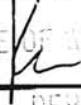


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

No. 42490-8-II

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

NORTHSHORE INVESTORS, LLC, a Washington limited liability
company; and NORTH SHORE GOLF ASSOCIATES, INC., a
Washington corporation; and SAVE NE TACOMA, a Washington non-
profit corporation, et. al.

Appellants/Cross-Respondents

v.

CITY OF TACOMA,

Respondent/Cross-Appellant

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**OPENING BRIEF
OF APPELLANT/CROSS-RESPONDENT
SAVE NE TACOMA, et. al.**

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

III. STATEMENT OF FACTS 3

 A. Initial Development of North Shore County Club
 Estates and the 1981 Approval of the North Shore
 Planned Residential Development. 3

 B. Appellant NSI’s 2007 Applications. 8

 C. The 2010 City Denials of the Applications. 10

 D. NSI’s Untimely LUPA Filing. 11

 E. Superior Court Denial of Motions Brought by the
 City and SNET to Dismiss the LUPA Appeals of
 NSI and NSGA. 12

 F. The Superior Court Affirms the City’s Denial of
 the Applications..... 12

IV. LAW AND ARGUMENT 12

 A. LUPA Standards of Review. 13

 B. The Superior Court Erred in Failing to Dismiss
 NSI’s Amended LUPA Petition as Having Been
 Untimely Served..... 14

 C. The Superior Court Erred in Affirming the
 Examiner’s Determination that Private Yards May
 Be Considered as Meeting the Code-Imposed Open
 Space Requirement. 19

 D. The Court Erred in Affirming the Examiner’s
 Failure to Require Compliance by NSI with the
 Mandatory Procedural and Substantive
 Requirements of RCW 58.17.215. 24

V. CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Chelan County v. Nykreim, 146 Wn.2d 904, 52 P.3d 1 (2002)..... 15

Conom v. Snohomish County, 155 Wn.2d 154, 118 P.3d 344
(2005)..... 14

Griffin v. The Thurston County Board of Health, 137 Wn.
App. 609, 154 P.3d 296 (2007) 22

Habitat Watch v. Skagit County, 155 Wn.2d 397, 120 P.3d 56
(2005)..... 14, 17

Lakeside Indus. v. Thurston County, 119 Wn. App. 886, 83
P.3d 433 (2004) 14

STATUTES

RCW 36.70A.130(1)(b) 24, 30

RCW 36.70A.130(1)(c) 24

RCW 36.70C.....2, 11

RCW 36.70C.010 14

RCW 36.70C.030 14

RCW 36.70C.040..... 15

RCW 36.70C.040(2).....2, 14, 30

RCW 36.70C.040(3)..... 14, 15

RCW 36.70C.040(4)..... 16

RCW 36.70C.040(4)(c) 17

RCW 36.70C.070..... 15

RCW 36.70C.130 13

RCW 58.17.2152, 24, 25, 27, 30

OTHER AUTHORITIES

TMC 13.06.140(F)(6)5

I. INTRODUCTION

This appeal involves the review by the City of Tacoma (the “City”) of applications (“Applications”) submitted by Appellant Northshore Investors, LLC (“NSI”) and North Shore Golf Associates, Inc. (“NSGA”) to ignore the conditions of approval imposed by the City in 1981 as part of its original approval of the planned residential development (“PRD”) known as North Shore County Club Estates. These conditions require that the property comprising the North Shore Golf Course be permanently retained as open space in order to ensure continued compliance with the open space requirements of the City’s PRD code. SAVE NE TACOMA (“SNET”), representing the residents and owners of homes within the PRD who made the decision to reside within North Shore in reliance on the existence of the open space represented by the golf course, vigorously opposed these applications. SNET is fully supportive of the City’s review and denial of the Applications and of the affirmation by the Superior Court of those denials. SNET adopts and incorporates the statements and arguments made by the City in its Opening Brief. In addition, SNET offers the following alternative justifications for the same end result—that the Applications be denied.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in not dismissing with prejudice the Amended Land Use Petition filed by Northshore Investors, LLC and North Shore Golf Associates, Inc. on May 3, 2010, on the basis of lack of jurisdiction pursuant to RCW 36.70C *et seq.* The Amended Land Use Petition was not timely served on Save NE Tacoma (“SNET”) or its attorneys in accordance with either RCW 36.70C.040(2) or the terms of the Stipulation and Order to Consolidate and Stay LUPA Appeals, Set Initial Hearing, Briefing Schedule and Hearing on the Merits filed in this matter on March 11, 2010.

2. The trial court erred in approving the Hearing Examiner’s finding that private yards fit within the definition of open space in the requirements of the planned residential district. Such a finding directly contradicts the 1981 Staff Report and Examiner’s Ruling, disregards common sense, and renders the language “usable, landscaped recreation areas” superfluous.

3. The trial court erred in not finding that Northshore Investments, LLC (“NSI”), failed to comply with the mandatory procedural and substantive requirements for the alteration of an existing plat as required by RCW 58.17.215. RCW 58.17.215 requires consent

of homeowners whose land will be affected by a proposed change in a subdivision; it is undisputed that no such consent was received.

III. STATEMENT OF FACTS

A. Initial Development of North Shore County Club Estates and the 1981 Approval of the North Shore Planned Residential Development.

Northshore Country Club Estates (“County Club Estates”) is a planned residential district consisting of residential developments and an 18-hole golf course situated on approximately 338 acres. CP 123. The PRD is located north of 33rd Street NE and Norpoint Way NE and west of 45th Avenue NE in the City of Tacoma, Washington. CP 123.

Prior to 1978, all property now included in Country Club Estates PRD, including the Golf Course, was owned by the Tacoma Land Company (“TLC”). CP 124. What is now known as Phase 1 of North Shore and at least 9 golf course holes had already been developed at the time the Applications were submitted. The pre-Application zoning classification for the property was R-2, One-Family Dwelling District. CP 126.

In 1981, the City approved a rezone of portions of the North Shore development to R-2 PRD. CP 124. The PRD application excluded the already-developed Phase 1 but included all of the golf course. At the time of the rezone approval, the R-2 PRD zoning

classification provided for greater flexibility in large scale residential developments, including, but not limited to: permitting townhouses, retirement homes and condominiums which were not permitted under the standard R-2 zone; reductions or the elimination of building setback requirements; opportunities to increase building heights above the standard 35-foot limit; reductions in lot size requirements and opportunities to reduce street rights of way below standard code requirements. CP 137. Applying these PRD principles to the original PRD application resulted in densities above what would have been permitted under the standard R-2 zoning code requirements. CP 126.

At the time of the 1981 PRD rezone, the Golf Course was the subject of an “Agreement Concerning North Shore Golf Course” (“Agreement”) between NSGA as the owner of the Golf Course, and the developer of the surrounding Country Club Estates residential area. CP 126. The Agreement allowed the residential property developer to include the Golf Course as an open space and recreation area necessary to obtain an R-2 PRD zoning classification for residential development of the Country Club Estates. CP 126. In reliance on the Agreement, the City approved R-2 PRD zoning for the Golf Course and the surrounding residential properties. CP 126. Tacoma’s decision to

rezone the Country Club Estates property to R-2 PRD was conditioned upon the permanent restriction of the Golf Course to golf course and open space uses. CP 125¹. The PRD open space requirement, in effect both in 1981 and in 2007 when the Applications were submitted, was codified at TMC 13.06.140(F)(6) which provided as follows:

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.

CP 128.

The Staff Report for the 1981 rezone and preliminary plat proposals states that after development of the whole project, approximately 33% of the site will be occupied by the golf course. CP 126. The Report declares that the open space represented by the golf course area is necessary to satisfy the PRD open space requirement and that the applicants intend to use the golf course and other small on-site recreational improvements for that purpose. CP 126. The Report further expresses a concern that the City has no guarantee that the golf course will remain as open space in perpetuity. CP 126.

¹ See also SNET's Opening LUPA Brief, CP 1488-1606, and Exhibit 8 before the City Hearing Examiner.

The City's 1981 approval was actually comprised of three separate and independent applications: (1) a rezone to R-2 PRD; (2) a site plan approval of Divisions 2, 3 and 4 of Country Club Estates; and (3) Preliminary Plat approval of Division 2A. CP 1488-1606.

In Conclusion 4E of his decision and recommendation, the 1981 Hearing Examiner expressed in several separate instances his view that the area of the golf course was necessary to meet the 1/3 PRD open space requirement. CP 125. The Examiner's recommendation, which was subsequently adopted by the Tacoma City Council, called for the approval of each of the three separate applications. CP 127. The Examiner and Council, in approving the three applications, *including particularly the preliminary plat of Division 2A*, made each approval subject, inter alia, to the following condition which reflects the concerns set forth in Conclusion 4E:

The applicant shall submit a legal agreement, which is legally 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.

CP 125 (emphasis added).

The condition was implemented in part by the recordation of a modified Open Space Taxation Agreement ("OSTA") and a Concomitant Zoning Agreement ("CZA").

CP 125.

This plat approval condition was subsequently reviewed by the City Council and was carried forward as a condition of approval of all subsequent plats within the North Shore PRD in 1985, 1986 and 1988. CP 127². Thus, each and every plat within the North Shore PRD is expressly conditioned upon the perpetual existence of the golf course/open space. Further, Note 17 of the final plat for Division II, which was recorded on March 24, 1994, under Recording Number 9403240358, contains the following language originally adopted by the City Council in 1985 to clarify the continuing application of the open space requirement:

17) PRIOR TO THE ISSUANCE OF ANY BUILDING PERMITS, THE CONCOMITANT ZONING AGREEMENT HERETOFORE ISSUED IN CONJUNCTION WITH (THE ORIGINAL 1981 APPROVALS) SHALL BE MODIFIED TO

² See also CP 1488-1606 and particularly Hearing Examiner Exhibit 115.

ENCOMPASS THE REQUIREMENTS (THE ORIGINAL APPROVALS) AND AN OPINION OF THE CITY ATTORNEY OBTAINED THAT THE "OPEN SPACE TAXATION AGREEMENT" ENTERED INTO ON THE 10TH DAY OF MAY, 1979, BY AND BETWEEN THE CITY OF TACOMA AND NORTH SHORE GOLF ASSOCIATES, INC., IS VALID AND LEGAL, IS ENFORCEABLE, EXECUTED BY THE PROPER PARTIES, CONSISTENT WITH CONDITION 4.E OF THE EXAMINER'S REPORT OF MARCH 2, 1981, AND THAT THE AGREEMENT COMPLIES WITH THE REQUIREMENTS OF SECTION 13.06.245, TACOMA CITY ORDINANCES, RELATIVE TO OPEN SPACE REQUIREMENTS. *THE FOREGOING SHALL BE NECESSARY TO ASSURE THE CONTINUED AVAILABILITY OF THE GULF COURSE FOR OPEN SPACE DENSITY REQUIREMENTS IN PERPETUITY.* THE PLANNING DEPARTMENT HAS CONCURRED IN THE FOREGOING CONDITION.³

(emphasis added).

B. Appellant NSI's 2007 Applications.

On January 29, 2007, NSI and NSGA submitted applications for permits to void the 1981 open space approval condition, remove the golf course, and construct 860 residential units consisting of 366 single-family detached units and 494 town home units in its place. CP 124.

In its Rezone Modification application, NSI sought 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

³ CP 1488-1606 and particularly Hearing Examiner Exhibits 217-218.

requires adherence to the approved Site Plan which clearly depicts the golf course. CP 125.

However, NSI applied to modify *only two* of the three 1981 approvals, each of which require the continued existence of the open space represented by the golf course. NSI submitted applications to modify the site plan and to remove the PRD rezone open space condition. No application has been made to remove the *plat approval condition* of each of the plats within the PRD which independently require the continued retention of the golf course open space. CP 125.

NSI's 2007 preliminary plat application relates solely to dividing the land on the golf course. NSI made no application to modify the terms of plat approval for Division 2A or any of the other divisions of Country Club Estates. CP 125.

In support of the applications which were submitted, NSI contends that the private yards of each of the residences within the PRD may be counted towards satisfying the PRD code's open space requirement. Under its interpretation, and even though the golf course would be *entirely* eliminated, NSI contends that the private lawns of homes within the PRD alone provide sufficient open space to satisfy the

code requirement that roughly 1/3 of the area within the PRD be preserved as open space.

C. The 2010 City Denials of the Applications.

On January 7, 2010, the Tacoma Hearing Examiner issued his decisions and recommendation regarding the Applications. CP 122-42. The Examiner recommended that the City Council deny NSI's request for a rezone modification. The Examiner also denied NSI's requested site plan approval and preliminary plat application.

On April 13, 2010, the City Council, by an 8-0 oral vote, rejected the Petitioners' appeal of the hearing examiner's denial of Petitioners' Rezone Modification application. CP 211. The City Council further adopted the Hearing Examiner's findings and conclusions on NSI's Rezone request. CP 211.

The City Council's decision was made orally and was neither a resolution nor the adoption of an ordinance. CP 211, 290-91. The City Council's oral decision was contemporaneously entered into the public record on April 13, 2010, when it was published on the City of Tacoma's website and published in a story on the Tacoma News Tribune's website. CP 204, 300. The Petitioners' counsel was present at the time the oral decision was made and was fully aware of the decision. CP 239-45; 253-55. The City Council's decision was entered

into the public record by further means on April 14, 2010, when it was published on the City of Tacoma's public website. CP 204, 300.

D. NSI's Untimely LUPA Filing.

On May 3, 2010, at 4:11 p.m., Northshore Investors, LLC and North Shore Golf Associates, Inc. filed an Amended Land Use Petition Pursuant to RCW 36.70C *et seq.* (the "Amended Petition"). CP 302-49. Counsel for Save NE Tacoma was served with the Amended Petition for the first time via e-mail at 3:03 p.m. on May 6, 2010, twenty-three days after the Tacoma City Council had issued its decision denying the Rezone Modification on April 10, 2010. CP 351-53; 388. Counsel for Northshore Investors, Aaron Laing, signed a certificate served with the Amended Petition stating that Gary Huff, counsel for Save NE Tacoma, was served via "First Class U.S. Mail and email" on May 6, 2010. CP 352-53. The certificate also stated, "My legal assistant erroneously believed that the pleadings was [*sic*] being served via ECF e-service at the time the document was e-filed with the Court." CP 353. May 6, 2010, was twenty-three days after the Tacoma City Council had issued its oral decision denying the Rezone modification on April 13, 2010; May 6, 2010, was twenty-two days after the decision was entered into the public record by publication on the City of Tacoma's website.

E. Superior Court Denial of Motions Brought by the City and SNET to Dismiss the LUPA Appeals of NSI and NSGA.

The City and SNET each brought motions to dismiss the Amended LUPA Petitions filed by NSI and NSGA. The Court's order denying both motions was filed on June 18, 2010. CP 1390-1392.

F. The Superior Court Affirms the City's Denial of the Applications.

After considering the arguments of all sides on appeal, the Superior Court fully affirmed the City's review and denial of the Applications. The court's ruling, filed on June 18, 2010, also effectively denied SNET's objections regarding alternative grounds justifying the same end result—that the Applications be denied. CP 2315-19.

IV. LAW AND ARGUMENT

The Superior Court affirmed all aspects of the recommendation and decisions of both the Hearing Examiner and City Council without further discussion. Thus, this brief addresses those portions of the findings of the Hearing Examiner which SNET are in error and which should provide alternative legal justification for the City's ultimate conclusion to deny the Applications.

A. LUPA Standards of Review.

The standards for granting relief in appeals brought under the Land Use Petition Act are set forth in RCW 36.70C.130 as follows:

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection have been met. The standards are:

(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 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.

(2) In order to grant relief under this chapter, it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct . . .

B. The Superior Court Erred in Failing to Dismiss NSI's Amended LUPA Petition as Having Been Untimely Served.

LUPA is the “exclusive means of judicial review of land use decisions.” RCW 36.70C.030(1). To challenge a land use decision, an aggrieved party has 21 days to file an appeal. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406, 120 P.3d 56 (2005) (quoting RCW 36.70C.010). “A LUPA petition is timely only if it is filed *and served* within 21 days of the land use decision.” *Lakeside Indus. v. Thurston County*, 119 Wn. App. 886, 899-900, 83 P.3d 433 (2004), *review denied*, 152 Wn.2d 1015 (2004) (emphasis added); RCW 36.70C.040(3). A party’s failure to properly serve a LUPA petition on the necessary parties deprives the Court of jurisdiction. RCW 36.70C.040(2); *Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005). “[A] land use decision becomes unreviewable by the courts if not appealed to superior court within LUPA’s specified timeline.” *Habitat Watch*, 155 Wn.2d at 407. A court lacking jurisdiction must dismiss the matter. *Conom*, 155 Wn.2d at 157.

Here, the parties stipulated to LUPA’s deadlines for service of the Amended Petition. The stipulation expressly states that “[w]ithin twenty-one (21) days of issuance of the City Council’s final decision on the pending related appeal, Applicants’ LUPA petition and/or Save NE

Tacoma's LUPA petition may be amended to address the City Council's decision by filing an amended LUPA petition *consistent with the requirements of RCW 36.70C.040 and .070.*" CP 190 (emphasis added). This stipulation was incorporated as an order of the court: "The parties counsel of record shall accept service of the [Amended Petition], without any waiver of any defense other than improper service, via electronic mail and the Court's e-filing system, which service shall be deemed effective date of electronic transmittal." CP 195. NSI flatly failed to serve the Save NE Tacoma defendants within the 21-day appeal period set forth in RCW 36.70C.040(3) and the court therefore lacked jurisdiction to review the Amended Petition. *See Chelan County v. Nykreim*, 146 Wn.2d 904, 926, 52 P.3d 1 (2002).

RCW 36.70C.040(3) sets forth LUPA's statute of limitation, which begins to run on the date a land use decision is issued. The date on which a land use decision is issued is:

- (a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;
- (b) *If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or*

(c) *If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.*

RCW 36.70C.040(4) (emphasis added).

The land use decision pertaining to the Rezone Modification was made by City Council vote, following deliberation, on April 13, 2010. CP 207, 211. Attorney Aaron Laing, counsel of record for Petitioners, along with Ted Stone, a representative of Petitioner Northshore Investors, were both present at the time the motion denying Petitioners appeal of the Hearing Examiner's recommendation pertaining to the Rezone Modification was declared adopted by the Tacoma City Council. CP 226-38. Mr. Laing made a presentation and gave oral argument on behalf of both Petitioners and was present when the Council voted. CP 239-45; 253-55. Mr. Laing commented on the decision in an article that appeared in the online version of the Tacoma News Tribune on the night of April 13, 2010, and the print version of the newspaper published the following day. *See* CP 378-87. Petitioners indisputably had actual notice of the City's land use decision at the time the decision was made by the City Council on April 13, 2010.

Prior to the filing of the Amended Petition, the parties expressly agreed in the Stipulation and Order that the appeal deadline would be 21 days following the date of the Council's decision. The stipulation

expressly provides that if the Council acts on April 13, 2010, then the appeal deadline would be “on or about May 4, 2010.” CP 188-202. Though Petitioners were clearly aware of the deadline for appeal of the City Council’s decision, they failed to serve the Amended Petition within the prescribed time.

NSI’s actual notice of the land use decision on April 13, 2010, resulted in a LUPA appeal deadline of May 4, 2010, the latest deadline for service of the Amended LUPA Petition. Because the Tacoma City Council’s decision pertaining to the rezone modification was neither a written decision, nor made by ordinance or resolution, RCW 36.70C.040(4)(c) determines the latest date on which the land use decision could be deemed to have issued for purposes of LUPA’s deadline.

Under RCW 36.70C.040(4)(c), in the absence of a written land use decision or decision made by ordinance or resolution, the date on which a land use decision is raised is the date the decision is entered into the public record. The Washington Supreme Court applied RCW 36.70C.040(4)(c) in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 408, 120 P.3d 56 (2005), and dismissed a LUPA where the petitioners therein had not met LUPA’s twenty-one day filing deadline upon

learning of Skagit County's land use decisions in response to a public record request. The Court further observed that LUPA's strict statute of limitations would operate to bar a petition brought more than twenty-one days after *actual notice* of the land use decision. *Id.* at 410 n.8 (2005) (emphasis added). The court stated "decisions made orally at a city council meeting" are deemed issued "when the minutes of the meeting are made open to the public *or* the decision is memorialized such that it is publicly accessible." *Id.* at 408 (emphasis added).

The City of Tacoma's land use decision was entered into the public record on April 13, 2010, at the Tacoma City Council hearing, and when the Tacoma News Tribune published its story on the Council's decision later that night (or at the latest, the following day when the voting record of the proceeding and a transcript were published on the City of Tacoma's official website). CP 204, 300.

Petitioners undeniably had actual notice of the land use decision on April 13, 2010. Consequently, under the Stipulation and Order, the LUPA appeal period ended on May 4, 2010, or, at the latest, on May 5, 2010 (21 days following April 14, 2010, the date when a Voting Record and closed captioned transcript of the City Council Proceedings of April 13, 2010, were posted on the City of Tacoma's official website).

There is no dispute that the Save NE Tacoma petitioners *were not* served until May 6, 2010, more than twenty-one days after Tacoma issued the land use decision pertaining to the Rezone Modification. CP 351. The Amended Petition should therefore have been dismissed with prejudice because the court lacked jurisdiction.

C. The Superior Court Erred in Affirming the Examiner's Determination that Private Yards May Be Considered as Meeting the Code-Imposed Open Space Requirement.

Hearing Examiner Finding of Fact No. 69 reads as follows:

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.

CP 135.

In both 1981 (at the time of the approval of the North Shore PRD) and at the time of the Petitioners' application in 2007, the PRD ordinance TMC 13.06.140(F)(6) required as follows:

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.

CP 131.

Based on the acreage figures included in the Examiner's decision, the golf course comprised 34% of the PRD area. Both the Staff Report

and 1981 Examiner's Conclusions stated that the golf course property *was necessary* in order to meet PRD open space requirements⁴. Thus, it is clear that in 1981, both the City staff and the Hearing Examiner believed that the full acreage of the golf course was necessary to meet this requirement.

As noted in Examiner Finding of Fact No. 63, the Applicants' proposal is predicated on the assumption that private yards may be counted as "usable landscaped recreation area," and thereby satisfy the PRD's 1/3 open space requirement.

Put more simply, the current application can be found to meet the PRD open space requirement *only* if the yards of the residences within the PRD qualify as the type of usable landscaped recreation area which satisfies the 1/3 open space requirement. As further noted by the Examiner in Finding of Fact No. 63: "Under this interpretation, the minimum open space requirements for the PRD can be satisfied *without even using the golf course.*" CP 134 (emphasis added.)

The Examiner's determination that private yards may be used to meet open space requirements is in direct contravention of the 1981 Staff Report and Examiner's ruling. Each of those documents expressly states

⁴ CP 125, CP 1488-1606 and particularly Hearing Examiner Exhibits 8 and 105.

that the open space represented by the golf course *was necessary* to satisfy the PRD open space requirements⁵.

The current Examiner further noted in Finding of Fact No. 64 that:

“ . . . 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.*” CP 134.

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

Finding of Fact No. 65, CP 135.

As noted by the Examiner, the Staff’s interpretation of the open space requirement (but not the language itself) evolved between 1981 and 2007:

“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

⁵ CP 125, CP 1488-1606 and particularly Hearing Examiner Exhibits 8 and 105.

space and have relied heavily on private roads and private yards to meet the requirement.”

Finding of Fact No. 66, CP 135.

Once the City Council learned of this “evolution,” and after this application became vested under the above definition, the Planning Commission and Council reviewed and approved the PRD regulations in a manner which essentially reinstated (and in some ways expanded) the original “1/3 open space requirement.” Finding of Fact No. 67, CP 135.

The fact that the staff’s interpretation may have evolved over time does not mean that the “evolved interpretation” is legally sufficient or justifiable. When such an evolved interpretation leads to the absurd conclusion that *private yards alone* satisfy the requirement that 1/3 of the PRD area be set aside as “usable landscaped recreation area” (thereby nullifying the requirement and making the subject language entirely superfluous), then the legal insufficiency of the “evolved interpretation” is evident.

The rules of statutory construction also apply to the interpretation of municipal ordinances. *Griffin v. The Thurston County Board of Health*, 137 Wn. App. 609, 154 P.3d 296 (2007), *affirmed* 165 Wn.2d 50 (2010). There, the Court stated as follows:

When reviewing ordinances, we first attempt to give effect to the plain meaning of the words. If a provision's meaning is plain on its face, there is no need for interpretation and we give effect to the legislative body's plain meaning . . .

We must give effect to all provisions of an ordinance and may not interpret an ordinance in a way that renders a portion meaningless or superfluous . . .

Id. at 618.

Here, if private yards qualify as open space under the code definition, then the PRD's 1/3 open space requirement and every word included in the phrase "usable, landscaped recreation areas" is rendered meaningless and superfluous. The rules of statutory construction dictate the opposite conclusion.

The "evolved" interpretation might be more legally supportable if the code language merely required that a minimum of one-third of the site shall not be covered by buildings or dedicated street right-of-way. However, the code clearly requires more. "Open space" must be afforded its normal meaning. The PRD must be interpreted in a manner which does not render "usable, landscaped recreation areas" superfluous.

Based on the rules of statutory construction, the Examiner erred in finding that private yards may be used to satisfy the PRD 1/3 open

space requirement. CP 135. The 1981 PRD approval was premised on the notion that the *entirety* of the golf course was necessary to meet code criteria. The original Staff Report, Examiner's approval conditions and Council ratification thereof repeatedly confirm that fact⁶.

The Superior Court's acceptance of the Examiner's failure to properly apply the rules of statutory construction to the PRD open space requirement constitutes an erroneous interpretation and an erroneous application of the law to the facts in violation of RCW 36.70A.130(1)(b) and (d). The conclusion that the PRD open space may be satisfied by private yards is not supported by substantial evidence and is therefore in contravention of RCW 36.70A.130(1)(c).

D. The Court Erred in Affirming the Examiner's Failure to Require Compliance by NSI with the Mandatory Procedural and Substantive Requirements of RCW 58.17.215.

The Superior Court and Hearing Examiner erred in Conclusions of Law Nos. 5 and 6 in failing to deny the Applications based on the Applicants' undisputed failure to comply with the mandatory requirements of RCW 58.17.215.

Conclusion of Law No. 5 states:

⁶ CP 125, CP 1488-1606 and particularly Hearing Examiner Exhibits 8 and 105.

Counsel for Save Northeast 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 that the covenant may be terminated or altered to accomplish the purpose of the subdivision change sought.

CP 140.

In this Conclusion, the Examiner summarizes only a portion of the requirements of the statute. As is more fully explained below, the procedural and substantive requirements of this statute apply regardless of the presence of a covenant--a fact which the Examiner failed to recognize.

Conclusion of Law No. 6 reads as follows:

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.*

CP 140 (emphasis added).

RCW 58.17.215 establishes mandatory procedural and substantive requirements whenever an existing plat is sought to be modified. The statute reads in pertinent part as follows:

When any person is interested in the alteration of any subdivision or the altering of any portion thereof . . . that person shall submit an application to request the alteration to the legislative authority of the city, town, or country where the subdivision is located. *The application shall contain the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered.* If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof.

(Emphasis added.)

In Conclusions of Law Nos. 5 and 6, the Examiner apparently failed to recognize that *each and every plat* within the PRD is expressly conditioned upon the continued existence of the open space represented by the golf course. Further, the Examiner failed recognize that *any* removal of the golf course/open space violates an approval condition of each plat and therefore necessarily constitutes an alteration thereof. *Any* alteration of a plat requires compliance with this statute.

The Examiner is correct in Conclusion of Law No. 6 in stating that the “only plat-related request (in the current application) is the application to plat the golf course.” CP 140. That, however, is exactly the point. *No* application was made here to alter or modify the approval

conditions of any of the PRD plats. RCW 58.17.215 requires that such an application be submitted to alter a subdivision or a portion thereof. The only remaining question is the percentage of the residents of the affected properties that must consent to the removal or alteration of the approval condition.

The Examiner states in Conclusion of Law No. 6 that whether the OSTA qualifies as a covenant under the statute is a matter for judicial interpretation. CP 140. It is true where a covenant is recorded as part of the original plat approval, then the signatures of 100% of the owners within the plat must consent to its removal.

While we firmly believe that the OSTA so qualifies as a covenant, the applicability of the statute is *not* dependent on the resolution of that issue. The 1981 approval condition clearly contemplates the recording of a covenant. CP 125. However, even if the restriction is not a covenant, the statute still requires that: (1) an application be made; and (2) 50% of the owners within the affected plat consent to the alteration. RCW 58.17.215.

Here, it is undisputed that no such application has been made. CP 140. Further, the record includes a document signed by over 88% of the owners within Division II that they will never consent to the

removal of the open space restriction⁷. At a minimum, the consent of at least a majority of the owners within each plat within the PRD must be obtained before the approval conditions of their respective plats can be altered. NSI's failure to apply to the City for the alteration of each plat within the PRD and to obtain those consents is fatal to its application.

While the Examiner declined to require compliance with RCW 58.17.215 and denied the Application via other means, he nonetheless recognized the barrier to redevelopment posed by RCW 58.17.215. In Conclusion of Law No. 7, the Examiner stated as follows:

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.*

CP 140 (emphasis added).

Because Applicants did not apply to alter the open space approval condition in any of the residential plats, then, despite the belated

⁷ Hearing Examiner Exhibit 246.

recognition of the barrier imposed by the above statute, Conclusions of Law Nos. 5 and 6 and the Application cannot stand.

The notion that the approval conditions of the residential plats must be modified as a precondition to golf course redevelopment is not a new concept. In the minutes of the public hearing conducted as part of the 1981 approval, the following language is found at page 9:

The Examiner asked what happened if after awhile the owners of the golf course decided that wanted to sell if for single-family development? Mr. Fishburn (counsel for the applicants) indicated that if his PRD followed the normal course of approval, then the golf course would be zoned R-2 PRD along with the area, which means that in order to develop it, they would have to have at least preliminary plat approval, *and also have an amendment to the preliminary plat*, as well as the fact that the Master Plan is specific⁸.

(emphasis added).

The only plat included as part of the 1981 application was the preliminary plat for Division 2A (later expanded and re-designated as Division II). Even the original developer's counsel understood that: (1) the residential plat approval was to be conditioned on the continued existence of the golf course/open space: and (2) the golf course could not be redeveloped without modifying the residential plat approvals.

⁸ Hearing Examiner Exhibit 8.

Any such modification must comply with RCW 58.17.215 – an effort which NSI has not even attempted. Therefore, the Examiner’s failure to require compliance with RCW 58.17.215 constitutes an erroneous interpretation and application of the law to the facts in violation of RCW 36.70A.130(1)(b) and (d). The court’s approval of the Examiner’s Conclusions of Law Nos. 5 and 6 is clearly erroneous.

V. CONCLUSION

SNET is fully supportive of the result of the City’s review and denial of the Applications. While supportive of the result, SNET offers additional legal grounds and justifications for that result.

Judicial review of NSI’s Amended LUPA Petition should have ceased when NSI failed to timely serve SNET’s counsel. To the extent the trial court found that the Amended LUPA Petition filed on May 3, 2010, was properly served on Petitioners in accordance with RCW 36.70C.040(2), this Court should reverse the court’s decision and dismiss the Amended LUPA Petition for lack of jurisdiction. Further, the Court should reverse the trial court’s affirmation of the Hearing Examiner’s determination that the private yards of PRD residents may be used to satisfy open space requirements. The Court should uphold all other rulings of the trial court and Hearing Examiner.

DATED this 3rd day of January, 2012.

A handwritten signature in black ink, appearing to read "Gary D. Huff". The signature is written in a cursive style with a large, looping initial "G".

Gary D. Huff, WSBA #06185
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COURT OF APPEALS
DIVISION II

DECLARATION OF SERVICE

12 JAN -5 PM 1:11

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

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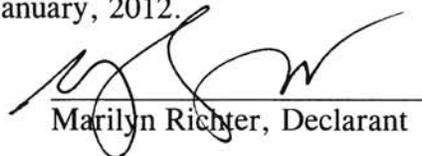
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STATE OF WASHINGTON
2012 JAN -3 PM 4:30

DATED this 3rd day of January, 2012.


Marilyn Richter, Declarant