreement "shall run with the land described herein and shall be binding upon the heirs, successors and assigns of the parties hereto," and that the agreement shall "remain in effect until such time as nullified by the City of Tacoma." CP at 27.

The City then adopted an ordinance rezoning the golf course and surrounding property to R-2 PRD. Nu-West and the City executed the North Shore Concomitant Zoning Agreement (Zoning Agreement), which provides that the North Shore Country Club Estates PRD must be developed and maintained in accordance with the Zoning Agreement and the approved site plan. The site plan designates the North Shore Golf Course as open space.

In 2007, North Shore Golf Associates and Northshore Investors applied for a permit to redevelop the golf course for residential use, proposing to build 860 residential units on the golf course property. The City filed an action for declaratory judgment in Pierce County Superior Court, requesting an order declaring that the Tax Agreement and the Zoning Agreement restrict the North Shore Golf Course to open space and golf course use, the restrictions are binding until the City agrees to nullify them, and the land use restrictions in the agreements created a real property interest for the City in the golf course. Lovelace, Cooper, and Lyons own homes adjacent to the golf course. They intervened in the declaratory judgment action and requested substantially the same relief as the City, claiming that they were intended third-party beneficiaries of the Tax Agreement and the Zoning Agreement.

resources and scenic beauty for the economic and social well-being of the state and its citizens." RCW 84.34.010.

No. 38941-0-II

The parties filed cross-motions for summary judgment on these issues. The trial court ruled that the land use restrictions in the Tax Agreement and the Zoning Agreement created “an open space land use designation,” not a real property interest for the City. CP at 1,965. The trial court also ruled that the Tax Agreement “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.” CP at 1,964. Finally, the trial court ruled that Lovelace, Cooper, and Lyons are not third-party beneficiaries under the Tax Agreement or the Zoning Agreement and dismissed all of their claims with prejudice.

ANALYSIS

Lovelace, Cooper, and Lyons first assign error to the trial court’s ruling that the Tax Agreement did not create a real property interest for the City in the golf course. They argue that the Tax Agreement created a restrictive running covenant, which is a nonpossessory property interest. North Shore Golf Associates and Northshore Investors respond that Lovelace, Cooper, and Lyons do not have standing to challenge the trial court’s ruling because they do not have standing to enforce the alleged covenant. Thus, we must address whether Lovelace, Cooper, and Lyons have standing before considering whether the Tax Agreement created a restrictive running covenant.

I. STANDING TO ENFORCE A COVENANT

Standing is a party’s right to make a legal claim or seek judicial enforcement of a duty or right. *State v. Link*, 136 Wn. App. 685, 692, 150 P.3d 610 (2007). The doctrine of standing prohibits a party from asserting another’s legal right. *West v. Thurston County*, 144 Wn. App. 573, 578, 183 P.3d 346 (2008). The rule ensures that courts render a final judgment on an actual

No. 38941-0-II

dispute between opposing parties that have a genuine stake in resolving the dispute. *Lakewood Racquet Club, Inc. v. Jensen*, 156 Wn. App. 215, 223, 232 P.3d 1147 (2010). We review standing issues de novo. *Link*, 136 Wn. App. at 692.

A “restrictive covenant” is an agreement between two or more parties that limits permissible land uses. See *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 690, 974 P.2d 836 (1999); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.3 (2000). Enforcement between the original parties is a matter of contract law. *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 257, 215 P.3d 990 (2009); *Leighton v. Leonard*, 22 Wn. App. 136, 139, 589 P.2d 279 (1978). A covenant may also be enforced by the original parties’ successors in interest if the covenant “runs with the land.” See *Deep Water Brewing*, 152 Wn. App. at 257-58; *Leighton*, 22 Wn. App. at 139. Finally, a covenant may be enforced by third-party beneficiaries. See *Deep Water Brewing*, 152 Wn. App. at 255-57; RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 2.6, 8.1. A third-party beneficiary is one who is not a party to the contract but will receive a direct benefit from the contract. See *McDonald Constr. Co. v. Murray*, 5 Wn. App. 68, 70, 485 P.2d 626 (1971). The original contracting parties must have intended to create a third-party beneficiary at the time it formed the contract. See *Ramos v. Arnold*, 141 Wn. App. 11, 21, 169 P.3d 482 (2007).

Here, Lovelace, Cooper, and Lyons are not original parties to the Tax Agreement between North Shore Golf Associates and the City, successors in interest to the original parties, or intended third-party beneficiaries.² They attempt to circumvent this procedural obstacle by

² The trial court ruled that Lovelace, Cooper, and Lyons are not third-party beneficiaries under any of the agreements at issue, including the Tax Agreement. Lovelace, Cooper, and Lyons do not assign error to this conclusion and do not argue that they have standing as third-party

No. 38941-0-II

arguing that even though they are not “conventional third-party beneficiaries,” the benefits of a restrictive running covenant may also be enforced by “remote parties.” Reply Br. of Appellants at 5.

It is not clear how a “remote beneficiary” differs from a third-party beneficiary. Any beneficiary who is not a party to the original contract but nevertheless has the right to enforce the contract is, by definition, a third-party beneficiary. See *McDonald*, 5 Wn. App. at 70, RESTATEMENT (THIRD) OF PROPERTY SERVITUDES, §§ 2.6, 8.1. Furthermore, under Washington law, that a party benefits from a contract does not confer standing to enforce the contract unless the party is an intended third-party beneficiary. See *Warner v. Design & Build Homes, Inc.*, 128 Wn. App. 34, 43, 114 P.3d 664 (2005) (citing *Del Guzzi Constr. Co. v. Global Nw. Ltd.*, 105 Wn.2d 878, 886, 719 P.2d 120 (1986)) (“An incidental, indirect, or inconsequential benefit to a third party is insufficient to demonstrate an intent to create a contract directly obligating the promisor to perform a duty to a third party.”); *McDonald*, 5 Wn. App. at 70 (“An incidental beneficiary acquires no right to recover damages for non-performance of the contract.”).

Finally, the authorities that Lovelace, Cooper, and Lyons rely on do not support their contention that “remote beneficiaries” are an additional category of parties entitled to enforce a covenant. See *Deep Water Brewing*, 152 Wn. App. at 255-61 (successor in interest enforcing a running covenant against an original contracting party); *Save Sea Lawn Acres v. Mercer*, 140 Wn. App. 411, 421-22, 166 P.3d 770 (2007) (discussing, and refusing to apply, the doctrine of implied reciprocal servitudes); 17 WILLIAM B. STOEBUCK, WASHINGTON PRACTICE: REAL

beneficiaries. “Unchallenged conclusions of law become the law of the case.” *State v. Moore*, 73 Wn. App. 805, 811, 871 P.2d 1086 (1994).

No. 38941-0-II

ESTATE: PROPERTY LAW § 3.2, at 126 (2d ed. 2004) (using the term “remote parties” to refer to the successors in interest of an original contracting party).

Lastly, Lovelace, Cooper, and Lyons assert that they have taxpayer standing to enforce the City’s alleged property interest in the North Shore Golf Course. Under certain circumstances, a party may have standing to challenge governmental acts based solely on his or her status as a taxpayer. *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 281, 937 P.2d 1082 (1997). Taxpayer standing is recognized “in the interest of providing a judicial forum for citizens to contest the legality of official acts of their government.” *Greater Harbor 2000*, 132 Wn.2d at 281. Because Lovelace, Cooper, and Lyons seek to enforce a right on behalf of the City and do not contest the legality of an official government act, taxpayer standing does not apply here.

In sum, original contracting parties, their successors in interest, and intended third-party beneficiaries have standing to enforce a running covenant. Lovelace, Cooper, and Lyons do not fit within any of those categories. That they own property adjacent to land allegedly burdened by a running covenant does not confer standing to seek judicial enforcement of the covenant. Accordingly, we hold that Lovelace, Cooper, and Lyons lack standing to challenge the trial court’s conclusion that the Tax Agreement did not convey a real property interest to the City in the form of a restrictive running covenant.

II. DISMISSAL WITH PREJUDICE

Lovelace, Cooper, and Lyons also assign error to the trial court’s order dismissing all of their claims with prejudice. They argue that two of their claims—that the Tax Agreement created a running covenant, and the Tax Agreement and Zoning Agreement created a common

No. 38941-0-II

plan of development—were not before the trial court on summary judgment; therefore, the trial court erred by dismissing those claims.

First, Lovelace, Cooper, and Lyons have not established that they have standing to enforce the running covenant the Tax Agreement allegedly created. For this reason alone, the trial court properly dismissed their restrictive covenant claim. Second, reviewing Lovelace's, Cooper's, and Lyons's complaint shows that all of their claims, including their running covenant claim, were premised on their status as third-party beneficiaries. Thus, the trial court properly dismissed all of their claims, including their restrictive covenant claim, after ruling that they are not third-party beneficiaries.

Third, Lovelace, Cooper, and Lyons did not assert a common plan claim in their complaint. They first raised this argument in their motion opposing North Shore Golf Associates' and Northshore Investors' motion for summary judgment. A civil complaint must "apprise the defendant of the nature of the plaintiff's claims and the legal grounds upon which the claims rest." *Kirby v. City of Tacoma*, 124 Wn. App. 454, 469-70, 98 P.3d 827 (2004) (quoting *Molloy v. Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993)). "A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." *Kirby*, 124 Wn. App. at 472 (quoting *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999)). If a party wishes to amend its pleadings to add an additional claim or theory, CR 15 sets forth the proper procedure for doing so. *See Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment."). Because the common plan claim was improperly pleaded for

No. 38941-0-II

the first time in summary judgment proceedings, the trial court properly dismissed that claim. *See Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) (“[A]n appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court.”).

Finally, even if Lovelace, Cooper, and Lyons had properly asserted a common plan claim, they have not alleged facts sufficient to support the claim. Under the common plan doctrine, when a developer sells land with restrictions designed to implement a common plan of development, the developer impliedly represents to the purchasers that the rest of the land included in the plan is, or will be, similarly restricted. Courts then enforce that representation by imposing an implied equitable servitude on the remaining land included in the developer’s plan. *See Sea Lawn Acres*, 140 Wn. App. at 420-21; RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.14(2)(b) cmt. i, at 190-91 (2000). To establish a common plan of development under Washington law, “substantially all of the property sold must be subject to the covenants sought to be enforced.” *Tindolph v. Schoenfeld Bros., Inc.*, 157 Wash. 605, 610, 289 P. 530 (1930). Here the trial court found:

None of the plats which were approved within the Country Club Estates PRD contains any dedication of open space or other use restrictions that affect the Golf Course property owned by North Shore Golf Associates, Inc.

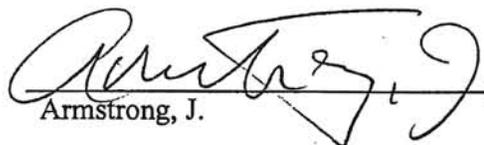
CP at 1,973-74. Thus, Lovelace, Cooper, and Lyons are unable to establish that “substantially all of the property sold” in the North Shore Country Club Estates PRD was subject to a covenant restricting the North Shore Golf Course to golf course and open space use. *Tindolph*, 157 Wash. at 610.

No. 38941-0-II

For these reasons, we affirm the trial court's dismissal of all of Lovelace's, Cooper's, and Lyons's claims on summary judgment.

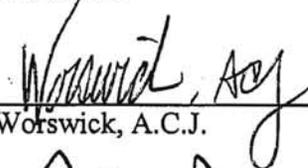
Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

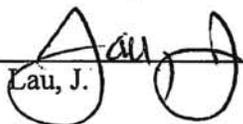


Armstrong, J.

We concur:



Worswick, A.C.J.



Lau, J.