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I. ARGUMENT AND AUTHORITY IN REPLY

Northshore has satisfied its burden under LUPA for reversal. Northshore has demonstrated that the City's decision to deny its permits was not based upon the merits of the project or the applicable standards, but upon the illegitimate considerations of public opposition and the Owners' alleged past "promise" to keep the Golf Course as open space "in perpetuity." Both the City and Save NE Tacoma argue that it would not be "fair," or, as the City likes to phrase it, "appropriate," to modify the designation in light of this past history. The latter argument, inherently circular, is impossible to overcome: one could never seek to change the use of property, once it was designated for another use, unless the new use was the same as the original use. The Superior Court declared that the past history did not prevent the modification, and that modification should be judged on the City's *articulated* standards. When this Court examines those objective standards and the evidence, it should reverse. Principles of deference do not require that this Court turn a blind eye to the inappropriate bases of the permitting decisions or to grant the City unfettered discretion in site-specific, quasi-judicial land use decisions.

A. **The Record Contains Substantial Evidence to Satisfy TMC 13.06.650's Requirements for a Rezone Modification, while the Denial Is Unsupported by Substantial Evidence or Legitimate Considerations**

Northshore recounted with specific citations to the record the ample evidence that demonstrates satisfaction of TMC 13.06.650's objective criteria. *See Opening Brief*, pp. 5-15 (Statement of the Facts) *and*

pp. 29-43 (Argument regarding TMC 13.06.640). The City and Save NE Tacoma agree that TMC 13.06.650 applies. *See City's Resp. Br.*, 23-24 (Criteria for Approval of Rezone Request); *Save NE Tacoma's Resp. Br.*, pp. 6-8 ("Tacoma Municipal Code Standards for Approval of Appellant's Modification Request").¹ To support the City's decision that the Code provision was not satisfied, Save NE Tacoma fails to cite to the administrative record and instead simply recounts challenged findings. *See, e.g., Save NE Tacoma's Brief*, pp. 17 (citing Findings 73-83 to "support" the City's decision, when these findings are challenged by Northshore). This response is inadequate and should be disregarded. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808-09, 828 P.2d 549 (1992) (holding failure to adequately brief issues is waiver).

The City picks over Northshore's evidence focusing not on what is *in* the record, but on speculation about what other evidence *might* show. *See City's Resp. Br.*, pp. 26-29. The City also argues that the Code gives the City unrestrained discretion to determine whether modification is "appropriate." This Court should reject that argument and hold the City to the standards articulated in TMC 13.06.650(B)(2). When this Court examines the objective standards vis-à-vis the record, the Court should determine that the criteria were satisfied as a matter of fact and law.

1. Substantial Evidence of Changed Conditions Satisfies TMC 13.06.650(B)(2), and this Court

¹ Many of the page numbers provided in Save NE Tacoma's Table of Contents are incorrect. Northshore cites to the page numbers in the body of the brief.

Should Reject the City’s Assertion of a “Two-Part” Test that Gives the City Unfettered Discretion to Deny the Modification Based on a Nebulous “If Appropriate” Standard.

Northshore identified substantial evidence in the record demonstrating changed conditions that supported the rezone modification. This included un rebutted evidence that continued operation of the Golf Course was not viable, and that no purchaser could be found to continue Golf Course operations. *See Opening Brief*, pp. 5-12, 31-33. The un rebutted evidence established that the Golf Course is economically failing, that the owners have tried for years to sell it as a going concern, including funding professional marketing efforts for a decade (*id.* citing CP 1190-1191). The evidence shows that this effort included attempting to sell the Golf Course to the City. *Id.* at p. 9, citing CP 1187. The City failed to even assert that the asking price was not reasonable, but that does not deter the City from speculating, in its findings and in its brief, about what other evidence *might* show. *See* CP 2743 (Decision at Findings 74-79); *City’s Resp. Br.*, pp. 26-29.² Such speculation is not evidence and is insufficient to support denial.

The evidence is not “mixed,” as the City asserts. Looking at the evidence even favorably to the City, it shows that the Golf Course’s economic viability has deteriorated due to an industry-wide decrease in

² For example, the City complains that the record does not show the Owners’ “asking price” for the Golf Course but ignores the un rebutted evidence that the owners attempted to sell the Golf Course for over a decade through professional marketing, including to the City.

golf rounds played. Even though the Owners have contributed millions of dollars to the upkeep of the Golf Course (CP 1186-87), which the Task Force found to be well-maintained and run, AR 7568-73 at ¶ 4.1 (Ex. 275), an influx of “alternate funding” would be necessary to make it viable. *Id.* at ¶ 6.1. The Task Force that studied the Golf Course stated that the declining rounds “are typical of Pierce County Golf Facilities” (*id.* at ¶ 3.1), which, added to the additional supporting evidence specific to declining rounds *at this course*, belies the City’s finding that national trends “may” not apply here. *See* CP 2743 (Decision at ¶ 75). The City’s findings regarding “Changed Circumstances” are based on speculation with a disregard for the un rebutted evidence in the record.

In a somewhat surprising change in emphasis, the City now argues that the Golf Course was always unprofitable, so its failed economic viability should not be considered a changed circumstance. *See City’s Resp. Br.*, pp. 26-27. This argument directly contradicts its own, unchallenged finding that “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.” CP 2743 (Decision at Finding 73). This Court should reject the argument. The City’s and Save NE Tacoma’s responses are unpersuasive in face of the evidence of the Golf Course’s changed economic conditions.

Additionally, Northshore set forth evidence demonstrating that increasingly worse annual flooding of the Golf Course affected its ongoing viability. *See Opening Brief*, pp. 12-15, 33-34. The City readily concedes

these changed conditions. *See City's Resp. Br.*, p. 32-33. This uncontested changed condition both prevents the property's use as a Golf Course during the majority of the year, and contributes to the unprofitability of the Course. This uncontested change in conditions is precisely the type of showing that justifies a modification of the use of the property.

The City suggests this Court should discount the evidence because the City controls the inadequate stormwater facilities in the area and "has the legal authority to address the issue." *City's Resp. Br.*, p. 33. The evidence in the record shows these conditions first appeared in the 1990's with additional development in the area and that the City has done nothing about it. The City would force the Golf Course owners to endure decades of unplayable course conditions, and then oppose the evidence of changed conditions by asserting it could solve the problem if it wanted to. The City's unsupported argument does not rebut the evidence that shows the Golf Course property is no longer suited to function as a golf course.

The admitted rampant, annual flooding directly contradicts the Staff finding adopted by the City that no substantial changes have occurred "affecting the use and development of the golf course site that would indicate that the requested modification to zoning is appropriate." *See CP 2744 (Decision, Finding Nos. 82 & 83)*. The rampant, annual flooding makes the Course unplayable. It affects the use and development of the Golf Course. It is of a type that makes the requested modification appropriate. So are the economic changes affecting the Golf Course.

Tugwell and *Henderson* demonstrate that these are precisely the types of changes in condition to which TMC 13.06.650(B)(2) speaks. The City argues that *Tugwell* and *Henderson* do not stand for the position that, where such changes exist, a rezone should always be granted. *City's Resp. Br.*, p. 32. That may be true, but only if other provisions applicable to the rezone are not met. *Tugwell* and *Henderson* show that economic and physical changes like those shown here objectively satisfy the requirement for "changed conditions" set forth in TMC 13.06.650(B)(2). This Court should conclude that the objective evidence of changed conditions is uncontroverted, and that such changed conditions justify changing the use of the land if the other objective requirements of TMC 13.06.650 are met.

The City argues that *Phoenix Dev. v. Woodinville* supports affirmance. *City's Resp. Br.*, p. 33, citing 171 Wn.2d 820, 256 P.3d 1150 (2011). In essence, the City argues that the *Phoenix* case stands for the proposition that local governments have unfettered, subjective discretion to approve or deny requests for rezones, even in the face of objective criteria. *See id.*, pp. 19-20 & 33. This is not so, and Washington courts have rejected the notion of such broad discretion for nearly a century. *See, e.g., Vincent v. Seattle*, 115 Wash. 475, 479, 197 P. 618, (1921); *Anderson v. City of Issaquah*, 70 Wn. App. 64, 80-81, 851 P.2d 744 (1993).

Contrary to the City's interpretation, the *Phoenix* Court held that "Because the City is **bound** to follow its own ordinances governing rezone applications, . . . a city's decision to rezone is a quasijudicial act." 171 Wn.2d at 836 (emphasis added). In *Phoenix*, our Supreme Court

distinguished provisions of Woodinville’s land use code that *supported* versus *required* approval of the rezone, if all objective criteria were met. *Id.* (noting “Former WMC 21.04.080 does not require the City to rezone under any circumstance—this work is done by WMC 21.44.070.”) Thus, the *Phoenix* Court acknowledged that, if the objective permitting criteria are met, then the rezone must be granted. *See id.* at 835-36.

The *Phoenix* Court found that Woodinville “interpreted the ‘demonstrated need’ criterion under WMC 21.44.070(1) to require ‘an objective judgment by the City Council based upon plans, goals, policies and timeframes.’” *Id.* at 836 (emphasis added). It also found that objective evidence in the record showed that Woodinville “is on target to meet its growth targets for 2022” and “currently has a diversity of housing to allow for a wide variety of housing types, incomes, and living situations,” so the Court upheld Woodinville’s determination that there was not a “demonstrated need” for the rezone. *Id. Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 256 P.3d 1150 (2011). Unlike the *Phoenix* case, the record here amply shows that the Golf Course is failing economically and is flooding, each of which constitute objective evidence to meet TMC 13.06.650(B)(2)’s objective criteria.

Northshore also argued that the inquiry of TMC 13.06.650(B)(2) is limited to changed conditions that affect use and development of the property at issue—the Golf Course—, and that the City went beyond these considerations in its analysis. *Opening Brief*, p. 30-31. The City argues that it could consider changed conditions in the surrounding area to

support its decision. *City's Resp. Br.*, p. 25-26. This is not what the City did. The City instead used what it found was *a lack of changed conditions in the surrounding area* as a counterweight to Northshore's un rebutted evidence of changed conditions to the property. This is not what the Code provision calls for. Northshore's evidence focuses on changes to the subject property, and where this evidence is substantial, as it is here, the lack of changes to the surrounding area are irrelevant.

This Court should conclude that substantial evidence and a proper application of law to the facts result in the conclusion that TMC 13.06.650(B)(2) was satisfied. The City has conceded the rampant, annual flooding but asserts that Northshore's evidence regarding the viability of the Golf Course is insufficient. The record belies the City's assertion. This Court should be left with the firm conviction that the City was mistaken in finding the provision unsatisfied.

The City argues that *even if* the record does establish one or more of these changed circumstances that concern use of the property, the City still had the authority to find (B)(2) unsatisfied based on its subjective opinion that modification was not "appropriate." According to the City, it can consider anything it wishes in this regard. This Court should reject the City's position as a matter of law as a mis-reading of the Code, which requires a showing as follows:

- (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.

TMC 13.06.650(B)(2). This phrasing does not create a two-part test as the City argues permitting the City to deny the permit for failures or considerations not stated in (B)(2). The “is appropriate” language relates to whether the substantial changes in condition that affect the use and development of the property are of a type that would support a change in zoning. They do not draw into (B)(2) an independent consideration such as whether a modification would be “appropriate,” *i.e.*, “fair,” based on the past history. This Court should reject the City’s assertion that the “is appropriate” language vests complete discretion in the City to consider anything it wants to determine if a modification is proper. *See Anderson*, 70 Wn. App. at 81; *Vincent*, 115 Wash. at 479; *accord Phoenix*, 171 Wn.2d at 835-36. If the City is correct, then truly the only standard under its Code is whether the City subjectively believes a rezone “is appropriate”—a standardless standard. *See id.*

The City’s argument is contrary to the plain language and clear intent of the provision and, if adopted, would require landowners to guess at what the City’s rezone requirements might be. “A [permitting] ordinance must contain workable guidelines. Too broad a discretion permits determinations based upon whim, caprice, or subjective considerations.” *Anderson*, 70 Wn. App. at 81. The City would have this Court read *Phoenix* to allow TMC 13.06.650(B)(2)’s reference to “is appropriate” to swallow any objectivity or standards, which reading is precisely the sort of interpretation our court’s reject. *See id.*, *see Vincent*, 115 Wash. at 479 (striking down ordinance that “purports to give the city

council power in its discretion to revoke or refuse any [permit] as it may see fit with or without reason”). If adopted, the City’s argument would require this Court to interpret TMC 13.06.650(B)(2) to give the City unfettered discretion to determine subjectively when a rezone “is appropriate” regardless of the objective circumstances supporting change.

As the case law cited by the parties on this issue shows, the changed conditions requirement is met through the presentation of objective evidence that conditions affecting the subject property (Golf Course) have so-changed so as to warrant a change in use. It is not an open-ended invitation to the City to conclude in tautological fashion that the 1981 documents and the Owner’s past agreement to the open space designation justify a rejection of the application.

The City’s attempt to hijack this language to its own purposes to uphold its decision illustrates the error of the denial and Northshore’s contention that the City did not apply the factors of TMC 13.06.650 but entertained illegitimate considerations. The City denied the project on the basis that the open space conditions were intended to last *in perpetuity* and that the surrounding neighbors did not consent to the change. The City admits this. It directly argues that Northshore “failed to meet its burden that it is ‘appropriate’ to eliminate open space conditions that were intended to last *in perpetuity*.” *City’s Resp. Br.*, p. 3 (emphasis supplied). Through this argument, the City illustrates perfectly why its decision is contrary to the Code and the Declaratory Judgment, which rejected the notion that the City indefinitely could retain the designation based on the

“in perpetuity” language in the 1981 documents. This Court should conclude that the record establishes ample objective evidence of changed conditions sufficient to support a modification to the open space designation under TMC 13.06.650(B)(2)’s objective criteria.

2. Substantial Evidence Shows that the Project Is Necessary to Implement Numerous Policies of the Comprehensive Plan and Alternatively Satisfied 13.06.650(B)(2), so This Court Should Reject the City’s Assertion That Its Comprehensive Plan Is Insufficiently “Express” to Warrant Recognition.

Because Northshore satisfied TMC 13.06.650(B)(2) by demonstrating changed conditions, it is not necessary that this Court resolve whether the project was necessary to implement one or more policies of the City’s Comprehensive Plan. If the Court does reach this issue, it should find that the project is necessary to implement those policies listed in Northshore’s Opening Brief at pp. 34-40. The Court should reject the City’s argument that these policies in its own Plan are not sufficiently “express” to constitute policies to which 13.06.650(B)(2) could apply. *See City’s Resp. Br.*, p. 38-39.

The City argues that Northshore did not establish that the project is “necessary” to accomplish objectives of its Comprehensive Plan. *See City’s Resp. Br.*, p. 37-38. It asserts that the Staff Report analysis, *id.* at Exhibit L, forecloses Northshore’s challenge. The record shows that the Golf Course will be changed from a pay-to-play course used by less than 10% of the population into trails and parks that provide long-planned key linkages to community amenities like Dash Point Park and the NorPoint

Community Center open to all of the public for free. *See Opening Brief*, pp. 34-43. It will always provide open space, just in a different form. *Id.*

The City also argues that its Comprehensive Plan policies and objectives are not sufficiently “express” to qualify for consideration under TMC 13.06.640(B)(2). *City’s Resp. Br.*, p. 39. The provisions of the Comprehensive Plan cited by Northshore rebut the contention. As this Court has already decided in *Tugwell* and *Henderson*, provisions of a Comprehensive Plan such as those cited by Northshore are more than sufficient to be considered in this inquiry.

This Court should reject the City’s characterization that this Division’s decisions *Tugwell* and *Henderson* depart from *SORE v. Snohomish County*, 99 Wn.2d 363, 662 P.2d 816 (1983). *See City’ Resp. Br.*, p. 34 at note 102. These decisions are consistent with *SORE*. The City cites the policy at issue in *Henderson* that “small lot zoning ‘may be preferable’ to twenty acre minimum lots” and characterizes this policy as more express than its own. *Id.* at p. 40, citing *Henderson*, 124 Wn. App. at 755. The point is not well taken where the policy at issue in *Henderson* is suggestive and not mandatory through use of the word “may,” whereas the City’s own policies cited by Northshore are not equivocal.

The record supports the conclusion that the project is necessary to satisfy components of the Comprehensive Plan. This Court should be left with the firm conviction that the City was mistaken in finding that TMC 13.06.640(B)(2) was not satisfied based on the project’s implementation of the Comprehensive Plan.

3. The Project Is Inconsistent with the PRD and Fails to Meet the Public Interest Under TMC 13.06.650(B)(3) and (5) Only if This Court Accepts Respondents' Circular Argument That the Golf Course "Should" Remain Open Space in Perpetuity or That the Adjacent Owners Must Consent to a Modification.

Northshore amply demonstrated why the record shows that the requested modification is consistent with the PRD and meets the public interest. *See Opening Brief*, pp. 40-43. When examined objectively, the record satisfies TMC 13.06.650(3) and (5). The City and Save NE Tacoma rely on impermissible factors to argue against this conclusion. The City first finds fault with its own findings for not expressly addressing the public interest element under TMC 13.06.650(B)(5), and it asks this Court to substitute the City's findings when it addressed the proposed plat. *City's Resp. Br.*, pp. 49-50. The City then supports its conclusion by citing to the SEIS that finds adverse impacts from the loss of the Golf Course views. *Id.* at p. 41 (citing AR 1913, AR 2122-23 (Exs. 91-92)). It also asks for an inference that is not supported by its citations or the record that surrounding property values would decrease from development of the Golf Course. *Id.* (citing inapposite testimony from 1981 project hearing). Save NE Tacoma again simply cites challenged findings to support the conclusion. *See Save NE Tacoma's Brief*, p. 20. The Court should reject these arguments.

The single factor of loss of golf course views does not show inconsistency with the PRD. No evidence, moreover, establishes that property values will decline. Additional residential development is not a

scourge in the community like a garbage dump or an industrial operation. The proposed residential development, with community amenities and public access, is consistent with the PRD. The City and Save NE Tacoma never address the fact that the project is located in a PRD *zoned for R-2 development*. The City's Comprehensive Plan calls for infill development to prevent urban sprawl. The project is consistent with the PRD and existing development, putting homes next to homes. Additionally, judged under the applicable codes—as the Superior Court held—the project's open space requirements are satisfied. This Court should conclude that substantial evidence shows the project is consistent with the PRD.

The record also shows that the project is in the public interest. Case law has shown the public interest met through the additional “tax money to provide additional services to the community is a benefit to the public health, safety, and welfare” and the “further[ing] the goals of the comprehensive plan” by decreasing sprawl. *See, e.g., Henderson* 124 Wn. App. at 756. Northshore's project goes far beyond these showings, benefitting the public in a myriad of ways demonstrated in the *Opening Brief*, pp. 34-43 (project promotes Comprehensive Plan policies, PRD intent and public interest). This evidence is substantial.

The City's single argument about the “adverse effect” of loss of views of the Golf Course is embarrassingly circular: Every time something is replaced, the replaced item is lost to view. If that is a permissible ground for the City's position, it will work for every proposed change anywhere. Surely the City is not permitted to stack the deck that way;

otherwise, the City would never be required even to consider the number of public benefits the project confers. It is contrary to the record to conclude that it is only the preservation of Golf Course views is in the public interest, rather than the myriad of benefits applicable to the greater community that can be gained from the project. Northshore's showing was more than sufficient to establish that the public interest is met.

This Court should conclude that substantial evidence in the record demonstrates that TMC 13.06.650(3) and (5) are satisfied. The City's reliance on impermissible considerations such as lost golf course views further demonstrates that the City's decision was erroneous.

B. The City's Denial of the Project Works an End-Run Around the Declaratory Judgment.

Northshore argued that the Declaratory Judgment issued by the Superior Court in 2009 and affirmed by this Court prevented the City from denying the modification on the basis of the 1981 documents and the owners' then agreement to designate the Golf Course as open space "in perpetuity." See *Opening Brief*, pp. 20-21 (Fact Section); pp. 43-45 (Argument Section). Northshore argued that, based on the Declaratory Judgment, the City was obliged to judge the modification request under its current land use rules, which all parties agree is TMC 13.06.650(B)(2). *Id.* at pp. 43-45. This Court should conclude that the City failed to restrict itself to the criteria of TMC 13.06.650(B), and instead relied upon factors that the Superior Court rejected, including the alleged right to restrict the

designation *in perpetuity* and the lack of consent by the neighboring owners. The denial, therefore, contravenes the Declaratory Judgment.

It is undisputed that TMC 13.06.650(B) does not permit denying the project because the neighboring owners refuse consent. The City nonetheless entered findings and denied the modification because the neighbors did not consent; this fact cannot be refuted. *See* CP 2737-2746 (Decision, at Findings 47, 71, 72, 81, 87, 88, 90, 92, 94, 95, 96, 99). In the eyes of the City and Save NE Tacoma, the lack of consent by neighboring owners and the “unilateral” action of the applicants to seek modification are perfectly valid reasons to deny the modification (or, as articulated in the Decision, that the public interest is not met or it’s inconsistent with the PRD). The Code also contains no estoppel provisions, but the City and Save NE Tacoma take the circular position that the modification can be denied based on the circumstances of its origination. This Court should hold that these reasons, which permeate the denial, are invalid and contradict the Declaratory Judgment. This alone justifies reversal.

The City and Save NE Tacoma mischaracterizes Northshore’s argument when they state that Northshore argues that the Declaratory Judgment compels granting of the permit without regard to the factors of TMC 13.06.650(B), as if the result of review of the application was preordained by the Declaratory Judgment. *See City’s Resp. Br.*, p. 2; *Save NE Tacoma’s Resp. Br.*, p. 25. That is not Northshore’s position.

Consistent with the Declaratory Judgment, Northshore had the burden to satisfy the objective criteria articulated in TMC 13.06.650(B).

Northshore seeks a remedy from this Court because, in the guise of applying TMC 13.06.650(B), the City relied on subjective and illicit factors and considered property rights that the Superior Court declared did not exist. The Superior Court held that the neighboring land owners had no right to insist on the continued open space designation, and that the current Code and not the past history would be dispositive. The City simply flouted those rulings. In truth, it is the lack of neighbor consent and the history of the designation that drive the City's decision. The City thus attempts an end-run around the result of the Declaratory Action. This Court should not permit it.

The City treated Northshore differently from other applicants, despite the Superior Court's unequivocal holding that Northshore should be treated like any other applicant. *See, e.g.*, CP 2734-2735. The City asserts, for example, in an attempt to distinguish these cases, that *Tugwell* and *Henderson* (where rezones were granted) "did not address the unique facts of this case, where a prior zoning decision imposed an open space condition that substantially impacted the Owners' reasonable expectations of profitability." *City's Resp. Br.*, p. 32. *Save NE Tacoma* also asserts that Northshore's application presented a special case, maintaining that the 1981 agreements "provide a contractual element which is not always associated with routine rezone requests" and "arguably makes the normal 'change of circumstances' test inapplicable." *Save NE Tacoma's Resp. Br.*, p. 5. The Superior Court rejected these arguments in the Declaratory Judgment Action. This Court should reject them, too. In doing so, this

Court should find what the City and Save NE Tacoma implicitly concede: during the processing of Northshore's application, Northshore was not treated like any other applicant but was held to a different standard despite the Superior Court's prohibitions against it. Reversal is warranted.

C. Northshore's Evidence Satisfies the Test to Establish a Violation of the Appearance of Fairness Doctrine.

Deputy Mayor Fey's role in the denial violates the appearance of fairness doctrine. *See Opening Brief*, pp. 17-20 (Fact Section); pp. 45-46 (Argument Section). This supports reversal. Northshore set forth the test established by *Magula v. Dep't of Labor & Indus.*, 116 Wn. App. 966, 972, 69 P.3d 354 (2003), that the doctrine is violated where "a reasonably prudent and disinterested observer would conclude" that the claimant did not obtain a fair, impartial, and neutral trial. *Id.* Here, this Court should conclude that any reasonable person would doubt the fairness of the evaluation of Northshore's applications.

Contrary to the City's suggestion, *see City's Br.*, p. 45, this Court does not defer to the trial court's evaluation of the issue. The City cites *State v. Jordan*, 103 Wn. App. 221, 229, 11 P.3d 866 (2000), which is not on point and concerns review of the special situation uniquely within the province of a trial court judge of replacing a juror. *City's Br.*, p. 46, n. 134. As the City tacitly acknowledges, the trial court did not perform any fact finding, but merely reviewed the record evidence. *Id.* This Court is in the same position as the trial court to review the record, and should not defer. *See Jenkins v. Snohomish County PUD No. 1*, 105 Wn.2d 99, 102, 713

P.2d 79 (1986); *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (“[t]he *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.”). The LUPA standard of review briefed by all parties also provides that this Court stands in the shoes of the trial court, see *Wells v. Whatcom County Water Dist. No. 10*, 105 Wn. App. 143, 150, 19 P.3d 453 (2001), which also demonstrates that deference to the trial court is not appropriate. This Court should determine *de novo* whether the City violated the appearance of fairness doctrine when Deputy Mayor Fey deliberated upon and voted to deny Northshore’s applications.

The respondents do not dispute that the doctrine is applicable to the decision at issue. See *City’s Resp. Br.*, pp. 45-48. (Save NE Tacoma does not address the issue.) The thrust of the City’s response is that Fey disputed his alleged bias and stated that he would be fair. *Id.* It is not Northshore’s burden to obtain an admission from Fey that he was biased against Northshore’s applications. The evidence presented by Northshore is more than sufficient to establish actual or potential bias. It is not “ambiguous” evidence as characterized by the City. That Fey did not author the 2007 email explaining his instruction to City staff to “affect/prevent/delay” the project does not, as the City would have it, diminish the evidentiary value of this document. See *City’s Resp. Br.*, p. 47, note 141. The evidence is more than sufficient to satisfy the *Magula* test.

This Court should find unconvincing the City's excuse that Fey may have held some *policy leanings* in opposition to Northshore's project, but no animus to Northshore's project in particular. *See City's Resp. Br.*, p. 47. To the contrary, the evidence shows Fey's opposition directed specifically at Northshore's project. He was opposed to Northshore's project the day Northshore submitted its application. Given this timing, his opposition was not based on a measured review of the application, Code provisions and Staff assessment. Fey vociferously fought the project before any review occurred. Fey pushed a moratorium in place to stall Northshore's project, lamented that Northshore had "beat him to the punch," suggested that the application be found "incomplete" to make the moratorium applicable (which suggestion the City promptly implemented, although a hearing examiner later reigned in that illegitimate effort), and, finally, refused to recuse himself when asked to do so and voted to deny the project.

The Court should reject the City's unconvincing argument (the majority of which appears in footnotes to avoid space limitations on its brief) that this evidence does not satisfy the *Magula* test. If the appearance of fairness doctrine does not apply to achieve reversal upon these facts, it might as well not exist. The record is more than sufficient to convince a reasonable person that Northshore did not obtain a fair, impartial, and neutral hearing before the City.

D. As the Permit Applicant, Northshore Has Standing and Is a Real Party in Interest Able to Appeal All Permitting Decisions at Issue on All Asserted Grounds,

Despite Save NE Tacoma's Unsupported Suggestions to the Contrary.

Save NE Tacoma suggests, with no authority and upon insufficient argument, that Northshore does not have the right to pursue the grounds asserted for reversal. Northshore is obliged to respond, regardless of how serious Save NE Tacoma is in making these assertions. As a project applicant, Northshore has every right to pursue this appeal and all the stated grounds for reversal.

Save NE Tacoma inadequately raises these issues by stating that the Golf Course owner did not appeal, that Northshore cannot argue changed circumstances that affect the Golf Course, and, thrown into its Conclusion, that the Golf Course owner is “the real party in interest.” *Save NE Tacoma's Resp. Br.*, pp. 1-2, 16, 28. Save NE Tacoma offers no citation to authority and no analysis to support what appear as off-hand comments. The Court should reject Save NE Tacoma's suggestion for these failures. *See* RAP 10.3(a)(6) (requiring citation to authority); *Tait v. Wahl*, 97 Wn. App. 765, 770 note 1, 987 P.2d 127 (1999) (“In the absence of argument and citation to authority, an issue raised on appeal will not be considered.”), citing *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991).

Northshore is an applicant and, by statute, a necessary and indispensable party to a LUPA appeal. *See* RCW 36.70C.040(2)(b)(i); *see also Conom v. Snohomish County*, 155 Wn.2d 154, 160, 118 P.3d 344, (2005). As a co-applicant, Northshore is aggrieved by the denials and entitled to appeal under LUPA. *See* RCW 36.70C.060(2) (standing applies

to “**the applicant** and the owner of property to which the land use decision is directed.”) (emphasis added). Save NE Tacoma has already acknowledged this fact having identified and served its own LUPA petition on applicant Northshore.

Northshore is also the real party in interest under Washington Civil Rule 17(a), which provides that “[e]very action shall be prosecuted in the name of the real party of interest.” The real party in interest is “the person who, if successful, will be entitled to the fruits of the action.” *Northwest Indep. Forest Mfrs. v. Dep’t of Labor & Industries*, 78 Wn. App. 707, 716, 899 P.2d 6 (1995). If Northshore prevails, it will be entitled to pursue the project, the fruits of the action. This Court should have no doubt that Northshore is entitled to pursue this appeal.

E. This Court Should Deny the City’s Request for Fees for Failure to Comply with RAP 18.1.

This Court should reject the City’s request for attorney fees pursuant to RCW 4.84.370(1) or (2) because the City failed to comply with RAP 18.1(b). Court rules require that a party requesting fees on appeal “must devote a section of its opening brief to the request for the fees or expenses.” RAP 18.1(b). The City failed to devote a section of its Response Brief to the issue, and also failed first to request fees in its Opening Brief filed in this consolidated appeal. If the City does prevail, it is not entitled to an award.

The City’s fee request is noncompliant. In its Response Brief, the City fails to devote a section of its brief to the request. *See City’s Resp.*

Br. The City only includes a one-sentence request in the last line of its Conclusion, mentioning its authority only in a footnote. *Id.*, at p. 50, note 147 (citing RCW 4.84.370(1)&(2)). This fails to satisfy the requirements of RAP 18.1(b) as enunciated by the Supreme Court in *Wilson Court Ltd. P'ship v. Tony Maroni's*, 134 Wn.2d 692, 710 note 4, 952 P.2d 590 (1998). On similar facts, the Supreme Court held that a request in the last line of the conclusion of a brief does not constitute a separate section in the brief devoted to the fee issue “as required by RAP 18.1(b),” stating:

[Appellant] includes a request for attorney fees and costs in the last line of the conclusion of its Supplemental Brief, but does not include a separate section in its brief devoted to the fees issue as required by RAP 18.1(b). This requirement is mandatory. The rule requires more than a bald request for attorney fees on appeal. Argument and citation to authority are required under the rule to advise us of the appropriate grounds for an award of attorney fees as costs. As *Wilson* fails to fulfill these requirements, attorney fees on appeal are denied.

Id. (citations omitted). Here, the City similarly failed to comply with RAP 18.1(b). The City’s request for fees only in the last line of the Conclusion of its brief, with authority and argument relegated only to a footnote, does not constitute the devotion of a section of the brief to the issue.

Washington courts also have declined to give judicial consideration to issues or aspects of an appeal raised in passing or in a footnote. *See State v. Johnson*, 119 Wn.2d 167, 171 829 P.2d 1082 (1992) (passing treatment of an issue is insufficient to merit judicial consideration); *State v. Johnson*, 69 Wn. App. 189, 194, 847 P.2d 960 (1993) (declining to address merits of argument mentioned only in a

footnote). This Court should deny the City's passing request for attorney fees that fails to comply with RAP 18.1(b).

The City not only failed properly to request fees in its Response Brief, but also failed to request fees in its own Opening Brief supporting its cross appeal. *See City's Opening Brief* filed on or about December 30, 2011. In its own Opening Brief, the City does not mention attorney fees at all. This failure independently warrants rejection of a fee award to the City. *See Zimmerman v. W8Less Prods., LLC*, 160 Wn. App. 678, 698, 248 P.3d 601 (2011) (denying fee request "for failure to meet the requirements of RAP 18.1(b)" where the party failed to request fees in its opening brief but requested fees in subsequent briefing). The lack of a proper request for fees in the City's Opening Brief supports rejection of a fee award to the City.

RAP 18.1 and well-established precedent warrant denial of the City's noncompliant fee request.

II. CONCLUSION

The City denied Northshore's application, despite clear, objective evidence that it met all of the applicable standards. The City ignored the Superior Court's ruling and tautologically required to show that the Golf Course would, in essence, remain a golf course *in perpetuity* in order to change its use. The Decision is based on the City's desire to placate the neighbors in Deputy Mayor Fey's district. Northshore respectfully requests that the Court reverse the City's Decision.

Respectfully submitted this 5th day of March, 2012.

A handwritten signature in black ink, consisting of several overlapping, fluid strokes that are difficult to decipher.

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

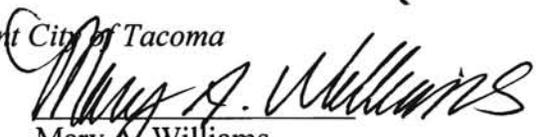
CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March, 2012, I caused to be served via Legal Messenger the foregoing REPLY 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 Appellant / Cross-Respondent 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
Attorneys for Appellant / Cross-Respondent North Shore Golf Associates

Jay P. Derr
Dale N. Johnson
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 Appellant / Cross-Respondent City of Tacoma


Mary A. Williams
PDX/11/1426/155180/AAL/9055267.4