Court of Appeals No. 48016-6-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

MARK AVOLIO, JOHN BAKER,
MAUREEN DeARMOND, and ANDY MERKO,

appellants,

v.

CEDARS GOLF, LLC,

respondent.

BRIEF OF APPELLANT

Mark A. Erikson, WSBA #23106
Erikson & Associates, PLLC
Attorneys for Mark Avolio, John Baker,
Maureen Dearmond, and Andy Merko,
as appellants
110 West 13th Street
Vancouver, WA 98660-2904
Telephone (360) 696-1012
E-mail: mark@eriksonlaw.com
kris@eriksonlaw.com

TABLE OF CONTENTS

Table of Authorities iii

I. Introduction 1

II. Assignments of Error

Assignment of Error 1

Issues Pertaining to Assignment of Error 2

III. Statement of the Case 3

IV. Summary of Argument 7

V. Argument 8

Standard of Review 8

ISSUE 1: Whether hearing examiner determinations which are outside of delegated authority have preclusive effect in subsequent Superior Court proceedings? 9

ISSUE 2: Whether parties are precluded who participate in administrative proceedings but do not challenge issues raised in subsequent court action? 22

ISSUE 3: Whether public policy weighs against the application of collateral estoppel to bar a subsequent action to enforce a restrictive covenant where a land use hearing examiner found the covenant unenforceable in ruling on the applicability of RCW 58.17.215 to a plat alteration? 24

ISSUE 4: Where the description of property encumbered by a restrictive covenant is unambiguous, does authority to annex additional property from an area which is nearly coextensive preclude enforcement? 26

Summary Judgment 29

VI. Conclusion 30

Appendix A – Washington Statutes
RCW 2.08.010 . . . . . A-1
RCW 36.70C.010 . . . . . A-2
RCW 36.70C.030 . . . . . A-3
RCW 36.70C.040 . . . . . A-4
RCW 58.17.215 . . . . . A-6

Appendix B – Washington Constitution
WA. Const., art. 4, §4 . . . . . A-7

Battle Ground Municipal Code
BGMC 2.10.070 . . . . . A-8
BGMC 2.10.080 . . . . . A-9

TABLE OF AUTHORITIES

Washington Cases

Asche v. Bloomquist,
132 Wash.App. 784, 133 P.3d 475 (2006) 17, 18

Bigelow v. Mood,
56 Wash.2d 340, 353 P.2d 429 (1960) 27

Burton v. Douglas County,
65 Wash.2d 619, 399 P.2d 68 (1965) 21

Cambridge Townhomes v. Pacific Star Roofing,
166 Wash.2d 475, 209 P.3d 863 (2009) 29

Chaussee v. Snohomish County,
38 Wash.App. 630, 689 P.2d 1084 (1984) 11

Christensen v. Grant County Hospital,
152 Wash.2d 299, 96 P.3d 957 (2004) 8, 9, 11, 22, 24, 25-26

Deja Vu v. Federal Way,
96 Wash.App. 255, 979 P.2d 464 (1999) 22

Dickson v. Kates,
132 Wash.App. 724, 133 P.3d 498 (2006) 27

Durland v. San Juan County,
182 Wash.2d 55, 340 P.3d 191 (2014) 16

East v. Fields,
42 Wash.2d 924, 259 P.2d 639 (1953) 14

Estate of Hambleton,
181 Wash.2d 802, 335 P.3d 398 (2014) 18

Folsom v. Burger King,
135 Wash.2d 658, 958 P.2d 301 (1998) 8

Grader v. Lynnwood,
45 Wash.App. 876, 728 P.2d 1057 (1986) 16

Grandmaster Sheng Yen Lu v. King County,
110 Wash.App. 92, 38 P.3d 1040 (2002) 16-17

Gwinn v. Cleaver,
56 Wash.2d 612, 354 P.2d 913 (1960) 28

Hadley v. Maxwell,
144 Wash.2d 306, 27 P.3d 600 (2001) 24-25

Haslund v. Seattle,
86 Wash.2d 607, 547 P.2d 1221 (1976) 21

Hayes v. Seattle,
131 Wash.2d 706, 934 P.2d 1179, 943 P.2d 265 (1997) 19, 20, 21, 22

Howell v. Inland Empire,
28 Wash.App. 494, 624 P.2d 739 (1981) 27

Jensen v. Lake Jane Estates,
165 Wash.App. 100, 267 P.3d 435 (2011) 29

Knight v. Yelm,
173 Wash.2d 325, 267 P.3d 973 (2011) 16

Lake Limerick v. Hunt Mfg. Homes,
120 Wash.App. 246, 84 P.3d 295 (2004) 27, 28

Lakey v. Puget Sound Energy,
176 Wash.2d 909, 296 P.3d 860 (2013) 17

Lige & Wm. B. Dickson Company v. County of Pierce,
65 Wash. App. 614, 829 P.2d 217 (1992) 16

Luisi Truck Lines v. Washington Utilities & Transp. Comm.,
72 Wash.2d 887, 435 P.2d 654 (1967) 14

Maranatha Mining v. Pierce County,
59 Wash.App. 795, 801 P.2d 985 (1990) 16

Marino Property Company v. Port of Seattle,
97 Wash.2d 307, 644 P.2d 1181 (1982) 19

McDaniels v. Carlson,
108 Wash.2d 299, 738 P.2d 254 (1987) 8, 23

McGee v. Wineholt,
23 Wash. 748, 63 P. 571 (1901) 14

Mellor v. Chamberlin,
100 Wash.2d 643, 673 P.2d 610 (1983) 23

Nielson v. Spanaway General Medical Clinic,
135 Wash.2d 255, 956 P.2d 312 (1998) 9

Norco v. King County,
106 Wash.2d 290, 721 P.2d 511 (1986) 20

Ohler v. Tacoma General Hospital,
92 Wash.2d 507, 598 P.2d 1358 (1979) 30

Olson Land v. Seattle,
76 Wash. 142, 136 P. 118 (1913) 27

Pacific County v. Sherwood Pacific,
17 Wash.App. 790, 567 P.2d 642 (1977) 10

Post v. Tacoma,
167 Wash.2d 300, 217 P.3d 1179 (2009) 16

Reninger v. Dept of Corrections,
134 Wash.2d 437, 951 P.2d 782 (1998) 9, 10, 24

Selby v. Knudson,
77 Wash.App. 189, 890 P.2d 514 (1995) 27, 28

Shoemaker v. Bremerton,
109 Wash.2d 504, 745 P.2d 858 (1987) 9, 10, 12

Smith v. Bates Technical College,
139 Wash.2d 793, 991 P.2d 1135 (2000) 26

State v. Mullin-Coston,
152 Wash.2d 107, 95 P.3d 321 (2004) 23

State v. Williams,
132 Wash.2d 248, 937 P.2d 1052 (1997) 9, 24, 25-26

State v. Vasquez,
148 Wash.2d 303, 59 P.3d 648 (2002) 24

Stevedoring Services v. Eggert,
129 Wash.2d 17, 914 P.2d 737 (1996) 10

Vancouver v. Jarvis,
76 Wash.2d 110, 455 P.2d 591 (1969) 12

Viking Properties v. Holm,
155 Wash.2d 112, 118 P.3d 322 (2005) 16

White v. Wilhelm,
34 Wash.App. 763, 665 P.2d 407 (1983) 29

Wilkinson v. Chiwawa Communities,
180 Wash.2d 241, 327 P.3d 614 (2014) 10, 11

Woods View II v. Kitsap County,
188 Wash.App. 1, 352 P.3d 807 (2015) 17

Federal Cases

United States v. Utah Construction & Mining,
384 U.S. 394, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966) 10

Washington Statutes

RCW 2.08.010 21

RCW 36.70C.010 16

RCW 36.70C.030 16

RCW 36.70C.040 16

RCW 58.17.215 . . . . . 2, 6, 7, 8, 13, 14, 15, 18, 23, 24, 30

Washington Constitution

WA. Const., art. 4, §4 21

Battle Ground Municipal Code

BGMC 2.10.070 12

BGMC 2.10.080 . . . . . 12, 18

I. INTRODUCTION

This appeal involves the application of administrative collateral estoppel to preclude enforcement of contract rights under a restrictive covenant. While it is reasonable to hold administrative determinations preclusive in areas of administrative competence, the sphere of competence must be closely drawn to avoid conferring *defacto* power outside of authority delegated by statute. A hearing examiner's competence does not include the interpretation nor enforcement of restrictive covenants.

* * *

II. ASSIGNMENTS OF ERROR

Assignment of Error:

Appellants, Mark Avolio, John Baker, Maureen DeArmond, and Andrew Merko, assign error to the following:

1. Trial court's grant of Cedars Golf's motion for summary judgment dismissing appellants' claims with prejudice under CR 56 (*Order* filed September 4, 2015). *CP 372*, ln. 21-22.

2. Trial court's denial of appellants' "cross-motion for summary declaratory judgment that restrictive covenants preclude further subdivision of Lots 1 and 8, Phase II of The Cedars." *CP 182*, ln. 15-16; *CP 373*, ln. 1.

3. Trial court's denial of appellants' *Motion for Reconsideration* filed August 28, 2015. *CP 370.*

* * *

Issues Pertaining to Assignments of Error

ISSUE 1: Whether hearing examiner determinations which are outside of delegated authority have preclusive effect in subsequent Superior Court proceedings? (Assignments of Error 1 and 2.)

ISSUE 2: Whether parties are precluded who participate in administrative proceedings but do not challenge issues raised in subsequent court action? (Assignments of Error 1, 2 and 3.)

ISSUE 3: Whether public policy weighs against the application of collateral estoppel to bar a subsequent action to enforce a restrictive covenant where a land use hearing examiner found the covenant unenforceable in ruling on the applicability of RCW 58.17.215 to a plat alteration? (Assignments of Error 1 and 2.)

ISSUE 4: Where the description of property encumbered by a restrictive covenant is unambiguous, does authority to annex additional property from an area which is nearly coextensive preclude enforcement? (Assignments of Error 1 and 2.)

III. STATEMENT OF THE CASE

The appellants own and reside upon lots within The Cedars residential subdivision in Battle Ground, Washington. Lots belonging to appellants Avolio (Lot 6), DeArmond and Merko (Lot 7) are located in Phase II of the Cedars, *CP 1-2*, depicted at *CP 236*. Appellant Baker's lot is located in Phase I of the Cedars. *CP 2*. Respondent Cedars Golf owns Lots 1 and 8 of Phase II, which remain vacant, *CP 2-3*, depicted at *CP 236*.

The Cedars, including properties mentioned above, is encumbered by a *Declaration of Covenants, Conditions and Restrictions* dated February 23, 1973, filed for record at Clark County Auditor's File No. G27415 (the "1973 Declaration") which provides as follows:

> WHEREAS, Declarant is the owner of certain property in Clark County, State of Washington, which is more particularly described in **Exhibit "A"** attached and by this reference made a part hereof. . . .
>
> "Properties" shall mean and refer to that certain real property hereinbefore described, together with such additional land within the area described on **Exhibit "C"** attached as may be annexed by the Declarant or assignees without the consent of the members within seven (7) years of the date of this instrument. . . .
>
> "Lot" shall mean and refer to the designated lot area designated by number as shown upon any recorded subdivision map of the Properties with the exception of the Common Area, plus any Towne House erected on Towne

> House areas on the Properties.

CP 202, ln. 1-4; *CP 203-04*, emphasis added.

> No lot as platted shall be resubdivided into separate building sites.

CP 209.

> Additional residential property and Common Area may be annexed to the Properties by a two-thirds (2/3) vote of the members. Provided, however, that any of the land within the real estate described in Exhibit "C" may be annexed by the Declarant or assignee without the consent of the members within seven (7) years of the date of this instrument.

CP 217.

Exhibit A to the 1973 Declaration describes all of The Cedars, while Exhibit C is nearly coextensive with Exhibit A, with the exception of approximately ten acres located in the northeast corner, not at issue in the present case. *CP 202*, ln. 5-14, *CP 232*.

The *Phase III Towne House Area Supplemental Declaration of Covenants, Conditions and Restrictions* dated December 6, 1978 (prior to Phase II), acknowledged the continuing applicability of the 1973 Declaration:

> This Declaration shall supplant the Declaration of Covenants, Conditions and Restrictions of the Cedars, recorded February 23, 1973 [as to Phase III] . . .

CP 237.

Dedication of the Cedars Phase II, dated June 12, 1980, incorporates "any protective covenants, conditions and restrictions" by reference:

> We, the undersigned owners of the above described land do hereby lay out and Plat the same into streets and lots, as shown upon the official plat of "THE CEDARS PHASE II", filed concurrently herewith in the plat records of Clark County, Washington. However the ownership, use and enjoinment of the lots therein are subject to the easements as shown thereon and to **any protective covenants, conditions and restrictions**, which shall run with the land and be for the mutual benefit and protection of all lots within the land and be for the mutual benefit and protection of all lots within said plat and the owners thereof, and which **by reference is made a part hereof**.

CP 336, CP 343, emphasis added. The plat of Phase II includes a note incorporating the 1973 Declaration:

> The Cedar Pacific Properties, Inc., in recording this plat of the "Cedars Phase-II" has designated certain areas of land as Nature Trails intended for use by the Homeowners in "The Cedars-Phase II" for recreation and other related activities. The designated areas are not dedicated for use by the general public but are dedicated for the common use and enjoyment of the Homeowners of "The Cedars-Phase II" as more fully provided for in **the Declaration of Covenants, Conditions and Restrictions applicable to "The Cedars-Phase I" dated February 23, 1973, and is incorporated in, and made a part of this plat.**

CP 236, emphasis added. No provision in the 1973 Declaration deals with "Nature Trails;" hence, the foregoing provides no support for a finding that incorporation is limited to provisions dealing with such trails.

On July 22, 2014, Cedars Golf received approval from the Battle Ground hearing examiner to subdivide its property into 13 residential lots and 4 environmental tracts. *CP 262*; depicted at *CP 268*. The examiner's decision included a finding that "the plat alteration complies with RCW 58.17.215," and concluded that the proposal "should be approved, because it does or can comply with the applicable standards of the Battle Ground Municipal Code and the Revised Code of Washington." *CP 257*.

All of the appellants submitted comment to the hearing examiner, opposing the proposed plat alteration. Appellants Avolio, DeArmond and Merko were represented by attorney Mark F. Stoker, Heurlin, Potter, *et al.*, who argued non-compliance with RCW 58.17.215. *CP 101-05*; *CP 143-46*. Appellant Baker was not represented by counsel, and argued environmental impacts:

> I am a long-term resident in the Cedars I community. As you know, much of the Cedars and Salmon Creek is high-quality riparian habitat. A 200-foot buffer is required on Salmon Creek, and this must be respected during any development plans. I am concerned that property development might be given priority over environmental needs (as they too often are).

CP 139. Heurlin Potter filed a LUPA appeal of the examiner's decision on behalf of appellant Avolio. The other appellants did not participate in the

LUPA appeal. Clark County Superior Court affirmed the hearing examiner's decision on March 20, 2015. *CP 151-153*, ln. 18-20.

Appellants filed the underlying action on June 3, 2015, to enforce the prohibition against further subdivision in the 1973 Declaration. *CP 1*. The trial court granted Cedar Golf's motion for summary judgment from the bench on August 20, 2015. *CP 356*, ln. 16-17. An order denying appellant's motion for reconsideration was filed August 28, 2015. *CP 369-70*. An order granting Cedar's Golf's motion for summary judgment, and denying appellants' cross-motion, was entered September 4, 2015. *CP 371-74*.

* * *

IV. SUMMARY OF ARGUMENT

Neither *res judicata* nor collateral estoppel apply to bar court interpretation and enforcement of restrictive covenants which prohibit further subdivision of lots owned by Cedars Golf because the Battle Ground hearing examiner lacked competence to decide the issue. In addition, the examiner determined that proposed division was *not* a plat alteration subject to RCW 58.17.215, so any further ruling was surplusage. Likewise, Superior Court was limited to review of the land use decision, and was precluded from making findings of fact.

Collateral estoppel is not a bar to appellant Baker, who did not raise RCW 58.17.215 before the examiner, did not appeal the examiner's decision, and was not in privity with the other appellants.

Moreover, collateral estoppel would contravene public policy for reasons including disparity of relief, and would confer *defacto* power upon the hearing examiner outside of authority delegated by statute.

There is only one interpretation which renders the restrictive covenant meaningful: that it encumbers all of the property described in Exhibit A, notwithstanding mention of annexation for property described in Exhibit C, because an annexation requirement would preclude application to any phase.

* * *

V. ARGUMENT

Standard of review

Appellate review of summary judgment is *de novo. Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998). Whether collateral estoppel applies to bar relitigation of an issue is also reviewed de novo. *Christensen v. Grant County Hospital*, 152 Wash.2d 299, 305, 96 P.3d 957 (2004). The burden of proof is on the party asserting collateral estoppel. *McDaniels v. Carlson*, 108 Wash.2d 299, 303, 738 P.2d 254 (1987).

ISSUE 1: Whether hearing examiner determinations which are outside of delegated authority have preclusive effect in subsequent Superior Court proceedings? (Assignments of Error 1 and 2.)

Collateral Estoppel

Collateral estoppel requires the concurrence of four elements:

> For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.

Christensen, 152 Wash.2d at 307; citing *Reninger v. Dept of Corrections*, 134 Wash.2d 437, 449, 951 P.2d 782 (1998); and *State v. Williams,* 132 Wash.2d 248, 254, 937 P.2d 1052 (1997).

> Collateral estoppel may be applied to preclude only those issues that have actually been litigated and necessarily and finally determined in the earlier proceeding. . . . the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

Christensen, 152 Wash.2d at 307; citing *Shoemaker v. Bremerton*, 109 Wash.2d 504, 507, 745 P.2d 858 (1987); and *Nielson v. Spanaway General Medical Clinic*, 135 Wash.2d 255, 264-65, 956 P.2d 312 (1998).

Three additional factors must be considered before collateral estoppel may be applied to administrative findings:

> (1) whether the agency acting within its competence made a factual decision; (2) agency and court procedural differences; and (3) policy considerations.

Reninger, 134 Wash.2d at 450, emphasis added; citing *Stevedoring Services v. Eggert*, 129 Wash.2d 17, 40, 914 P.2d 737 (1996); and *Shoemaker*, 109 Wash.2d at 508. Administrative collateral estoppel is limited to factual findings under the foregoing rule, while "[i]nterpretation of a restrictive covenant is a question of law." *Wilkinson v. Chiwawa Communities*, 180 Wash.2d 241, 250-51, 327 P.3d 614 (2014). The U.S. Supreme Court applies preclusion to administrative determinations when the "agency is acting in a judicial capacity and resolves disputed *issues of fact properly before it* which the parties have had an adequate opportunity to litigate." *United States v. Utah Construction & Mining*, 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966), emphasis added.

Municipal corporations can exercise only those powers which are expressly granted or necessarily implied. *Pacific County v. Sherwood Pacific*, 17 Wash.App. 790, 794, 567 P.2d 642 (1977), *review denied*, 89 Wash.2d 1013 (1978). Moreover, factual decisions upon which collateral

estoppel is based must be within the agency's competence:

> In order for an administrative decision to have collateral estoppel effect, the tribunal must have been competent to decide the issue.

Christensen, 152 Wash.2d at 319.

In *Christensen*, governing legislation expressly authorized the Public Employment Relations Committee to make fact findings regarding labor relations. In the present case, covenant interpretation would involve, at least, mixed questions of fact and law. *Wilkinson*, 180 Wash.2d at 250-51. The Battle Ground hearing examiner lacks competence to resolve issues of law inherent in covenant interpretation and enforcement. Examiner competence "is limited to an administrative proceeding to determine whether or not a particular piece of property is subject to a . . . land ordinance." *Chaussee v. Snohomish County*, 38 Wash.App. 630, 638, 689 P.2d 1084 (1984). Such competence is defined in the Battle Ground Municipal Code, as follows:

> 1. Hearing and reporting on any proposal to amend a zoning ordinance or comprehensive plan map amendment proposals to change the land use and implementing zoning designation of specific parcels of land, including such annual reviews which are applied for and are not of general applicability;
>
> 2. Revisions or rescissions of agreements concomitant to rezones;

> 3. Preliminary subdivision plat applications;
>
> 4. The authority herein to decide variances in lieu of provisions for boards of adjustment under RCW 35A.63.110;
>
> 5. All other applications for permits or approvals, including appeals, under Titles 16, 17 and 18 of this code which call for an appeal of an administrative decision or a hearing on a quasi-judicial decision.

BGMC 2.10.080(A), *A-9*.

In *Shoemaker*, the lack of procedural rules governing administrative hearing was satisfied by default to the governing statute:

> Where a city has not adopted an ordinance accomplishing the purposes of RCW 41.12, the statute itself controls. . . . This court has held that the procedural protections provided for in that chapter do meet due process.

Shoemaker, 109 Wash.2d at 510-11; citing *Vancouver v. Jarvis,* 76 Wash.2d 110, 115, 455 P.2d 591 (1969).

In the present case, the municipal ordinance merely subdelegates rulemaking authority to the hearing examiner:

> The examiner shall have the power to prescribe rules for the scheduling and conduct of hearings and other procedural matters related to the duties of his office.

BGMC 2.10.070; *A-8*. Resort to the governing statute provides *no* clarification:

> 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. . . .

RCW 58.17.215, *A-6*, emphasis added. The foregoing paragraph is a *submittal requirement* ("the application shall contain"), it includes *no* express authority to interpret restrictive covenants. Even under the most sympathetic reading, the foregoing paragraph delegates authority only to determine whether the subdivision is subject to a restrictive covenant that would preclude the proposed alteration. There is no question that The Cedars is subject to the 1973 Declaration, only whether certain phases were "annexed," which is relevant, allegedly, to enforcement. In any event, the hearing examiner's *Final Order* clearly found that the proposed alteration affected only two lots belonging to Cedars Golf; hence, it was *not* a "plat alteration" subject to RCW 58.17.215:

> 3. The examiner finds that the plat alteration complies with RCW 58.17.215.
>
> a. The applicant is requesting alteration of the plat to remove the "townhomes" designation on Lots 1 and 8. Lots 1 and 8 of the Cedars Phase II are the only portion of the subdivision proposed to be altered. Therefore RCW

> 58.17.215 only requires the signature of the majority of persons with an ownership interest in Lots 1 and 8 of the Cedars Phase II. **The further division of these platted lots is not a "plat alteration" subject to RCW 58.17.215.**

CP 54, emphasis added.

The examiner went on to conclude that the declarant had no authority to amend the covenant when the Phase II plat was recorded in 1980; that there is no evidence of a membership vote adding Phase II; and that the Phase II plat incorporated only provisions governing "Nature Trails," not the entire covenant. However, those conclusions were surplusage after finding that the proposed application "is not a 'plat alteration' subject to RCW 58.17.215." *CP 54*.

Under the applicable rule, "issues which are not material to the controversy, although determined, do not become Res adjudicata." [1] *Luisi Truck Lines v. Washington Utilities & Transp. Comm.*, 72 Wash.2d 887, 894, 435 P.2d 654 (1967); citing *McGee v. Wineholt*, 23 Wash. 748, 63 P. 571 (1901); *East v. Fields*, 42 Wash.2d 924, 259 P.2d 639 (1953); and Restatement, Judgments §68 at 309 (1942). In the present case, interpretation of the restrictive covenant was not material to the controversy because the

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[1]The Court in *Luisi* uses the term *res adjudicata* in the general sense, to cover both claim and issue preclusion.

hearing examiner decided that "further division of these platted lots is not a 'plat alteration' subject to RCW 58.17.215." *CP 54.*

The *Judgment Affirming Decision of the Battle Ground Hearings Examiner* included similar findings:

> With regards to Petitioners' claim that the Hearings Examiner erroneously interpreted RCW 58.17.215, the Court makes the following findings of fact:
>
> A) The Hearings Examiner correctly found alteration of Cedars Phase II was limited to the removal of the "Townhouse" designation from lots 1 and 8.
>
> B) The Hearings Examiner correctly found Lots 1 and 8 are the only portion of Cedars Phase II being altered.
>
> C) The Hearings Examiner correctly found RCW 58.17.215 only requires approval of a majority of the property owners in the portion of the Cedars Phase II being altered, not a majority of all property owners in Cedars Phase II.
>
> D) The Hearings Examiner correctly concluded the City of Battle Ground application process met the requirements of RCW 58.17.215 because an alteration application was signed by the owners of lots 1 and 8.

CP 152, ln. 1-14. The Superior Court also included findings regarding violation of the restrictive covenant, but such findings were surplusage: "A tribunal with only appellate jurisdiction is not permitted or required to make its own findings, . . . and such findings, if entered, are surplusage."

Lige & Wm. B. Dickson Company v. County of Pierce, 65 Wash. App. 614, 618, 829 P.2d 217, *review denied*, 120 Wash.2d 1008, 841 P.2d 47 (1992); citing *Maranatha Mining v. Pierce County,* 59 Wash.App. 795, 802, 801 P.2d 985 (1990); *Grader v. Lynnwood,* 45 Wash.App. 876, 879, 728 P.2d 1057 (1986).

The land use petition replaces only the "Writ of Certiorari for appeal of land use decisions," RCW 36.70C.030(1), *A-3*; and Superior Courts are limited to appellate jurisdiction in reviewing examiner decisions:

> A superior court hearing a LUPA petition acts in an appellate capacity and has only the jurisdiction conferred by law. . . . Under LUPA, the superior court review is limited to actions defined by LUPA as land use decisions.

Durland v. San Juan County, 182 Wash.2d 55, 64, 340 P.3d 191 (2014); citing *Knight v. Yelm*, 173 Wash.2d 325, 337, 267 P.3d 973 (2011); *Post v. Tacoma,* 167 Wash.2d 300, 309, 217 P.3d 1179 (2009); and RCW 36.70C.010, *A-2*; RCW 36.70C.040, *A-4*. LUPA competence is limited to land use regulations, interpretations and approvals. *Viking Properties v. Holm*, 155 Wash.2d 112, 130, 118 P.3d 322 (2005) (City had no authority to enforce or invalidate restrictive covenants).

Although declaratory judgment is inappropriate where "LUPA provides an adequate alternative means of review," *Grandmaster Sheng Yen*

Lu v. King County, 110 Wash.App. 92, 106, 38 P.3d 1040 (2002); declaratory judgment is proper and *necessary* where the agency lacks competence to interpret and enforce restrictive covenants. *Lakey v. Puget Sound Energy*, 176 Wash.2d 909, 928, 296 P.3d 860 (2013). In *Lakey,* neighbors who failed to appeal under LUPA were not barred from inverse condemnation claims alleging that electro-magnetic fields from an approved power substation threatened their use and enjoyment of land, because they were not "invoking the superior court's appellate jurisdiction and LUPA [did] not govern their claim." *Lakey*, 176 Wash.2d at 928. Accord *Woods View II v. Kitsap County*, 188 Wash.App. 1, 25, 352 P.3d 807, *review denied*, 184 Wash.2d 1015, 360 P.3d 818 (2015).

The Court in *Woods View II* summarized the holding in *Ashe v. Bloomquist*, that "a damage claim may still be controlled by LUPA if it is dependent on 'an interpretive decision regarding the application of a zoning ordinance.'" *Woods View II*, at 9, quoting *Asche v. Bloomquist,* 132 Wash.App. 784, 801, 133 P.3d 475 (2006), *review denied,* 159 Wash.2d 1005, 153 P.3d 195 (2007). The Court in *Asche* noted:

> The Asches' public nuisance claim depends entirely upon finding the building permit violates the zoning ordinance. Specifically, they argue, "[b]ecause the project violates the zoning code, the project constitutes a public nuisance."

Asche, 132 Wash.App. at 801. In *Asche*, the administrative decision was preclusive as to land ordinance violations *within administrative competence*. In the present case, enforcement of the covenant is *not* dependent upon administrative determinations regarding the application of land ordinances. Land ordinances regulate plat amendment, not restrictive covenants.

The governing statute goes on to confer competence upon the examiner to determine public use and interest:

> The legislative body shall determine the public use and interest in the proposed alteration and may deny or approve the application for alteration. . . .

RCW 58.17.215, *A-6*, emphasis added. The foregoing provision does *not* "necessarily imply" authority to interpret covenants because the express delegation is limited to *public* use and interest, not *private* use and interest – a restrictive covenant is inherently private, and the examiner is not competent to resolve disputes between private parties. BGMC 2.10.080(A).

If, on the other hand, the *Subdivision Act* does authorize hearing examiners to determine that restrictive covenants are unenforceable, then it "operated as a substantial impairment of a contractual relationship," in violation of constitutional prohibitions. *Estate of Hambleton*, 181 Wash.2d 802, 830-31, 335 P.3d 398 (2014), *certiorari denied*, 136 S. Ct. 318 (2015);

citing U.S. Const. art. I, §23; U.S. Const. art I. §10, cl. 1. The impaired relationship is clearly contractual; and the examiner's interpretation alters terms, imposes new conditions for enforcement, and lessens the value of the restrictive covenant. The impairment is substantial for persons living in The Cedars, such as the appellants, who relied upon the clause prohibiting further subdivision. There is no way they could have anticipated new legislation in area not previously regulated under the *Subdivision Act*.

Res Judicata

The element of *competence* applies equally to the doctrine of *res judicata*:

> The doctrine of res judicata rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of **competent jurisdiction**, should not be permitted to be litigated again.

Marino Property Company v. Port of Seattle, 97 Wash.2d 307, 312, 644 P.2d 1181 (1982), emphasis added. Under *res judicata*, "a subsequent action is barred when it is identical with a previous action in four respects:

> (1) same subject matter; (2) same cause of action; (3) same persons and parties; and (4) same quality of the persons for or against whom the claim is made.

Hayes v. Seattle, 131 Wash.2d 706, 712, 934 P.2d 1179, 943 P.2d 265

(1997); citing *Norco v. King County,* 106 Wash.2d 290, 293, 721 P.2d 511 (1986). In *Hayes*, the Supreme Court held that reversal of arbitrary and capricious development conditions did not preclude a subsequent damage action under 42 U.S.C. §1983 based upon the same conditions:

> We are satisfied that the two lawsuits with which we are here concerned do not involve the same subject matter simply because they both arise out of the same set of facts. . . .
>
> We reach that conclusion because the nature of the two claims is entirely disparate. The action for judicial review focused exclusively on the propriety of the decision making process of the Seattle City Council. On the other hand, the subsequent action was for a judgment for money to compensate Hayes for the damages he allegedly suffered as a result of the Council's action.

Hayes, 131 Wash.2d at 712-13, 934 P.2d at 1182.

In the present case, the LUPA appeal focused on the propriety of land use approvals, while the underlying action focused upon contract rights to enforce the covenant. Regulatory approval and covenant enforcement involve neither the same subject matter nor cause of action. Four factors are considered to determine whether proceedings are based upon the same cause of action:

> (1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits

> involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Hayes, 131 Wash.2d at 713, 934 P.2d at 1182. In the present case, the administrative proceeding established regulatory approvals, but did not affect contract rights to enforce the covenant. Enforcing the covenant will not affect regulatory approvals which have been affirmed upon LUPA appeal. The fact that both regulatory approvals and covenant enforcement may address the same activity is not equivalent to impairment of the approvals.

In 1976, the Supreme Court held that a prior mandamus action challenging permit approval did not determine the issues in a subsequent tort action alleging wrongful permit issuance:

> Although involving the same parties, respondents' mandamus action did not actually or necessarily determine any of the issues presented in this case since the prior action considered only the propriety of respondents' permit application and the duty of appellant under its building code to allow construction to commence. Therefore, respondents were not collaterally estopped from litigating the tort liability of appellant for issuance of an invalid building permit.

Haslund v. Seattle, 86 Wash.2d 607, 622-23, 547 P.2d 1221 (1976). We acknowledge that *Haslund* antedated LUPA; however, LUPA cannot violate the separation of powers doctrine by interfering with the Superior Court's power and original jurisdiction under RCW 2.08.010. WA. Const., art. 4, §4.

The LUPA appeal involved the right to be free of government infringement upon the free use of land, *Burton v. Douglas County*, 65 Wash.2d 619, 622, 399 P.2d 68 (1965) ("[r]estrictions, being in derogation of the common-law right to use land for all lawful purposes, will not be extended by implication to include any use not clearly expressed"); while the underlying action involves private infringement upon contract rights under the covenant.

In *Deja Vu v. Federal Way* a state action arose out of the same nucleus of facts as a prior federal action because it challenged the same ordinance. *Deja Vu v. Federal Way*, 96 Wash.App. 255, 262, 979 P.2d 464 (1999). In the underlying action, no ordinance was challenged.

* * *

ISSUE 2: Whether parties are precluded who participate in administrative proceedings but do not challenge issues raised in subsequent court action?

Collateral estoppel precludes only parties, or those in privity with parties, to earlier proceedings. *Christensen*, 152 Wash.2d at 307. *Res judicata* precludes the "same persons and parties," who were also the "same quality of persons." *Hayes*, 131 Wash.2d at 712. In the present case, appellant Baker resides in Phase I, not Phase II of The Cedars. *CP 2*. He did

not raise RCW 58.17.215 nor any covenant-related issues before the hearing examiner; rather, he commented upon potential environmental impacts. *CP 139*. He was not represented by legal counsel who represented other appellants at administrative proceedings. *CP 101-05*. He did not participate in the LUPA appeal. *CP 151*.

The Washington Supreme Court holds that "privity denotes a 'mutual or successive relationship to the same right or property.'" *McDaniels*, 108 Wash.2d at 306. In civil cases, "the issue decided in the prior adjudication must be identical with the one presented in the second." *State v. Mullin-Coston*, 152 Wash.2d 107, 114, 95 P.3d 321 (2004).

Moreover, appellant Avolio's *quality* changed as the cause of action changed from land use appeal to covenant enforcement:

> Clearly, the identity of the parties was the same; their "quality" differed, however, as the causes of action changed from misrepresentation to breach of covenant of title. Hence, we hold the second action is not barred by res judicata as the concurrence of identity in three out of the four elements is missing.

Mellor v. Chamberlin, 100 Wash.2d 643, 646, 673 P.2d 610 (1983). The Court in *Mellor* noted that "the 'primary right' not to misrepresent a sale is distinguishable from the right to enforce a breach of a covenant of title." *Id.* In the present case, the public right to ensure regulatory compliance is

distinguishable from the contractual right to enforce a private covenant. Hence, although appellant Avolio was the same person, he was not of the same quality of litigant in the LUPA appeal and underlying action.

* * *

ISSUE 3: Whether public policy weighs against the application of collateral estoppel to bar a subsequent action to enforce a restrictive covenant where a land use hearing examiner found the covenant unenforceable in ruling on the applicability of RCW 58.17.215 to a plat alteration?

Washington Courts have held collateral estoppel improper where "the issue is first determined after an informal, expedited hearing with relaxed evidentiary standards." *Christensen*, 152 Wash.2d at 309; citing *State v. Vasquez*, 148 Wash.2d 303, 308-09, 59 P.3d 648 (2002); and *Williams*, 132 Wash.2d at 257-58. Also relevant to application of the doctrine is disparity of relief:

> In addition, disparity of relief may be so great that a party would be unlikely to have vigorously litigated the crucial issues in the first forum and so it would be unfair to preclude relitigation of the issues in a second forum.

Christensen, 152 Wash.2d at 309; citing *Reninger,* 134 Wash.2d at 453. Finally, "sufficient motivation" is required to frame the issues:

> Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice. To that end, we hold it is not generally appropriate when there is nothing more at stake than a nominal fine. There must be sufficient motivation for a full and vigorous litigation of the issue.

Hadley v. Maxwell, 144 Wash.2d 306, 315, 27 P.3d 600 (2001).

In *Christensen*, the Public Employment Relations Commission had authority to impose monetary damages; hence, the Court did not find disparity in relief sufficient to prevent the application of collateral estoppel. In the present case, the hearing examiner was authorized to approve or disapprove the plat amendment, not to interpret nor enforce restrictive covenants. Hence, the stakes were insufficient to justify collateral estoppel.

Moreover, neighbors who succeed at administrative proceedings will be compelled, nonetheless, to initiate court action to enforce the covenant, because the hearing examiner cannot grant injunctive nor monetary relief. On the other hand, application of collateral estoppel could force neighbors to forego their statutory rights to comment upon plat amendments in order to avoid losing contract rights to enforce restrictive covenants:

> In Williams, the court determined that public policy reasons weighed against application of collateral estoppel to bar a criminal prosecution for welfare fraud where the same conduct had been the subject of Department of Social and Health Services proceedings[, noting that the] application of

> collateral estoppel would result in the State effectively having to choose between prosecuting for criminal charges in the administrative forum, with attendant inefficiency and reallocation of resources, or forgoing the administrative hearing and recovery of financial losses because of the potential collateral estoppel effect of the administrative decision.

Christensen, 152 Wash.2d at 309-10; citing *Williams,* 132 Wash.2d at 258.

By analogy to *Smith v. Bates Technical College*, 139 Wash.2d 793, 811, 991 P.2d 1135 (2000), the right of contract enforcement is distinct from the right to comment upon land use applications. If collateral estoppel applies, a neighbor who loses at the administrative hearing would be estopped from enforcing distinct contractual rights. If exhaustion also applies, the administrative remedy would be the only remedy; thus conferring *defacto* power upon the hearing examiner outside of authority delegated by statute.

* * *

ISSUE 4: Where the description of property encumbered by a restrictive covenant is unambiguous, does authority to annex additional property from an area which is nearly coextensive preclude enforcement?

Required elements of servitudes, both legal and equitable, include enforceability between original parties and compliance with the *Statute of Frauds*:

> Enforceability of covenants between the original parties is based on contract law. . . . But in order to be enforceable between the original parties, a covenant must also satisfy the statute of frauds.

Dickson v. Kates, 132 Wash.App. 724, 733, 133 P.3d 498 (2006); citing *Lake Limerick v. Hunt Mfg. Homes*, 120 Wash.App. 246, 254-55, 84 P.3d 295 (2004).

> [I]n order to comply with the statute of frauds, a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description.

Howell v. Inland Empire, 28 Wash.App. 494, 495, 624 P.2d 739 (1981); quoting *Bigelow v. Mood*, 56 Wash.2d 340, 341, 353 P.2d 429 (1960).

In the present case, Exhibit A to the restrictive covenant unambiguously describes the entirety of The Cedars. *CP 202, CP 232*. "If the plat is unambiguous, the intent, as expressed in such plat, cannot be contradicted by parol evidence." *Selby v. Knudson*, 77 Wash.App. 189, 194, 890 P.2d 514 (1995); citing *Olson Land v. Seattle,* 76 Wash. 142, 145, 136 P. 118 (1913). In *Selby*, a plat map was not ambiguous, even subject to an error in survey measurements, where the legal description was *not* capable of different meanings:

> The 1906 subdivision plat is not ambiguous. The plat map indicates the legal description and measurements of each lot. Lines used in the plat drawing indicate the subdivision boundaries. Although an error occurred in the survey measurements, the plat is not capable of two meanings.

Selby, 77 Wash.App. at 194; citing *Olson Land,* 76 Wash. at 145.

In the present case, the plat of Phase II incorporated the 1973 Declaration by reference, which became a part thereof. *Gwinn v. Cleaver*, 56 Wash.2d 612, 615, 354 P.2d 913 (1960). Lack of express incorporation in deeds of conveyance does not affect restrictive covenants which evidence a common plan or scheme:

> [A] servitude can be created by a contract or conveyance that is either "donative" or for consideration. The servitude is not effective "[s]o long as all the property covered by the declaration is in a single ownership," but it becomes effective "when the developer conveys a parcel subject to the declaration[.]"

Lake Limerick, 120 Wash.App. at 256, 84 P.3d at 300; citing 1 Restatement (Third) of Property: Servitudes §2.1 cmt. a-d, at 53-56. The decision in *Lake Limerick* emphasized comment "c," which elaborates as follows:

> If the circumstances surrounding conveyance of property covered by a recorded declaration indicate that the property is conveyed subject to the general plan, an express reference to the recorded declaration in the instrument of conveyance is not necessary to create the servitude.

Lake Limerick, 120 Wash.App. at 256; quoting 1 Restatement (Third) of

Property: Servitudes §2.1 cmt. c, at 54.

Cedars Golf has argued that the 1973 Declaration must be *amended* to add phases which are within the area described in Exhibit C. If the 1973 Declaration *were* ambiguous, we would look to circumstances affecting the intent of the drafters, not those extant at time of interpretation:

> "[S]urrounding circumstances" as may be considered are only those which tend to reflect the intent of the drafters; circumstances extant at the time the covenant is sought to be enforced are irrelevant to the question of ambiguity.

White v. Wilhelm, 34 Wash.App. 763, 771-72, 665 P.2d 407, 412, *review denied*, 100 Wash.2d 1025 (1983). If inclusion in the description of Exhibit C somehow excludes Phase II from the 1973 Declaration, then it must also exclude all other phases, which are also included in the Exhibit C description. *CP 202*, *CP 232*. This would render the covenant entirely without subject matter or meaningless. "Basic rules of contract interpretation apply to the court's review of restrictive covenants." *Jensen v. Lake Jane Estates*, 165 Wash.App. 100, 105, 267 P.3d 435 (2011). "Courts should not adopt a contract interpretation that renders a term ineffective or meaningless." *Cambridge Townhomes v. Pacific Star Roofing*, 166 Wash.2d 475, 487, 209 P.3d 863 (2009). The only interpretation which renders the 1973 Declaration meaningful is that it governs the entire property described in Exhibit A.

Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c). In ruling on summary judgment, the court must consider all evidence and reasonable inferences in favor of the non-moving party. CR 56(c); *Ohler v. Tacoma General Hospital*, 92 Wash.2d 507, 511, 598 P.2d 1358 (1979).

* * *

CONCLUSION

In the present case, summary judgment of dismissal constituted error because the examiner lacked competence to interpret or enforce restrictive covenants, and because he ruled that the proposed subdivision was *not* a plat alteration subject to RCW 58.17.215. Any further decision was surplusage.

Denial of appellants' motion for summary declaratory judgment was also erroneous because there is only one interpretation that renders the 1973 Declaration meaningful: that it encumbers all property described in Exhibit A.

One purpose of trial is allow the fact finder to observe the demeanor of witnesses. In the present case, factual evidence is entirely documentary, dating from 1973 and 1980. There are simply no witnesses to observe, so the case should be decided as a matter of law.

The appellants request reversal and remand with instructions to enter judgment in favor of the appellants on all issues.

RESPECTFULLY SUBMITTED this 23rd of December, 2015.

ERIKSON & ASSOCIATES, PLLC
Attorneys for the appellants

By: _____
Mark A. Erikson, WSBA #23106

CERTIFICATE OF SERVICE

#48016-6-II

I certify that on the 23rd day of December 2015, I caused a true and correct copy of this *Brief of Appellants* to be served on the following in the manner indicated below:

Counsel for the respondents:

Adele J. Ridenour Damien Hall Ball Janik, LLP 101 SW Main Street Suite 1100 Portland, OR 97204 **E-mail: aridenour@balljanik.com** **dhall@balljanik.com**	(X) US Mail ( ) Hand Delivery (X) E-mail, as agreed by recipient

By: Kris Eklove
Kris Eklove

West's Revised Code of Washington Annotated
Title 2. Courts of Record (Refs & Annos)
Chapter 2.08. Superior Courts (Refs & Annos)

West's RCWA 2.08.010

2.08.010. Original jurisdiction

Currentness

The superior court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three hundred dollars, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce and for annulment of marriage, and for such special cases and proceedings as are not otherwise provided for; and shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court, and shall have the power of naturalization and to issue papers therefor. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition and writs of habeas corpus on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued on legal holidays and nonjudicial days.

Credits
[1955 c 38 § 3; 1890 p 342 § 5; RRS § 15.]

West's RCWA 2.08.010, WA ST 2.08.010
Current with all laws from the 2015 Regular and Special Sessions and Laws 2016, chs. 1 and 2

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APPENDIX A
Page 1 Of 9

West's Revised Code of Washington Annotated
Title 36. Counties (Refs & Annos)
Chapter 36.70C. Judicial Review of Land Use Decisions (Refs & Annos)

West's RCWA 36.70C.010

36.70C.010. Purpose

Currentness

The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.

Credits
[1995 c 347 § 702.]

West's RCWA 36.70C.010, WA ST 36.70C.010
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APPENDIX A
Page 2 of 9

West's Revised Code of Washington Annotated
Title 36. Counties (Refs & Annos)
Chapter 36.70C. Judicial Review of Land Use Decisions (Refs & Annos)

West's RCWA 36.70C.030

36.70C.030. Chapter exclusive means of judicial review of land use decisions--Exceptions

Effective: June 30, 2010
Currentness

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(a) Judicial review of:

(i) Land use decisions made by bodies that are not part of a local jurisdiction;

(ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board or the growth management hearings board;

(b) Judicial review of applications for a writ of mandamus or prohibition; or

(c) Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.

(2) The superior court civil rules govern procedural matters under this chapter to the extent that the rules are consistent with this chapter.

Credits
[2010 1st sp.s. c 7 § 38, eff. June 30, 2010; 2003 c 393 § 17, eff. May 20, 2003; 1995 c 347 § 704.]

West's RCWA 36.70C.030, WA ST 36.70C.030
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APPENDIX A
Page 3 Of 9

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Revised Code of Washington Annotated
Title 36. Counties (Refs & Annos)
Chapter 36.70C. Judicial Review of Land Use Decisions (Refs & Annos)

West's RCWA 36.70C.040

36.70C.040. Commencement of review--Land use petition--Procedure

Currentness

(1) Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court.

(2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

(a) The local jurisdiction, which for purposes of the petition shall be the jurisdiction's corporate entity and not an individual decision maker or department;

(b) Each of the following persons if the person is not the petitioner:

(i) Each person identified by name and address in the local jurisdiction's written decision as an applicant for the permit or approval at issue; and

(ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue;

(c) If no person is identified in a written decision as provided in (b) of this subsection, each person identified by name and address as a taxpayer for the property at issue in the records of the county assessor, based upon the description of the property in the application; and

(d) Each person named in the written decision who filed an appeal to a local jurisdiction quasi-judicial decision maker regarding the land use decision at issue, unless the person has abandoned the appeal or the person's claims were dismissed before the quasi-judicial decision was rendered. Persons who later intervened or joined in the appeal are not required to be made parties under this subsection.

(3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.

(4) For the purposes of this section, the date on which a land use decision is issued is:

APPENDIX A
Page 4 Of 9

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(a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;

(b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or

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

(5) Service on the local jurisdiction must be by delivery of a copy of the petition to the persons identified by or pursuant to RCW 4.28.080 to receive service of process. Service on other parties must be in accordance with the superior court civil rules or by first-class mail to:

(a) The address stated in the written decision of the local jurisdiction for each person made a party under subsection (2)(b) of this section;

(b) The address stated in the records of the county assessor for each person made a party under subsection (2)(c) of this section; and

(c) The address stated in the appeal to the quasi-judicial decision maker for each person made a party under subsection (2)(d) of this section.

(6) Service by mail is effective on the date of mailing and proof of service shall be by affidavit or declaration under penalty of perjury.

Credits
[1995 c 347 § 705.]

West's RCWA 36.70C.040, WA ST 36.70C.040
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APPENDIX A
Page 5 of 9

West's Revised Code of Washington Annotated
Title 58. Boundaries and Plats (Refs & Annos)
Chapter 58.17. Plats--Subdivisions--Dedications (Refs & Annos)

West's RCWA 58.17.215

58.17.215. Alteration of subdivision--Procedure

Currentness

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.

Credits
[1987 c 354 § 4.]

West's RCWA 58.17.215, WA ST 58.17.215
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APPENDIX A
Page 6 Of 9

West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 4. The Judiciary (Refs & Annos)

West's RCWA Const. Art. 4, § 4

§ 4. Jurisdiction

Currentness

The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars ($200) unless the action involves the legality of a tax, impost, assessment, tool, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state or any judge thereof.

Credits
Adopted 1889.

West's RCWA Const. Art. 4, § 4, WA CONST Art. 4, § 4
Current through amendments approved 11-3-2015.

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APPENDIX A
Page 7 of 9

2.10.070 Rules.

SHARE

The examiner shall have the power to prescribe rules for the scheduling and conduct of hearings and other procedural matters related to the duties of his office. (Ord. 98-020 § 1(A) (part), 1998: Ord. 98-019 § 1(A) (part), 1998)

APPENDIX A
Page 8 of 9

2.10.080 Powers.

SHARE

A. Except as provided for in subsection B of this section, the examiner shall receive and examine available information, conduct public hearings and prepare a record thereof, and enter final decisions, subject to application, notice, public hearing and appeal procedures of BGMC 17.102, on the following matters:

1. Hearing and reporting on any proposal to amend a zoning ordinance or comprehensive plan map amendment proposals to change the land use and implementing zoning designation of specific parcels of land, including such annual reviews which are applied for and are not of general applicability;

2. Revisions or rescissions of agreements concomitant to rezones;

3. Preliminary subdivision plat applications;

4. The authority herein to decide variances in lieu of provisions for boards of adjustment under RCW 35A.63.110;

5. All other applications for permits or approvals, including appeals, under Titles 16,17 and 18 of this code which call for an appeal of an administrative decision or a hearing on a quasi-judicial decision.

B. Notwithstanding the provisions of subsection A of this section, the following matters shall be heard by the planning commission:

1. Rezone applications initiated by the city to implement a newly adopted or amended comprehensive land use plan which is of general applicability, until such time as the comprehensive plan designations and implementing zoning function are separated, and;

2. All legislative amendments to the development code (Titles 16, 17 and 18). (Ord. 98-020 § 1(A) (part), 1998: Ord. 98-019 § 1(A) (part), 1998)

APPENDIX A
Page 9 of 9

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