

No. 42490-8-II

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STATE OF WASHINGTON
BY  J. J. J. J.
JULY

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

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

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SAVE NE TACOMA, Johnnie E. Lovelace, Lois S. Cooper and James V. and Renee D. Lyons (together “SNET”) by and through Gary D. Huff of Karr Tuttle Campbell, hereby reply to the Response Brief of Appellant Northshore Investors, LLC. SNET incorporates the factual summary contained in its Opening Brief and offers this restatement of facts, reply and argument.

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

SNET fully supports and adopts by reference the arguments and legal authority presented by the City of Tacoma in its Reply Brief herein.

II. RESTATEMENT OF FACTS.

The following restatement and supplementation of the factual history herein is necessary to fully respond to Appellant’s inaccurate assertions. It is hoped that this restatement will allow the Court to review these arguments in the proper (and in an accurate) perspective.

A. The Adoption and Repeated Re-adoption of the Plat-Based Open Space Approval Condition.

The original 1981 Hearing Examiner Recommendation and Decision addressed three separate and distinct applications and approvals: 1) a rezone to R-2 Planned Residential District (“PRD”); 2) site plan approval for Divisions 2, 3 and 4 of Country Club Estates; and 3) *Preliminary Plat approval of Division 2A*, the first of the residential

subdivisions within the PRD.¹ The Tacoma City Council subsequently approved and adopted the Examiner's recommendation and decision, including specifically the preliminary plat of Division 2A.²

Appellant ignores the fact that the continued existence of the open space was and continues to be an approval requirement not just of the original 1981 rezone and site plan approval (which Appellant has applied to modify) but also of *each and every preliminary and final plat approval within the PRD*. For ease of reference, this discussion will be directed to Division 2A (later expanded to include all of Division 2³). The same analysis applies equally to all plats within the PRD.

Unlike the other aspects of the original Examiner's decision, the plat approval condition was repeatedly reviewed by subsequent City Councils and was carried forward as a condition of approval of all subsequent plats within the North Shore PRD in 1985, 1986 and 1988.⁴ Thus, each and every plat is expressly conditioned upon the on-going existence of the golf course/open space. Further, Note 17 of the final plat for Division II which was recorded in 1994 and which is referenced in the

¹ AR 476-489 (See Appendix A, page 13)

² See Hearing Examiner Exhibit 109

³ Division 2 and Division II are used interchangeably in the historical documents.

⁴ See Appendix F, page 6 (FOF 25) referencing Hearing Examiner Exhibits 115, 217, and 218.

deed to every lot within the division, contains the following language which confirms the continuing application of the plat-based 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 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 golf course for open space density requirements in perpetuity.* The planning department has concurred in the foregoing condition.⁵

(Emphasis added.)

B. Neither the Examiner Nor the Superior Court Has Ruled on the Applicability of RCW 58.17.215 in the Prior Proceedings Herein.

RCW 58.17.215, which establishes the mandatory procedure imposed by state law for the amendment of existing plats, provides 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

⁵ See Appendix B (Hearing Examiner Ex. 218)

to the legislative authority of the city, town, or county 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.

Appellant repeatedly contends throughout its Response⁶ that SNET has litigated this argument in prior proceedings, has lost that legal argument in each instance, and is therefore precluded from raising this argument in this appeal.⁷ Appellant, however, previously acknowledged before the Superior Court in its LUPA appeal that SNET was in fact *not* a party to the Declaratory Judgment Action.⁸

Appellant has also previously acknowledged that “the specific issue of compliance with RCW 58.17.215 was not raised or litigated in the Declaratory Judgment Action.”⁹ In fact, neither the pleadings nor Judge Hartman’s order addresses or even mentions this statute.

⁶ See Appellant’s Response at pages 20, 28, 30, 32.

⁷ See Appellant’ Response at page 29.

⁸ See Appellant’ LUPA Response at page 31.

⁹ *Id* at page 29, line 22 and page 14, line 12.

The following summarizes the role of this statute, if any, in each of the prior proceedings herein.

1. The Examiner’s 2007 Hearing Regarding the Completeness of Appellant’s Application (the “Completeness Hearing”).

At the Completeness Hearing, SNET sought to convince the Examiner to consider RCW 58.17.215 in determining whether Appellant’s application was complete under Tacoma’s land use regulations. SNET argued that the application was incomplete in part due to NSI/Appellant’s failure to comply with above statute. The Examiner limited his ruling regarding the completeness of the application *to the submittal items listed in Tacoma’s land use code*. The Examiner confirmed in his Order on Motion for Clarification, conveniently ignored by Appellant, that he *had not ruled on the applicability of RCW 58.17.215 to the application*.¹⁰

2. The Superior Court Declaratory Judgment Action.

Intervenors John Lovelace, Lois Cooper and Jim and Renee Lyons intervened in City’s declaratory judgment action regarding ongoing validity of Open Space Taxation Agreement (“OSTA”) and Concomitant Zoning agreement (“CZA”). SNET sought court approval to intervene but its motion was denied.

¹⁰See Appendix D (Hearing Examiner Exhibit 227).

All pleadings, arguments, briefing and the decision of Judge Hartman address the OSTA and CZA *only in the context of the original 1981 rezone and site plan approval conditions*. The complaint is specific regarding these limited issues. At no point in these proceedings did any party address or in any way mention the more complicated and ongoing role that the *plat-based* open space condition still plays. All attention was focused solely on the question of the interpretation and on-going validity of the OSTA and CZA as they pertain to Appellant's two pending applications—the requested changes to the rezone and site plan approval conditions. The remaining plat-based open space condition was not before the court. Appellant has acknowledged as much.¹¹ An application to remove the plat-based open space restriction has never been made.

RCW 58.17.215 was never plead, never argued and never even mentioned in this proceeding. The fact that the original plat-based approval condition was later re-adopted on numerous occasions by the City Council and was incorporated on the face of the final recorded plat further gives this condition a wholly separate and independent life.¹² The import of RCW 58.17.215 and its application to these wholly distinct facts has simply never been litigated.

¹¹See Appellant's LUPA Response Brief at page 29, line 22 and page 14, line 12.

SNET does not dispute that in the applicable portion of his ruling, Judge Hartman held OSTA, CZA granted neither the individual intervenors nor the City any third party beneficiary rights in the OSTA and CZA. Nor does SNET dispute the fact that Judge Hartman ruled that neither the OSTA nor CZA, in the context of the original rezone and site plan approvals, created any kind of property interest by others in the golf course. However, it is beyond dispute that Judge Hartman neither addressed nor ruled regarding either the plat-based open space condition or the application of RCW 58.17.215. Those matters were simply not before him.

Judge Hartman dismissed the claims of the individual Intervenor *in this matter*.¹³ “This matter” pertained strictly to the continuing validity and ongoing enforceability of the OSTA and CZA. “This matter” neither included nor addressed: 1) the open space condition in the approval of each of the plats; 2) the language on the face of the Final Plat of Division II; and 3) the applicability and requirements of RCW 58.17.215.

¹² See Appendix F, page 6 (FOF No. 25) referencing Hearing Examiner Exhibits 115, 217, and 218.

¹³ See Appendix E (Order on NSI’s Motion for Summary Judgment) page 4, line 25.

3. **The Superior Court LUPA Proceedings.**

In the LUPA proceedings below, the Superior Court affirmed the City's actions in all respects. Thus, the court did not address the applicability of RCW 58.17.215.

C. **Private Yards as Open Space.**

Tacoma's PRD regulations require the following:

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. All open space shall be maintained free of litter and of conditions constituting a potential public nuisance.¹⁴

As recognized by the Examiner, Appellant's entire development concept is dependent on the notion that the private yards of the PRD's residents qualify as "open space" and therefore cause the above requirement to be satisfied.¹⁵ If private yards do not constitute "open space," then regardless of all other matters, Appellant's proposal cannot be approved.

Chapter 13.06.140 of the Tacoma Municipal Code contains the following provisions which may be of assistance in the Court's interpretation of the definition of open space:

¹⁴ TMC 13.06.140(F)(6)

¹⁵ See Appendix F at page 13 (FOF 63)

1. TMC 13.06.140A. Intent. The PRD Planned Residential Development District is intended to: . . . *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; . . . conserve natural features; and *facilitate more desirable, aesthetic, and efficient use of open space.*

(Emphasis added.)

2. TMC 13.06.140B. Procedures.

...The findings of the Hearing Examiner...shall be concerned with, but not limited to, the following:

- 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.
3. TMC 13.06.140(F)(5). Site coverage. Buildings and structures shall not occupy more than one-third of the gross area of the PRD District.

III. LEGAL ARGUMENT.

A. Private Yards Do Not Meet the PRD Definition of Open Space.

The parties are in agreement that the language of the provisions of the Tacoma Municipal Code must be read in a manner which gives

meaning to each of the terms and does not render any such provision superfluous.

A full reading of TMC 13.06.140(F)(6) is helpful in ascertaining the intent of these code provisions:

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. *All open space shall be maintained free of litter and of conditions constituting a potential public nuisance.*

(Emphasis added.)

The requirement that the open space be kept free of litter only makes sense if private yards are excluded. It is highly unlikely that the drafters of this provision intended to utilize a minimum PRD open space requirement as the vehicle by which individual owners are required to keep their private yards free of litter.

Further, if “private” yards were intended to be included within the definition of open space, then for what purpose would the drafters have required that a portion of such yards should be “usable?” And useable by whom?

Similarly, under what authority could the City require that private yards must be landscaped and maintained? For what purpose would the City mandate the availability of recreational opportunities if such can be

provided solely within private yards? It is nonsensical to assume that the drafters intended that the City should examine and determine how much of each yard is usable and landscaped and measure the extent to which it provides recreation. This language only makes sense when “open space” is given its normal meaning.

The more telling argument arises when the open space definition is read in the context of other PRD code requirements. The following provision is found immediately preceding the 1/3 open space requirement at TMC 13.06.140(F)(5)**Error! Bookmark not defined.** This section provides as follows:

“Site coverage. Buildings and structures shall not occupy more than one-third of the gross area of the PRD District.”

Thus, by definition, a full 2/3 of the land within the PRD must remain uncovered by buildings or structures.

Recognizing that streets and sidewalks are not “structures” and may therefore constitute a portion of the required 2/3 of “uncovered” land within the PRD, it nonetheless stands to reason that even after deducting for roads and sidewalks, the remainder of this “uncovered” area will necessarily be greater than, and therefore at in all cases satisfy, the 1/3 open space requirement.

Under the argument advanced by Appellant, in nearly every conceivable situation and regardless of the existence of *any* open space as that term is commonly understood, the 1/3 open space requirement will *always* be satisfied *solely* by the existence of private yards. That result is inconsistent with the statement of intent adopted as part of and in support of the PRD zoning designation:

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*¹⁶.

The Council's stated intent to facilitate a more desirable, aesthetic, and efficient use of open space is directly at odds with the minimalization, if not the total elimination, of traditional open space which flows from Appellant's proffered interpretation. Allowing private yards to meet open space requirements can (and in many cases certainly would) result in the total elimination of actual shared traditional open spaces. Such an outcome

¹⁶ TMC 13.06.140A--PRD Planned Residential Development District.

would directly contravene the stated purpose of and intent behind the PRD code provisions.

The *only* way to interpret and reconcile this code requirements in a manner in which neither is rendered superfluous is to conclude that private yards cannot be considered to be open spaces under the ordinance.

B. That Appellant Has Not Attempted to Comply With the Mandatory Procedural and Substantive Requirements of RCW 58.17.215 is Beyond Dispute.

1. The Role (or Lack Thereof) of RCW 58.17.215 in Prior Proceedings.

In its Response, Appellant argues that the application of RCW 58.17.215 was already litigated before the Hearing Examiner in his Completeness determination.¹⁷ Appellant ignores the fact that this hearing addressed the extent to which its applications complied with the requirements of Tacoma's municipal code. Appellant further ignores the more compelling fact that the Examiner¹⁸ expressly stated that he was *not* ruling on the applicability of RCW 58.17.215.¹⁹ For Appellant to argue otherwise is quite troublesome. No arguments were made, and the Examiner did not rule, on any matters beyond the completeness of the Applications under Tacoma's code-imposed requirements.

¹⁷ See Appellant's Response at p. 28.

¹⁸ The same Examiner heard and ruled in both the 2009 Completeness Hearing and upon the sufficiency of the Applications in 2010.

As is evidenced in the language of his eventual ruling on the merits of the applications, the Examiner clearly didn't think he had previously ruled on the applicability of RCW 58.17.215. Instead, the Examiner recognized that in the event that his Decision and Recommendation are overturned, the applicability of the statute may eventually need to be determined.²⁰ Despite Appellant's misleading assertions to the contrary, there has been no ruling of the applicability of RCW 58.17.215 to Appellant's plans.²¹

Appellant's characterizations of Judge Hartman's ruling in the Declaratory Judgment Action are equally fanciful. Appellant inaccurately asserts that Judge Hartman ruled that SNET had asserted no rights that could prevent a change to the golf course open space.²² Appellant further asserts (inaccurately and without any reference) that Judge Hartman ruled that the "plats contained nothing that conflicted with a modification of the Golf Course's open space designation."²³

First and as set forth in the Restatement of Facts above, SNET was *not* a party to this litigation. Second, the Declaratory Judgment action was

¹⁹ See Appendix F, p. 19 (COL 5 and 6)

²⁰ See Appendix F, p. 19 (COL 7)

²¹ See Appellant's Response, p. 32.

²² *Id* at p. 33

²³ *Id* at p. 34

brought by the City to determine the ongoing import and effectiveness of the CZA and OSTA. As previously explained above, RCW 58.17.215 was never plead and never argued. It was simply not before the court.

Judge Hartman *did* rule that the individual intervenors had acquired no property rights under the OSTA and CZA in the golf course/open space and were not third party beneficiaries of those agreements. That is far different that Appellant's expansive language regarding both the parties to those proceedings and the matters actually decided.

Appellant acknowledges much too late that the application of RCW 58.17.215 never raised in these proceedings.²⁴ Despite that acknowledgment, Appellant contends that SNET, though not a party to those proceedings, should nonetheless have somehow plead and argued the applicability of state law in order to preserve the claim that compliance with RCW 58.17.215 is required. Appellant again conveniently ignores the subject matter before the court—the ongoing application and enforceability of the CZA and OSTA—and contends that the language of a Superior Court ruling can be interpreted so broadly as to excuse compliance with state law, even by parties not before the court on matters which were never mentioned, not even once, in those proceedings.

Regardless, the requirements of RCW 58.17.215 are mandatory. Compliance with the procedural and substantive elements of this state statute are not optional. Compliance is not dependent on whether any party mentioned the statute in litigation involving wholly separate issues. Compliance with RCW 58.17.215 is separate and distinct from the third party beneficiary/property right matters which were addressed by Judge Hartman.

Appellant's argument further fails to distinguish between the consent which may arise in the context of third party beneficiary status and that which is granted by state law to persons who purchase property within a subdivision based on the terms and conditions of existing plat approvals. Judge Hartman's order does not mention, nor could it in any circumstance excuse, compliance with the paramount mandatory requirements of controlling state law.

2. **The Application of RCW 58.17.215 is not Limited to "Subdivisions."**

Appellant hopes to avoid the application of RCW 58.17.215 by arguing that the golf course/open space is not part of any of the residential subdivisions within the PRD. It therefore contends that it may proceed with its plans unimpeded by the procedural and substantive requirements

²⁴ *Id* at p. 35.

of the statute.²⁵ Even the Examiner at first misunderstood the application of the statute to these facts, assuming that the statute applied only if a covenant is found to have been adopted at the time of original approval:

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.*²⁶

(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.

²⁵ *Id* at p. 40

²⁶ See Appendix F, page 19 (COL 6)

(Emphasis added.)

Here, the Examiner initially failed to recognize that *each and every plat* within the PRD is expressly conditioned upon the continued existence of the golf course/open space. The Examiner was certainly correct in stating that the “only plat-related request (in the current application) is the application to plat the golf course.”²⁷ 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 *any* subdivision or a portion thereof. The only question is the percentage of the residents of the affected properties that must consent to the removal or alteration of the approval condition. The statute applies regardless of the existence of a covenant.

While we firmly believe that the OSTA is 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.²⁸ By its own terms, the recorded OSTA provides at paragraph 5 that “This agreement shall run with the land described herein (the golf

²⁷ See Appendix F, page 19 (COL 60)

²⁸ See Appendix A, page 13 (Conclusion 4E)

course) and shall be binding upon the heirs, successors and assigns of the parties hereto.”²⁹

However, *even if* the restriction is not a covenant, the statute nonetheless requires that: (1) an application be made; and (2) 50% of the owners within the affected plat consent to the alteration.

Here, it is undisputed that no such application has been made. Further, the record includes a document signed by over 88% of the owners within Division II stating that they will never consent to the removal of the open space restriction.³⁰

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. Appellant’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 the removal of the open space posed by RCW 58.17.215. In Conclusion of Law No. 7, the Examiner stated as follows:

²⁹ See Appendix G

³⁰ Hearing Examiner Exhibit 246

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.*³¹

(Emphasis added).

It cannot be seriously disputed that: 1) the 1981 Examiner's open space requirement applied to and became a condition of approval for the rezone, site plan approval *and for the preliminary plat approval of Division IIA*; 2) as noted by the current Examiner, each of the plats within the PRD in some manner carried forward the open space approval condition³²; and 3) the final plat for Division II, recorded in 1994, includes both an open space requirement and a note on the face of the recorded document that the golf course must remain to satisfy the plat's open space requirements.

³¹ See Appendix F, page 19 (COL 7)

³² See Appendix F page 6, (FOF 25)

3. **The Ownership of a Property Interest by SNET in the Golf Course/Open Space Property is not a Precondition to the Applicability of RCW 58.17.215.**

Appellant's conclusory assertion that SNET must possess a property interest in the open space property for the statute to apply is made without reference to any supporting authority. The assertion is also wholly unsupported by the specific language of this statutory provision which provides in pertinent part:

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 county 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.

Upon receipt of an application for alteration, the legislative body shall provide notice of the application to all owners of property within the subdivision . . . The notice shall either establish a date for a public hearing or provide that a hearing may be requested by a person receiving notice within fourteen days of receipt of the notice.

Appellant continues to assert that the only property sought to be physically altered (*i.e.* the golf course) is outside the specific plats. That argument *may* have some merit where the subject property and subdivision are not explicitly tied together by specific documentation and/or approval conditions. Here, the golf course and residential properties are expressly

linked by the plat-related open space condition and the language on the face of the recorded plats. Where, as is indisputably the case here, plat approval is expressly conditioned upon the golf course serving as required open space for the PRD, Appellant's argument is wholly inapplicable.

The Examiner reached the same inescapable conclusion in FOF's 90-92 which recognize that "approving the proposed plat (of the golf course) *would be to alter the primary condition of approval for the surrounding plats.*"³³

To similar effect, the Examiner stated "While the golf course was not subdivided, it was *tied to the adjacent plats* by the Hearing Examiner's 'open space' condition . . . *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."³⁴

Finally, the Examiner found that the removal of the golf course "*must be viewed as modifying those surrounding plats . . .*"³⁵

³³ See Appendix F at page 17 (FOF 90)

³⁴ *Id* at page 17 (FOF 91)

³⁵ *Id* at page 17 (FOF 92)

IV. CONCLUSION

SNET remains fully supportive of the result of the City's review and denial of the Applications. SNET believes, however, that the Examiner and City Council could and should have addressed additional alternative justifications for their very reasoned and appropriate denial of Appellant's applications.

The notion that the City Council, in adopting the PRD code, intended to include private yards within the definition of open space and require that such yards be developed and maintained as usable landscaped recreation areas, is nonsensical on its face. The PRD statement of intent, which clearly expresses the aim of conserving natural features and facilitating a more desirable, aesthetic and efficient use of open space,³⁶ is directly opposed to and inconsistent with Appellant's proffered interpretation.

Instead of promoting more desirable open spaces, Appellant's strained interpretation would eliminate *all* traditionally defined open space. Two-thirds of the PRD is already required to be left uncovered by buildings or structures. If private yards were intended to supply the PRD's open space requirements, then the additional requirement that one-third of

the property be set aside as open space is redundant. The open space requirement would already be satisfied by private yards in every circumstance.

Regarding the applicability of RCW 58.17.215, the Examiner's decision explains in detail how the open space must necessarily be viewed as being a part of each of the PRD plats.³⁷ Each of those plats is expressly conditioned upon the continued existence of the open space. Any removal of that open space necessarily constitutes of modification of each of those plats. RCW 58.17.215 does not preclude plat modifications but imposes mandatory procedural and substantive requirements with which Appellant has not even attempted to comply.

Moreover, as forcefully argued by the City, Appellant's LUPA appeal was untimely filed. The Superior Court was therefore deprived of jurisdiction and this appeal should have been terminated early on.

Failing a favorable ruling regarding the timeliness of Appellant's LUPA petition, this Court interpret "open space" in the normal and accustomed manner and reverse the Hearing Examiner's determination that the private yards of PRD residents may be used to satisfy PRD open space requirements. The Court should confirm the applicability of RCW

³⁶ TMC 13.06.140A

³⁷ See Appendix F at page 17 (FOF 90-92)

58.17.215 and require compliance with its mandatory procedural and substantive requirements.

In all other aspect, we request that this Court uphold all other rulings of the trial court and Hearing Examiner.

DATED this 28th day of February, 2012.



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DECLARATION OF SERVICE

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

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Attorneys for Defendant Northshore Investors, LLC

DATED this 29th day of February, 2012.


Marilyn Richter, Declarant

APPENDIX A

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

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

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

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

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

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

Subsequent to the hearing, the following exhibit was received:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. The property is a low intensity residential area.

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

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

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

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

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

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

Representing the applicant was:

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

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

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

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

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

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

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

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

Speaking in support was:

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

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

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

Speaking in support was:

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

Mr. Armis continuing:

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

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

Testifying in support was:

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

Testifying in support was Professor Bruce Mann who indicated that:

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

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

Professor Mann continuing:

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

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

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

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

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

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

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

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

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

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

FINDINGS, CONCLUSIONS, DECISION, AND RECOMMENDATIONS:

FINDINGS:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS:

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

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

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

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

All of the requests should be approved, subject, however, to compliance by the applicant with the following conditions:

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

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

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

DECISION:

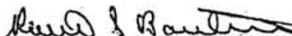
File No. 127.140 - The requested Site Plan is hereby granted, subject to conditions.

RECOMMENDATIONS:

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

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

ORDERED this 2nd day of March, 1981.


ROBERT J. BACKSTEIN, Hearings Examiner

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

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

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

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

NOTICE

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

000048

Exhibit 105

APPENDIX B

**HEARING EXAMINER'S REVISED APPROVAL
OF PRELIMINARY PLAT FOR DIVISION II
NORTH SHORE COUNTRY CLUB ESTATES**

The following language is found at Conclusion 5(u) of the Examiner's May 24, 1985 Recommendation regarding a requested revision to the original 1981 approval of the preliminary plat of North Shore Country Club Estates Division IIA (File 125.227). The identical language is found at Note 17 on the recorded Final Plat for North Shore Country Club Estates Division II:

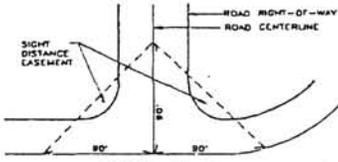
u. PRIOR TO THE ISSUANCE OF ANY BUILDING PERMITS, THE CONCOMITANT ZONING AGREEMENT HERETOFORE ISSUED IN CONJUNCTION WITH (THE ORIGINAL 1981 APPROVALS) SHALL BE MODIFIED TO ENCOMPASS THE REQUIREMENTS (THE ORIGINAL APPROVALS) AND AN OPINION OF THE CITY ATTORNEY OBTAINED THAT THE "OPEN SPACE TAXATION AGREEMENT" 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 GOLF COURSE FOR OPEN SPACE DENSITY REQUIREMENTS IN PERPETUITY. THE PLANNING DEPARTMENT HAS CONCURRED IN THE FOREGOING CONDITION.

006650

NORTH SHORE COUNTRY CLUB ESTATES DIVISION II

A PORTION OF THE SW 1/4 AND OF THE NW 1/4 OF SECTION 23, T. 21 N., R. 3 E., W.M.
CITY OF TACOMA, PIERCE COUNTY, WASHINGTON



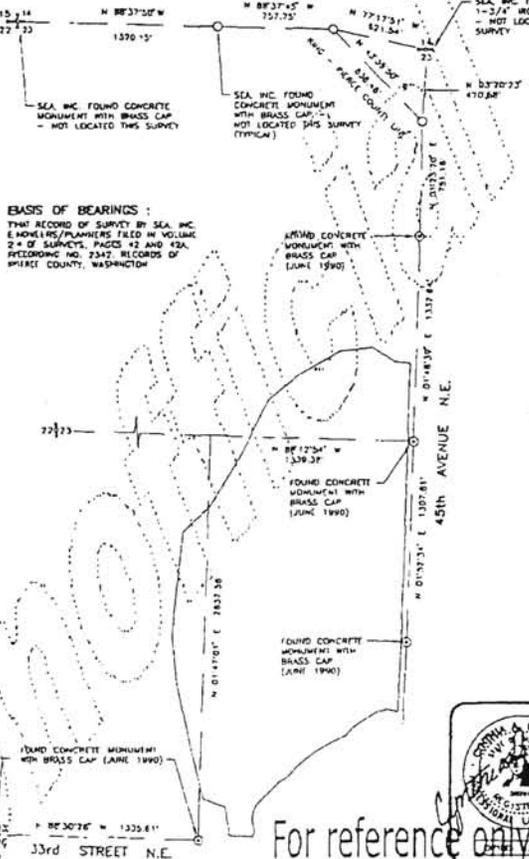
TYPICAL SIGHT DISTANCE EASEMENT DEDICATION OF SIGHT EASEMENT AT STREET INTERSECTIONS AND RESTRICTIVE COVENANTS

KNOW ALL MEN BY THESE PRESENTS THAT WE, THE UNDERSIGNED OWNERS OF THE LAND HEREIN DESCRIBED, ENJOINED AND COVERED BY THIS PLAN, DO HEREBY DEDICATE AND GRANT TO THE PUBLIC AND THE CITY OF TACOMA (HEREINAFTER CALLED THE "CITY") A PERPETUAL SIGHT DISTANCE EASEMENT ON AND OVER THE PRIVATE PROPERTY ADJACENT TO STREET INTERSECTIONS AND DESIGNATED AS SIGHT DISTANCE EASEMENT AREAS ON THIS PLAN, AND THE CITY IS GRANTED THE RIGHT UNDER SUCH EASEMENTS TO CONSTRUCT SUCH SLOPES AND CUTS AND TO REMOVE, AT ANY TIME, ANY VEGETATION, MATERIALS, OR OBSTRUCTIONS OF ANY NATURE AS MAY BE NECESSARY TO PROVIDE FOR UNOBSTRUCTED VIEW OVER AND ACROSS THE HEREIN DESIGNATED SIGHT DISTANCE EASEMENT AREAS AT AND ABOVE AN ELEVATION WHICH IS NOT HIGHER THAN THE ELEVATION OF A TRIANGULAR PLANE ESTABLISHED BY LINES LOCATED 2 (TWO) FEET ABOVE THE FINISHED SURFACE OF THE CENTERLINE OF THE ADJACENT IMPROVED STREET. THOSE LINES EXTENDING FROM THEIR POINT OF INTERSECTION TO A POINT ALONG THOSE EASEMENTS 90 (NINETY) FEET FROM THEIR POINT OF INTERSECTION, TOGETHER WITH OR SUBJECT TO THE FOLLOWING RIGHTS, OBLIGATIONS, COVENANTS, AND CONDITIONS AS FOLLOWS:

- 1) IT IS UNDERSTOOD AND AGREED THAT NEITHER THE OWNER, THE OWNERS, SUCCESSORS OR ASSIGNEES, NOR ANY OCCUPANT OF PRIVATE PROPERTY DESCRIBED IN THIS PLAN SHALL CONSTRUCT OR PLACE ANY STRUCTURE, PROPERTY, MATERIALS OR OBSTRUCTION OF ANY NATURE ON ANY DESIGNATED SIGHT DISTANCE AREA, PROVIDED, HOWEVER, THAT NOTHING HEREIN SHALL PROHIBIT THE PLACING OF OR DROWING OF PLANTS AND VEGETATION UP TO A HEIGHT OF THE ELEVATION OF THE ABOVE DESCRIBED PLANE.
- 2) IT IS COVENANTED AND AGREED THAT THE OWNERS OR OCCUPANTS OF PROPERTY SHALL BE OBLIGATED AT THEIR EXPENSE TO REMOVE ANY UNAUTHORIZED OBSTRUCTION TO SIGHT DISTANCE WHICH MAY BE PLACED OR CONSTRUCTED ON A DESIGNATED SIGHT DISTANCE AREA, AND TO KEEP ALL PLANTS AND VEGETATION ON THE DESIGNATED SIGHT DISTANCE AREA TRIMMED BELOW THE ELEVATION OF THE ABOVE DESCRIBED PLANE, AND UPON FAILURE OF ANY SUCH OWNER OR OCCUPANT TO DO SO, THE CITY SHALL HAVE THE RIGHT AT ANY TIME, WITHOUT NOTICE, TO ENTER UPON SUCH EASEMENT AREA AND REMOVE ANY AND ALL PLANTS AND VEGETATION AND ANY AND ALL OTHER OBSTRUCTIONS AND ENCROACHMENTS EXISTING ON SUCH AREA IN VIOLATION OF THE TERMS AND CONDITIONS OF THIS EASEMENT, AND THE OWNER OF THE PROPERTY ON WHICH SUCH OBSTRUCTIONS ARE REMOVED BY THE CITY SHALL BE LIABLE FOR ANY COSTS THE CITY MAY INCUR IN THE REMOVAL OF SUCH SIGHT OBSTRUCTIONS.
- 3) THE AGREEMENTS AND COVENANTS HEREIN CONTAINED SHALL APPLY TO AND INURE TO THE BENEFIT OF AND BE BINDING UPON THE CITY AND THE OWNER AND HIS RESPECTIVE SUCCESSORS AND ASSIGNS AS IF SO SPECIFICALLY EXPRESSED THROUGHOUT AND SHALL BE COVENANTS RUNNING WITH THE LAND.

SECTION SUBDIVISION

SCALE 1" = 500'



BASIS OF BEARINGS:
THAT RECORD OF SURVEY BY SEA, INC. ENGINEERS/PLANNERS FILED VOLUME 2 OF SURVEYS, PAGES 42 AND 43A, RECORDING NO. 2342, RECORDS OF PIERCE COUNTY, WASHINGTON.

NOTES

- 1) SET 1/2" REBAR AND CAP (ESM, INC. L.S. 15081/23281) AT ALL REAR LOT CORNERS. SET CONCRETE MARK IN THE CURB AT THE SUE LOT LINES PRODUCED TO AN INTERSECTION WITH THE CURB LINE.
- 2) CEMENT CONCRETE SIDEWALKS ON RESIDENTIAL STREET FRONTAGES SHALL BE CONSTRUCTED AS CONDITIONS OF THE ISSUANCE OF BUILDING PERMITS UNLESS OTHERWISE NOTED.
- 3) ALL LOTS SHALL CONNECT TO THE SANITARY SEWER AT THE CONSTRUCTION STAGE.
- 4) ALL NEW CONSTRUCTION SHALL TIE ALL ROOF AND AREA DRAINS TO THE CURB LINE OR TO THE CITY'S STORM SEWER IN AN APPROVED MANNER.
- 5) ALL DRIVEWAYS SHALL BE INSTALLED TO THE APPROVAL OF THE TRAFFIC ENGINEER AND SHALL COMPLY WITH THE DRIVEWAY ORDINANCE.
- 6) THIS SUBDIVISION SHALL NOT USE ASPHALT FLAG FOR ANY PURPOSE.
- 7) PRIVATE STORM DRAINAGE SYSTEMS ARE THE RESPONSIBILITY OF THE OWNERS, SUCCESSORS AND ASSIGNEES OF ALL LOTS BEING SERVED BY THEIR PRIVATE STORM SYSTEM. IT SHALL BE THE OWNER'S RESPONSIBILITY TO MAINTAIN, IMPROVE OR OTHERWISE SERVICE THIS SYSTEM YEARLY OR AT SHORTER INTERVALS SO AS TO PROVIDE FOR CONSISTANT OPERATION. ALL NEEDED REPAIRS SHALL BE DONE IN A TIMELY MANNER AND TO THE APPROVAL OF THE CITY ENGINEER. ANY DAMAGES RESULTING FROM A FAILURE OF THE PRIVATE SYSTEM SHALL BE THE SOLE RESPONSIBILITY OF THE LOTS SERVED.
- 8) FOR ADDITIONAL SUBDIVISION INFORMATION SEE PLAN RECORDS OF SURVEY FILED IN VOLUME 24 OF SURVEYS, PAGES 42 AND 43A, RECORDING NO. 2342 AND THOSE RECORDS OF SURVEYS FILED UNDER RECORDING NOS. 8406770258 AND 8406170117, RECORDS OF PIERCE COUNTY, WASHINGTON.
- 9) SUBJECT TO AN EASEMENT TO CONSTRUCT AND MAINTAIN CUTS AND/OR FILLS FOR SLOPES PER INSTRUMENT FILED UNDER RECORDING NO. 8912200170.
- 10) THE ESTABLISHMENT OF THE FINAL GRADE OF ROADSWAYS FOR THIS SUBDIVISION MAY REQUIRE ADDITIONAL GRADING OF THE LAND ADJACENT TO THE ROADWAY TO PROVIDE ADEQUATE VIEW AND SIGHT DISTANCES, PARTICULARLY AT STREET INTERSECTIONS. IN THE EVENT IT IS NECESSARY TO PROVIDE ADEQUATE VIEW AT INTERSECTIONS AND ELSEWHERE, APPROPRIATE VIEW AND SIGHT DISTANCE EASEMENTS SHALL BE EXECUTED BY THE DEVELOPER IN FAVOR OF THE CITY OF TACOMA FOR SUCH PURPOSES. THE CITY ENGINEER OF THE CITY OF TACOMA SHALL REQUIRE SUCH SIGHT AND VIEW EASEMENTS FOR TRAFFIC PURPOSES AT HIS DISCRETION.
- 11) AS A CONDITION OF THE ISSUANCE OF A BUILDING PERMIT, FOR ANY HOUSE TO BE CONSTRUCTED WITHIN THIS SUBDIVISION, THE BUILDER SHALL OBTAIN APPROVAL BY THE CITY ENGINEER OF A SITE DRAINAGE PLAN. SAID PLAN SHALL INDICATE HOW ALL DRAINAGE FROM THE LOT IN QUESTION IS TO BE HANDLED.
- 12) NO SETBACK VARIANCE WILL BE ALLOWED ON ANY LOT WITHIN THIS PLAN IF THE BASIS FOR SUCH VARIANCE IS TOPOGRAPHICAL DIFFICULTIES OF SITING A STRUCTURE ON THE LOT.
- 13) LEGAL DESCRIPTION AND EASEMENTS, CONDITIONS AND RESTRICTIONS ARE FROM PUGET SOUND TITLE COMPANY ORDER NO. 67834 DATED OCTOBER 27, 1993.
- 14) SUBJECT TO NORTH SHORE JOINDERMENT ZONING AGREEMENT AS FILED UNDER RECORDING NO. 817120139.
- 15) UNDERGROUND POWER WILL BE REQUIRED PER RESOLUTION NO. 18022. THE APPLICANT SHOULD CONTACT THE CONSUMER SERVICE DEPARTMENT OF THE LIGHT DIVISION AT LEAST 45 MONTHS PRIOR TO ANTICIPATED NEED OF ELECTRICAL SERVICE. RELOCATION OF LIGHT DIVISION FACILITIES WILL BE AT THE APPLICANT'S EXPENSE, IF REQUIRED. THE FOLLOWING ELECTRICAL UNDERGROUND EASEMENTS WILL BE REQUIRED: A) 8' ABUTTING THE SOUTH AND EAST SIDES OF ALL 30' RIGHTS-OF-WAY; B) 5' (EASEMENT INCLUDING ALL CU-DI-SLUG, E.) 10' ABUTTING THE SOUTH AND EAST SIDES OF 14' WOODED ROADSWAYS; C) 10' ABUTTING THE WEST SIDE OF 45th AVENUE N.E.
- 16) PRIVATE RESIDENTIAL ACCESS AND ON-STREET PARKING WILL BE ALLOWED ON ALL COLLECTION APPLICABLE EXCEPT WHERE SPECIFICALLY PROHIBITED BY THE PUBLIC WORKS DEPARTMENT. NEITHER PARKING NOR PRIVATE ACCESS WILL BE ALLOWED ON PRINCIPAL OR MAJOR ARTERIALS.
- 17) PRIOR TO THE ISSUANCE OF ANY BUILDING PERMITS, THE JOINDERMENT ZONING AGREEMENT INSTRUMENT ISSUED IN CONNECTION WITH FILE NOS. 130,874, 125,238 AND 127,140 SHALL BE MODIFIED TO ENFORCE THE REQUIREMENTS OF FILE NOS. 134,277 AND 127,238, AND AN ORDER OF THE CITY ATTORNEY DETERMINED THAT THE "OPEN SPACE TAXATION AGREEMENT" ENTERED INTO 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 PROPERTY PARTIES CONSISTENT WITH CONDITION #1 OF THE EXAMINER'S REPORT OF MARCH 2, 1981, AND THAT THE AGREEMENT COMPLIES WITH THE REQUIREMENTS OF SECTION 13.06.240, TACOMA CITY ORDINANCES, RELATIVE TO OPEN SPACE REQUIREMENTS. THE FOREGOING SHALL BE NECESSARY TO ASSURE THE CONTINUED MAINTENANCE OF THE GOLF COURSE FOR OPEN SPACE DENSITY REQUIREMENTS IN PERFECTURE. THE PLANNING DEPARTMENT HAS CONCURRED IN THE FOREGOING CONDITION.

INDEX TO MAP SHEETS

SCALE 1" = 500'



For reference only, not for sale.

01-12-94

ESM inc.
A DIVISION OF THE SURVEYING AND MAPPING GROUP OF THE
34004 9th AVENUE S. BUILDING A
FEDERAL WAY, WASHINGTON 98003
PHONE: [206] 836-8113

DATE: 01-12-94 JOB NO: 181-38-930-003
DRAWN: C. GILZNER SHEET 3 OF 15

9403240358
006651

C.R. 1911481

VOL/PS.

APPENDIX C

RCW 58.17.215
Alteration of subdivision — Procedure.

When any person is interested in the alteration of any subdivision or the altering of any portion thereof, except as provided in RCW 58.17.040(6), that person shall submit an application to request the alteration to the legislative authority of the city, town, or county 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.

Upon receipt of an application for alteration, the legislative body shall provide notice of the application to all owners of property within the subdivision, and as provided for in RCW 58.17.080 and 58.17.090. The notice shall either establish a date for a public hearing or provide that a hearing may be requested by a person receiving notice within fourteen days of receipt of the notice.

The legislative body shall determine the public use and interest in the proposed alteration and may deny or approve the application for alteration. If any land within the alteration is part of an assessment district, any outstanding assessments shall be equitably divided and levied against the remaining lots, parcels, or tracts, or be levied equitably on the lots resulting from the alteration. If any land within the alteration contains a dedication to the general use of persons residing within the subdivision, such land may be altered and divided equitably between the adjacent properties.

After approval of the alteration, the legislative body shall order the applicant to produce a revised drawing of the approved alteration of the final plat or short plat, which after signature of the legislative authority, shall be filed with the county auditor to become the lawful plat of the property.

This section shall not be construed as applying to the alteration or replatting of any plat of state-granted tide or shore lands.

[1987 c 354 § 4.]

APPENDIX D

OFFICE OF THE HEARING EXAMINER
CITY OF TACOMA

| | | |
|-----------------------------------|---|-----------------------------|
| In the Matters of: |) | |
| |) | HEXAPL2007-00002 and |
| NORTHSHORE INVESTORS, LLC, |) | HEXAPL2007-00003 |
| |) | |
| Appellants. |) | ORDER ON MOTION |
| |) | FOR CLARIFICATION |
| v. |) | |
| |) | |
| CITY OF TACOMA, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| SAVE NE TACOMA, |) | |
| |) | |
| Cross Appellant. |) | |

Cross Appellant SAVE NE TACOMA requested reconsideration or clarification of the Hearing Examiner Pro Tempore's decision of July 12, 2007. Applicant Northshore Investors, LLC filed a response opposing the request.

The Hearing Examiner Pro Tempore has considered these submissions and states the following. The decision was directed solely at the Notice of Incompleteness. Conclusion of

ORDER ON MOTION FOR CLARIFICATION

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
(253)591-5195 FAX (253)591-2003

COPY

1 Law 24 and Conclusion of Law 26 should be read in conjunction. No final ruling on the
2 applicability of RCW 58.17.215 was intended.

3 **SO ORDERED** this 30th day of July, 2007.
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6 WICK DUFFORD, Hearing Examiner Pro Tempore
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26 **ORDER ON MOTION FOR
CLARIFICATION**

- 2 -

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
(253)591-5195 FAX (253)591-2003

COPY

APPENDIX E

Signed & sent to Pierce
County for filing on
2/3/09

The Honorable Russell W. Hartman

FEB 04 2009

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

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

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

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

(2) Dismissal of Defendant NSGA's counterclaim for Inverse Condemnation.

(3) Reserving for trial the issue of whether Defendants are estopped to deny that they and the Golf course are bound by the CZA and the issue of whether Plaintiff City of Tacoma is entitled to quiet title in an interest in real property in the Golf Course.

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

(1) The 1979 Agreement Concerning North Shore Golf Course has expired by its terms and does not restrict the Golf Course to open space use in perpetuity;

(2) The 1978 Real Estate Contract between NSGA and Tacoma Land Company, Inc., has expired by its own terms and does not restrict the Golf Course to open space use in perpetuity;

(3) The OSTA does not constitute a property interest in the Golf Course; it is a revocable agreement that does not restrict the Golf Course to open space in perpetuity;

(4) The CZA does not constitute a property interest in the Golf Course; it is a zoning enactment that does not restrict the Golf Course to open space use in perpetuity; and

(5) Dismissal with prejudice of all of Intervenor-Plaintiffs' claims, which request and relief shall be addressed by separate order.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 1 d. Defendants' takings claim arising out of the 1981 PRD zoning decision is
2 barred by the statute of limitations, pursuant to *Orion Corporation v. State*,
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
10 as though it were owned by Nu-West. It is undisputed that the 1979
11 Agreement was presented by the parties and considered during the PRD
12 approval process. Accordingly, the OSTA, CZA, and 1979 Agreement
13 establish a legal relationship that binds the Golf Course to the land use
14 designation set forth in the CZA.
- 15 g. The Defendants do not have the right to unilaterally terminate the OSTA.
16 The express language of the OSTA provides that the use of the Golf Course
17 shall be restricted solely to golf course and open space use unless and until
18 the City of Tacoma consents otherwise. Inclusion of this restriction, which
19 resulted from the land use process, in the OSTA does not violate RCW Ch.
20 84.34 *et seq.*
- 21 h. The open space land use designation on the Golf Course property set forth
22 in the OSTA and CZA does not constitute a property interest held by the
23 City of Tacoma in the Golf Course property.

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

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

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

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

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

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

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

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

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

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

GORDONDERR LLP

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

Approved as to form; notice of presentation waived:

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

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Matthew Turetsky, WSBA #23611
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KARR TUTTLE CAMPBELL, PSC

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

VANDEBERG, JOHNSON & GANDARA, LLP

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

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Attorney for Plaintiff Heritage Bank

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By:

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By: Mark A. Hood by Mark R. Ott (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
Thereto. 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

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Seattle, Washington 98101
TEL 206.682.6600 • 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

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 - 3

4639/001/224085.2

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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 Intervenor 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 NORTSHORE
INVESTORS, LLC'S JOINT MOTION FOR SUMMARY
JUDGMENT DISMISSAL OF INTERVENOR-PLAINTIFFS'
CLAIMS AND DENYING MOTION TO STRIKE - 4
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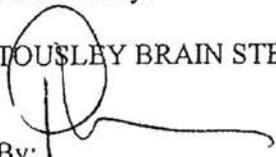
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1 DATED this 27 day of February, 2009.

2
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4 
HONORABLE RUSSELL W. HARTMAN

5 Presented by:

6 TOUSLEY BRAIN STEPHENS PLLC

7
8 By: 

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

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12 SCHWABE, WILLIAMSON & WYATT, P.C.

13 By: _____

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

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

17 KARR TUTTLE CAMPBELL

19 By: _____

20 Steven D. Robinson, WSBA #12999
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22 GORDONDERR LLP

24 By: _____

25 Dale N. Johnson, WSBA #26629
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

4639/001/22A085.2

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1 DATED this _____ day of February, 2009.

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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

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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

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1 DATED this _____ day of February, 2009.

2
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4 HONORABLE RUSSELL W. HARTMAN

5 Presented by:

6 TOUSLEY BRAIN STEPHENS PLLC

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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.

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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

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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 NORTHSHORE INVESTORS, LLC'S JOINT MOTION FOR SUMMARY JUDGMENT DISMISSAL OF INTERVENOR-PLAINTIFFS' CLAIMS AND DENYING MOTION TO STRIKE - 5

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1 DATED this _____ day of February, 2009.

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HONORABLE RUSSELL W. HARTMAN

Presented by:

TOUSLEY BRAIN STEPHENS PLLC

By: _____
Christopher I. Brain, WSBA #5054
Paul W. Moomaw, WSBA #32728
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Associates, Inc.*

SCHWABE, WILLIAMSON & WYATT, P.C.

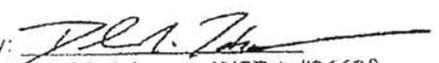
By: _____
Aaron M. Laing, WSBA #34453
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Investors, LLC*

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KARR TUTTLE CAMPBELL

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Attorneys for Intervenor-Plaintiffs

GORDONDERR LLP

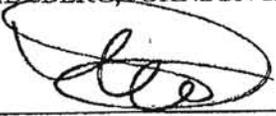
By:  9 FEB 09
Dale N. Johnson, WSBA #26629
Attorneys for Plaintiff City of Tacoma

[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
4639/001/234085.2

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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 NORTHSORE INVESTORS, LLC'S JOINT MOTION FOR SUMMARY JUDGMENT DISMISSAL OF INTERVENOR-PLAINTIFFS' CLAIMS AND DENYING MOTION TO STRIKE - 6

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APPENDIX F

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 rezone through the present, the surrounding residential areas and the golf course area have been in separate ownership.

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

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

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

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

8. The golf course occupies approximately 116 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 1 of Country Club Estates had been approved and was under construction. Except for Division 1, the area around the golf course was at that time undeveloped forest area.

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

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

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

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

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

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

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

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

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

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

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

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

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

Procedural Background for the Subject Application

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conduct of the Hearing

38. The public hearings were conducted in the standard manner for pre-decision permit matters. The City Staff presented an overview of the project and summarized its Staff Report. The applicants made their presentation introducing a redesign of the proposal that it called the "Perfected 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 rezone. They registered no objections to the conditions of approval for the PRD.

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

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

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

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

82. The Staff Report states the following:

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

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

PRD Intent

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

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

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

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

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

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

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

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

Public Interest

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

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

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

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

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

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

General Discussion

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

RECOMMENDATION

The Hearing Examiner recommends that the Rezone Modification be denied.

DECISIONS

The Preliminary Plat is denied.

The Site Plan approval is denied.

SO ORDERED, this 7th day of January, 2010.

ELECTRONIC COPY

Wick Dufford, Hearing Examiner Pro Tempore

APPENDIX G

8110300211

OPEN SPACE TAXATION AGREEMENT

THIS AGREEMENT between NORTH SHORE GOLF ASSOCIATES, INC., hereinafter called the "Owner", and the CITY OF TACOMA is entered into this 27th day of September, 1981.

WHEREAS the Owner of the real property described in the attached Exhibit "A" having made application for classification of that property under the provisions of RCW 84.34, and

WHEREAS both the Owner and the legislative authority desire to limit the use of said property, recognizing that such land has substantial public value as open space and that the preservation of such land constitutes an important physical, social, esthetic and economic asset to the public, and both parties agree that the classification of the property during the life of this agreement shall be for Open Space;

NOW, THEREFORE, the parties, in consideration of the mutual covenants and conditions set forth herein, do agree as follows:

RETURN TO: Pierce County Forester

1. The land use classification under RCW 84.34 (current use taxation) may not change on any portion of the subject property. Any partial change in land use will subject the entire property covered under this agreement to a rollback and penalty.
2. 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 hereunder shall be authorized or allowed without the express consent of the City of Tacoma.
3. A fence shall be placed in proximity to the seventh tee in such fashion as to assure protection to traffic on 33rd Street; the exact location of which fence and length thereof to be determined by North Shore Golf Associates, Inc. in consultation with the City of Tacoma.
4. No structures shall be erected upon such land except those directly related to and compatible with the classified use of the land or except those residence buildings for such individuals as are engaged in the care, use, operation or management of such land.
5. This agreement shall run with the land described herein and shall be binding upon the heirs, successors and assigns of the parties hereto.
6. When any permissible action in eminent domain for the condemnation of the fee title of the land under this agreement is filed or when such land is acquired as a result of a sale to a public body, this agreement shall be null and void as of the date the action is filed, and thereafter this agreement shall not be binding on any party to it.
7. This 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 the City of Tacoma.
8. After the land has been classified and an agreement executed, any change of the use of the land, except through compliance with subparagraphs 7 and 9 of this agreement, shall be considered a breach of this agreement and subject to applicable taxes, penalties and interest as provided in Sections 9 and 12, Chapter 212, Laws of 1973, 1st Ex. Sess.
9. A breach of agreement shall not occur and the additional tax shall not be imposed if the removal of designation resulted solely from:
 - a. Transfer to a government entity in exchange for other land located within the State of Washington;

note

b. A taking through exercise of the power of eminent domain, or sale or transfer to an entity having the power of eminent domain in anticipation of the exercise of such power;

c. A natural disaster such as a flood, windstorm, earthquake or other such calamity rather than by virtue of the act of the landowner changing the use of such property;

d. Official action by an agency of the State of Washington or by the County or City within which the land is located which disallows the present use of such land.

It is declared that this agreement contains the classification and conditions as provided for in RCW 84.34 and the conditions imposed by this legislative authority.

The legal description of the classified land is attached hereto, designated Exhibit "A" and by this reference made a part hereof.

Assessor's Parcel No. 03-21-23-2-016.

DATED this ____ day of September, 1981.

CITY OF TAGOMA

By _____
Mayor

Attest: _____
City Clerk

Legal Description Approved:

Director of Planning

Approved as to form:

Assistant City Attorney

Approved:

County Executive

Approved as to form only:

ROGER J. KOENER, Acting
Chief Civil Deputy Prosecuting
Attorney

As Owner of the property above described, I indicate by my signature that I am aware of the potential tax liability which may arise upon breach hereof and I hereby accept the classification and conditions of this agreement.

NORTH SHORE GOLF ASSOCIATES, INC.

By _____
President
By _____
Secretary

RECORDED

81 OCT 30 PM 2:48

PERCE COUNTY WASH
DEPUTY

STATE OF WASHINGTON)
) ss
County of Pierce)

I, THE UNDERSIGNED, a Notary Public in and for the State of Washington, do hereby certify that on this 21 day of September, 1981, personally appeared before me James Bourne and Patrick C. Comfort, to me known to be the President and Secretary, respectively, of the corporation which executed the above instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes above mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

GIVEN under my hand and official seal the day and year last above



Francis Andreasen
Notary Public in and for the
State of Washington, residing
at Tacoma

SEA INCORPORATED
ENGINEERS/PLANNERS

LEGAL DESCRIPTION
NORTH SHORE GOLF COURSE

That portion of Section 23, T21N, R3E, W.M., City of Tacoma, Pierce County, Washington, more particularly described as follows:

COMMENCING at the Southeast corner of the SW 1/4 of the SW 1/4 of said Section 23;

THENCE N 01°47'01" E, 30.00 feet along the East line of said SW 1/4 of the SW 1/4 to a point on the Northerly margin of 33rd Street N.E. and the TRUE POINT OF BEGINNING;

THENCE S 88°38'30" E, 203.28 feet along said Northerly margin;

THENCE N 01°21'30" E, 46.37 feet;

THENCE N 09°43'22" W, 144.24 feet;

THENCE N 70°01'17" W, 149.44 feet;

THENCE N 14°17'48" W, 341.98 feet;

THENCE N 12°25'18" W, 446.76 feet;

THENCE N 05°15'59" W, 299.83 feet;

THENCE N 05°45'09" E, 381.21 feet;

THENCE N 05°56'49" E, 296.60 feet;

THENCE N 48°02'03" E, 249.67 feet;

THENCE N 31°03'06" E, 380.68 feet;

THENCE N 26°53'30" E, 418.92 feet;

THENCE N 51°49'18" E, 244.02 feet;

THENCE N 60°28'30" E, 318.55 feet;

THENCE N 30°03'06" E, 158.39 feet;

THENCE N 07°26'13" W, 489.21 feet;

THENCE N 51°40'00" E, 274.09 feet;

THENCE N 22°28'46" E, 156.92 feet;

3811 9th AVENUE SOUTH
FEDERAL WAY WASHINGTON STATE
(206) 836-2111

PRINCIPALS
RICHARD H. ARDEN P.E.
FRANCIS
DONALD D. SYRDE P.E.
Suburban Valley Firm
JOE W. HENNING P.E.
Vaux Firm
HARVEY W. HILSON P.E.
Vaux Firm
STELLA M. ANTONIS
Suburban Valley Firm
LARRY J. SIMMONS
ROBERT D. SULLIVAN P.E.
THOMAS E. TRAMBLAT P.E.

EXHIBIT A.

LEGAL DESCRIPTION
North Shore Golf Course
Page 2

SEA
RECORDED

THENCE N 01°52'40" E, 305.16 feet;
THENCE N 21°58'28" W, 307.33 feet;
THENCE N 14°37'15" E, 118.85 feet;
THENCE N 57°01'50" W, 220.51 feet;
THENCE N 68°11'55" W, 269.26 feet;
THENCE N 84°33'35" W, 316.43 feet;
THENCE S 83°26'35" W, 437.86 feet;
THENCE N 80°57'38" W, 222.77 feet;
THENCE S 53°54'59" W, 116.88 feet;
THENCE S 51°25'38" W, 292.47 feet;
THENCE S 45°55'31" W, 134.85 feet;
THENCE S 04°06'24" W, 164.77 feet;
THENCE S 04°11'10" E, 292.21 feet;
THENCE S 30°29'12" E, 109.34 feet;
THENCE S 06°43'59" W, 725.00 feet;
THENCE S 26°33'54" W, 447.21 feet;

THENCE S 28°52'25" W, 419.87 feet to a point on the Northerly line of the plat of "North Shore Country Club Estates, Div. 1" as recorded in Volume 58, Pages 1 through 7, Pierce County;

THENCE S 88°43'58" E, 31.48 feet along said Northerly line;

THENCE along said Northerly line S 71°18'36" E, 154.93 feet;

THENCE along the Easterly line of said plat, S 18°54'24" W, 36.94 feet to a point of curvature;

THENCE Southerly along said Easterly line 186.07 feet along the arc of a non-tangent curve to the left, having a radius of 645.00 feet, the radius point of which bears S 71°13'55" E, through a central angle of 16°31'44" to the end of said curve.



Legal Description
North Shore Golf Course
Page 3

THENCE along said Easterly line, S 02°14'23" W, 1170.50 feet to a point of curvature;

THENCE Southerly along said Easterly line 447.56 feet along the arc of a non-tangent curve to the right, having a radius of 1085.28 feet, the radius point of which bears N 87°45'06" W, through a central angle of 23°37'42", to the end of said curve;

THENCE along said Easterly line, S 51°04'10" E, 104.28 feet to a point of curvature;

THENCE Southeasterly along said Easterly line, 314.08 feet along the arc of a non-tangent curve to the right, having a radius of 270.00 feet, the radius point of which bears S 44°23'49" W, through a central angle of 66°39'02", to the end of said curve;

THENCE S 10°18'41" W, 400.00 feet to a point on the Northerly margin of 33rd Street N.E.;

THENCE along said Northerly margin S 88°30'26" E, 1039.89 feet to the TRUE POINT OF BEGINNING.

EXCEPT that portion situate in said Section 23, more particularly described as follows:

Commencing at the NW corner of said Section 23:

THENCE S 88°37'51" E, 1158.44 feet along the North line of the NW 1/4 of the NW 1/4 of said section;

THENCE S 01°22'09" W, 444.15 feet to the TRUE POINT OF BEGINNING;

THENCE N 85°42'39" E, 401.12 feet;

THENCE S 78°32'28" E, 377.53 feet;

THENCE S 50°18'15" E, 305.13 feet;

THENCE S 01°21'02" E, 458.69 feet;

THENCE S 07°18'32" W, 122.55 feet;

THENCE S 43°12'36" W, 452.77 feet;



Legal Description
North Shore Golf Course
Page 5

THENCE N 30°51'15" W, 448.47 feet;

THENCE N 14°55'53" E, 77.62 feet to the TRUE POINT OF BEGINNING.

AND EXCEPT a 60.00 foot strip in the ownership of Pierce County, more particularly described as follows:

Commencing at the NW corner of said Section 23;

THENCE S 88°37'51" E, 630.08 feet along the North line of the NW 1/4 of the NW 1/4 of said Section 23 to the True Point of Beginning;

THENCE S 01°20'27" W, 1332.90 feet to a point on the South line of said NW 1/4 of the NW 1/4;

THENCE S 88°19'37" E, 60.00 feet along said South line;

THENCE N 01°20'27" E, 1333.22 feet to a point on said North line of the NW 1/4 of the NW 1/4;

THENCE N 88°37'51" W, 60.00 feet along said North line to the True Point of Beginning.

North Shore Golf Course, less exceptions, containing 114.16 acres, more or less.

Entire parcel to be subject to easements for public utilities of all types and ingress-egress easements or dedications.

- 1.2 acres added for right away -



Legal Description
North Shore Golf Course
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THENCE N 08°40'23" W, 596.83 feet;
THENCE N 39°48'20" W, 468.62 feet;
THENCE N 61°11'21" W, 342.38 feet;
THENCE N 00°00'00" E, 35.00 feet to the TRUE POINT OF
BEGINNING.

AND EXCEPT that portion situate in said Section 23, more
particularly described as follows:

Commencing at the NW corner of said Section 23;

THENCE S 88°37'51" E, 874.37 feet along the North line of
said NW 1/4 of the NW 1/4;

THENCE S 01°22'09" W, 696.01 feet to the TRUE POINT OF
BEGINNING:

THENCE N 86°03'17" E, 290.69 feet;
THENCE S 64°17'24" E, 449.50 feet;
THENCE S 05°33'11" E, 361.70 feet;
THENCE S 80°32'16" E, 60.83 feet;
THENCE S 19°39'14" E, 74.33 feet;
THENCE S 04°36'38" W, 311.01 feet;
THENCE S 22°04'04" W, 399.25 feet;
THENCE S 31°22'23" W, 480.21 feet;
THENCE S 25°12'04" W, 187.88 feet;
THENCE N 61°41'57" W, 147.65 feet;
THENCE N 06°20'25" W, 90.55 feet;
THENCE N 50°18'35" W, 302.58 feet;
THENCE N 12°12'09" E, 723.10 feet;
THENCE N 18°40'36" E, 374.73 feet;

STATE OF WASHINGTON, County of Pierce
I, Pat McCarthy, Auditor, of the above
entitled county, do hereby certify that this
foregoing instrument is a true and correct copy
of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of Said County.



PAT McCARTHY Auditor

By: [Signature] Deputy

Date: NOV 18 2008

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Attachment D