

65279-6

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

NO. 65279-6-I

F.G. ASSOCIATES,
Appellants,

v.

GRAHAM NEIGHBORHOOD ASSOCIATION, a Washington
Non-profit corporation, RAY STRUB, GEORGE F. WEARN and
JAMES L. HALMO, and PIERCE COUNTY,

Respondents.

BRIEF OF RESPONDENT GRAHAM NEIGHBORHOOD
ASSOCIATION

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I. INTRODUCTION

Fourteen years ago, real estate developer F.G. Associates discovered that a large parcel of land they owned was in an area in which the land use regulations were about to change. Rather than accept the change, even though F.G. Associates was unsure what they wanted to do with the property, they sent an agent to Pierce County to apply for a short plat. Unfortunately for F.G. Associates, in their rush to submit documents before the deadline, they failed to pay the proper fee, filled out the environmental checklist in either a nonresponsive or flippant manner, and failed to disclose the proposed uses on the parcel as required by Pierce County's code. Several days after this failed attempt to submit a complete application, the land use regulations changed. After the change, F.G. Associates submitted the proper fee, and Pierce County initially classified their application as complete on May 23, 1996 – 23 days too late for F.G. Associates to have “vested” to the regulations formerly in effect. F.G. Associates then took nearly 13 years to complete their application, continuing to submit additional documents until 2009.

As the Superior Court found, F.G. Associates failed to vest to the regulations before they changed to prohibit the later-proposed uses, and thus its proposal does not meet the requirements of Pierce County's code

and the plat approval must be remanded. As this brief demonstrates, the Superior Court was correct in its conclusions on vesting, and even if the Superior Court erred, other grounds exist to remand this flawed strip mall thrust into a rural area in violation of Pierce County's land use regulations.

II. ISSUES PRESENTED

1. A preliminary plat application must be complete according to the standards set forth by local ordinance before it "vests" to laws in effect at the time it is completed. Fourteen years ago, F.G. Associates failed to meet the standards of Pierce County's completeness ordinance by failing to pay the proper fee, failing to complete an environmental checklist, and failing to describe the uses planned for the parcel. Should F.G. Associates be allowed to vest to laws that are over a decade old even though the application was incomplete before Pierce County's code changed?

2. Pierce County code requires that an applicant for a preliminary plat either complete the process or seek a one-time continuance from the Hearing Examiner within one year of a letter from the County stating that the application is inactive, or the application is null and void. F.G. Associates received notice that their application was inactive in 2005, and failed to either complete the application or seek a continuance from the Hearing Examiner. Even if F.G. Associates' application vested in 1996, was it null and void in 2006?

3. A preliminary plat proposal must comply with all relevant sections of Pierce County's code. F.G. Associates' proposal violated numerous sections of Pierce County's code. Even if the proposal vested and was not null and void in 2006, is there a separate basis to affirm the Superior Court's ruling that the application must be remanded?

III. STATEMENT OF THE CASE

In an 11th-hour attempt to avoid a change to the Pierce County code, the developer of Mountain View Plaza¹ sent an agent dashing to the Pierce County permit counter on April 25, 1996 to submit an application to subdivide an approximately 20-acre parcel in rural Pierce County into multiple commercial lots. The reason for the rush was that Pierce County had changed the permitted uses for the property, and after May 1, 1996, commercial uses would be limited. At the time F.G. Associates sent the agent scurrying to the permit counter, plans for the site were incomplete. The application filed on April 25, 1996 listed only the subdivision in the “detailed description of request” section, and did not list any planned uses. AR 283. The environmental worksheet filed with the application indicated “do not know” in response to the “[d]escription of proposal and uses” section. AR 272.

In the rush to complete the mandatory application paperwork, F.G. Associates also failed to pay the proper fee. Although some of the application materials described a six-lot development, the cover page of the application stated that it was a five-lot plat, the fee form for a five-lot

¹ The developer is referred to by various names in the record. Because F.G. Associates uses “F.G. Associates” consistently in its briefing, respondents do so as well in this brief.

application was used, and F.G. Associates only paid the fee for five lots. 7/23/09 RP at 44; AR 271, 282.² F.G. Associates also failed to complete the mandatory environmental worksheet. AR 272-80. The vast majority of the environmental information on the form was marked “n/a” or “none known.” Other answers were purely flippant; the only noise impacts from the project were “[s]creams of exasperation from filling out tedious environmental check list questions for preliminary plats,” and the agricultural history of the property was that “20 years ago a few cows ate some of the grass on the site” AR 277. The “detailed description of request” section of the preliminary plat application listed only subdivision, not any uses or proposed buildings. AR 283. The drawing only showed lots, not buildings, and listed use only as “commercial.” AR 168, 595.³

F.G. Associates paid the proper fee amount for a six-lot development in May, 1996, after the permitted uses had changed, meaning that the project vested only to those uses permitted by the code after May 1, 1996. AR 270. On May 28, 1996, Pierce County staff issued a

² Other documents in the administrative record have undated, handwritten corrections on these same documents showing that F.G. Associates wanted a six-lot plat. Since the uncontroverted evidence is that the fee was paid in May, 1996, the only possible conclusion is that these handwritten corrections were made after May 1, 1996. AR 270.

³ The original plat map itself appears to have been omitted from the record. The citations are to a description by County staff of the map.

letter indicating that the application materials were received on May 23, 1996, and was considered complete. AR 620.

Although F.G. Associates makes much of the fact that this litigation is taking place over 14 years after they submitted their first application, F.G. Associates alone is responsible for the delay. Over the years, F.G. Associates submitted additional paperwork to the County. Some of these documents were either incorrect, or plainly false. For example, F.G. Associates told the County that there would be no work requiring a Hydraulic Project Approval, and no streams on the site, instead identifying only a drainage ditch. But the Washington Department of Fish and Wildlife stated that the watercourse on the site is a water of the state, and Pierce County's wetland biologist identified it as a Type 4 or 5 stream. AR 517, AR 456, 670, C.⁴ Over a decade passed, and F.G. Associates still had not completed the mandatory studies and other prerequisites to development.

F.G. Associates' dilatory behavior over the years led to the application's cancellation. On June 6, 2005, Pierce County development staff sent the applicant a letter advising that "[i]n accordance with Title 18.160.080, the above-described applications shall become null and

⁴ A small portion of the administrative record has letter rather than number identifiers. The color copy of AR C is reproduced here as Att. A.

void one year from the date this registered notice is mailed to the applicant and property owner.” AR 301. F.G. Associates failed to follow the requirements of Title 18, and neither sought an extension from the Hearing Examiner nor completed the application within one year, and on June 6, 2006, the application was “null and void” pursuant to PCC 18.160.080’s mandate. AR 300 (Pierce County Application/Permit status printout, showing “Application cancelled as of 6/6/06”).

Later, after a change in planning department staff, Pierce County rewrote history and began claiming that the application vested on the date the original paperwork was submitted (April 25, 1996), rather than the date the correct fee was paid, or the date F.G. Associates revealed what the “detailed project proposal” actually was. Without citing any authority other than “per Terry Belieu,”⁵ on May 9, 2008, County staff “removed” the cancellation nearly two years after it took effect. AR 300.

In 2009, thirteen years after the zoning designation for the area changed to prohibit the commercial development proposed, F.G. Associates sought preliminary plat approval from the Hearing Examiner. In 2009, F.G. Associates submitted a near-complete set of documents, and finally told the County what its actual plans were:

⁵ A planner since terminated from County employment.

Lot 1 is proposed to be developed with a 3,470 square foot food restaurant; Lot 2 is proposed to be developed with a 5,540 square foot bank; Lot 3 is proposed to be developed with a 5,370 Square Foot sit down restaurant; Lot 4 is proposed to be developed with an 80,000 square foot grocery store; Lot 5 is proposed to be developed with an 80,000 square foot home improvement center; and Lot 6 is proposed to be developed with septic drainfields.

AR 31 (Decision); 251 (March 24, 2009 plat map). The site plan showed that, contrary to previous submissions to the County, F.G. Associates was planning on moving the stream onsite into a pipe and concrete ditch and paving over much of it. AR 251.

In a surprising decision, the Pierce County Hearing Examiner approved the preliminary plat application. AR 30-55. In a rambling and often incoherent opinion, the Examiner noted that prior to 1995 “the applicant could have built anything he wanted to on each of the lots,” and that the applicants “have spent large volumes of money” on the application process. AR 38-39, 40. The Examiner concluded that “[b]oth subdivision and through the public interest are providing a commercial center for the rural areas in an attractive manor (sic) and location and therefore the request for preliminary plat for Mountain View Plaza should be granted.” AR 45. Graham Neighborhood Association filed a timely

Land Use Petition Act challenge, and on April 13, 2010, the Honorable Teresa Doyle reversed the Hearing Examiner, finding “[t]he Hearing Examiner erred in determining that the developer’s rights vested as of April 25, 1996. This issue is dispositive” and remanded the matter to the Hearing Examiner. April 13, 2010 Order Reversing Decision (Order) (Attached to F.G. Associate’s Notice of Appeal). Appellants F.G. Associates appealed to this court. Pierce County has not appealed the Superior Court’s reversal.

IV. ARGUMENT

A. Standard of Review

Under the Land Use Petition Act (LUPA), the standard of review of a land use decision is defined by RCW 36.70C.130. The Superior Court’s conclusions are reviewed de novo by this court. RCW 36.70C.130 provides that a court must reverse the decision of the County when:

- b) The decision is an erroneous interpretation of the law, after allowing deference for local expertise;
- c) The decision is not supported by evidence that is substantial when viewed in light of the whole record before the court; or

- d) The decision is a clearly erroneous application of the law to the facts. RCW 36.70C.130(1).

Isla Verde Int. Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 751-52 (2002); *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 693-94 (2002). In reviewing the record, this court reviews errors of law under a de novo standard. *Pinecrest Homeowners Association v. Glen A. Cloninger & Associates*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004). Errors of fact are reviewed for substantial evidence. RCW 36.70B.130(c). Substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. *Benchmark*, 146 Wn.2d at 694. Errors applying the law to the facts are reviewed under the clearly erroneous standard, which requires that this court “have a firm and definite conviction that a mistake has been committed” when reversing the decision. *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 340-41, 190 P.3d 38 (2008).

F.G. Associates misstates the standard of review in arguing that this court’s inquiry on vesting is whether the hearing examiner’s conclusion that the application was complete for purposes of vesting is reviewed for substantial evidence. Brief of Appellant at 3. Whether an application is complete is a question of law. *Friends of the Law v. King*

County, 123 Wn.2d 518, 523, 869 P.2d 1056 (1994). In this case, there is no dispute over the facts, but instead only on whether the facts meet the legal definition.

B. The Vesting Issue Was Properly Before the Superior Court, and is Properly Before This Court.

Citing only to *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002), F.G. Associates argues that an appeal it filed to the Pierce County Hearing Examiner in 1998 relating to whether they had to get a conditional use permit means that the citizens comprising the Graham Neighborhood Association were unable to challenge the final approval of the plat in 2009. Brief of Appellant at 28-29. The Superior Court correctly rejected this argument, ruling that “the issue of vesting was not litigated. Hence, collateral estoppel is inapplicable here.” Order, at p.3.

The Superior Court ruled correctly. F.G. Associates submitted an incomplete application on April 25, 1996, supplied more materials in May, 1996, and continued to supply documents over the years, including, at one point, asking for a conditional use permit. In 1998, Pierce County sent F.G. Associates a letter denying F.G. Associates’ request for a conditional use permit to develop the site. AR 168-69. There is no evidence that this letter was publicly disseminated, or that the public had any way

whatsoever of knowing that the letter existed. F.G. Associates appealed the conditional use permit letter to the Pierce County Hearing Examiner. AR 166-67. The only parties to the appeal were Pierce County and F.G. Associates. AR 186-87. The only issue confronted by the Hearing Examiner in 1998 was whether the County erred in denying the conditional use permit application. AR 178. On September 24, 1998, the Pierce County Hearing Examiner issued a decision ruling that F.G. Associates did not need a conditional use permit. AR 186. Neither of the parties that had the legal ability to appeal that decision, Pierce County and F.G. Associates, did so. Graham Neighborhood Association was not a party to the decision, and it appears unlikely that they could have been a party; the only issue was whether F.G. Associates needed a conditional use permit, an issue on which neighbors and concerned citizens may not have had standing to intervene, and did not have notice they needed to do so. F.G. Associates now argues that Graham Neighborhood Association was required to appeal that 1998 decision, rather than the timely appeal Graham Neighborhood Association filed to the issuance of a preliminary plat approval by the Hearing Examiner in 2009. But RCW 36.70C.020 governs which decisions can be appealed under LUPA, and provides in pertinent part:

(2) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals[.]

In this case, Graham Neighborhood Association is not asking this court to review whether the applicant should have filed for a conditional use permit. They are asking this court to review the final decision by the highest level of authority on whether the applicant can subdivide his property into six commercial lots: the 2009 decision of the Hearing Examiner, approving the preliminary plat. *Chelan County v. Nykreim*, 146 Wn.2d 904, supports the view that Graham Neighborhood was required to wait. In *Chelan County*, a property owner applied for and received a boundary line adjustment. The property owner later applied for a conditional use permit, and neighbors attempted to challenge the boundary line adjustment, but were held to be time-barred from doing so because over 21 days had passed from the issuance of the boundary line adjustment. Had Graham Neighborhood Association tried to appeal a not-yet issued preliminary plat approval in 1998, F.G. Associates could properly have moved to strike that LUPA petition as untimely, since only the conditional use permit was at issue.

F.G. Associates may be arguing that even though Graham Neighborhood Association properly filed its challenge to the preliminary plat, the 1998 notation in the Hearing Examiner's ruling that the property vested in April, 1996 is binding in this later litigation. Any argument that it is must be determined under either res judicata or collateral estoppel. This court recently addressed res judicata in the land use context in *Stevens County v. Futurewise*, 146 Wn. App. 493, 503, 192 P.3d 1 (2008).

The court held:

The party asserting res judicata must establish that the subsequent action is identical to an earlier action in (1) identity of persons and parties, (2) the subject matter, (3) the cause of action, and (4) the quality of the persons for or against whom the claim is made.

The doctrine of collateral estoppel similarly prevents relitigation of issues between the same parties, but only if they are actually litigated. As the *Stevens County* court noted,

Unlike res judicata, collateral estoppel is applicable when the claim is different but some of the issues are the same. Important here, collateral estoppel precludes only those issues that have actually been litigated and determined.

Id. at 507 (internal quotations and citations omitted). “Actually litigated” means what it says: the issue must have been in dispute, and fully argued by the parties. *McDaniels v. Carlson*, 108 Wn.2d 299, 738 P.2d 254 (1987). Issues which were the subject of stipulations or otherwise not subject to dispute cannot support a claim of collateral estoppel. *Id.*

Neither doctrine applies here. The parties are different. In 1998, the litigation was between the applicant and the County. AR 186-87. Graham Neighborhood Association was not a party, was not a successor in interest to either the County or F.G. Associates, and did not have standing to insert themselves into the litigation over the County’s letter to the applicant. Further, the issue before this court is different than the issue presented to the Examiner in 1998. In 1998, the Examiner was asked to determine whether the developer needed a conditional use permit. AR 186. This court is asked to decide whether the plat application approved by the Examiner is valid. A conditional use permit is simply not at issue.

Moreover, vesting was not actually litigated in 1998. In the 1998 appeal, the County and F.G. Associates both asserted (wrongly) that the application was complete as of April 25, 1996. AR 179. The dispute was not over the vesting date, but rather was limited to whether F.G.

Associates' failure to specify uses meant that a separate conditional use permit was required. AR 179-86.

Other claims by F.G. Associates regarding the timeliness of this LUPA are unsupported by any authority, and wrong. Some show a profound misunderstanding of the basics of land use law. For example, F.G. Associates notes that RCW 36.70B.070(4)(a) provides for an automatic determination of completeness if the County fails to review an application once it is submitted, and claims that if this were to happen the application is "presumably not subject to challenge." Brief of Appellant at 38. F.G. Associates later cites to general laches law. Brief of Appellant at 39. But Graham Neighborhood Association may not challenge a determination under the Land Use Petition Act until the final decision by Pierce County on the permit Graham Neighborhood Association wished to challenge. RCW 36.70C.020. Graham Neighborhood Association timely appealed the preliminary plat determination, which was the first and only final land use action of concern to these neighbors. There is simply no legal doctrine requiring or even allowing Graham Neighborhood Association to file a legal challenge until the preliminary plat was approved. That F.G. Associates took 14 years to complete a plat application that should have been complete when filed cannot be ascribed

to any party other than F.G. Associates, and does not create any reason whatsoever to re-interpret the clear mandate of the legislature that appealing the final land use action be the only avenue of appeal.

Holding that Graham Neighborhood Association is barred from litigating the issuance of the preliminary plat now would create a dangerous precedent. There is no public notice of a staff letter determination, like that appealed by the applicant in 1998. Citizens, like those who formed Graham Neighborhood Association, would have to constantly peruse the County's files for any ministerial decision and appeal midstream, or would risk losing their ability to challenge the ultimately-issued permit. Issues would be litigated piecemeal, with interlocutory-type appeals required at every step of the development process. A developer wishing to insulate itself from LUPA review would only need to appeal any ministerial decision mid-process, prepare a list of stipulations addressing the entirety of the application as part of that mid-stream appeal, and then rest easy that even when the permit was ultimately issued, no party could challenge any issue. The Land Use Petition Act does not require such an absurd course of action. Instead, LUPA mandates that a petitioner appeal the "final action" they are concerned with, in this case the 2009 approval of the preliminary plat.

C. The Development Did Not Vest in April, 1996 Because the Application Was Incomplete

In arguing that they should vest despite an incomplete application, F.G. Associates engages in a lengthy diatribe about the unfairness of requiring a complete application, asserting that the failure to pay the proper fee, complete the environmental checklist, or describe the proposal are failings remedied by the “iterative process”. F.G. Associates wants this court to believe that this “process” excuses compliance with the requirement that an application be complete before it vests.⁶ Brief of Appellants, passim, esp. 27-28; 30-39. These arguments fail both as a matter of policy and because Washington courts apply a “zero tolerance

⁶ F.G. Associates does not challenge the Superior Court’s correct conclusion that vesting is dispositive in this case. On May 1, 1996, Pierce County changed its code to prohibit the type of commercial uses proposed by the developer on this parcel. Pierce County’s Code is convoluted: until January, 2008, the parcel was in the Graham Rural Activity Center. AR 424. The Rural Activity Center allows some, but not all, urban uses in the rural area. Prior to May 1, 1996, commercial centers of any size were permitted in the Rural Activity Center. The Rural Activity Center section was amended by Ordinance 96-18, effective May 1, 1996. AR 170. Starting on May 1, 1996, PCC 18A.24.020 provides that Commercial Centers are permitted in the Graham Rural Activity Center only at “Level 1.” PCC 18A.33.270(H) provides that “Level 1” commercial centers are limited to “Any store or commercial center containing a variety of stores with a cumulative floor area over 40,000 square feet and up to 80,000 square feet.” Because the developer wants to build 174,380 square feet of stores, this project simply could not be built under zoning in effect from May 1, 1996 onward in the Rural Activity Center. This development would not be allowed at all under current zoning regulations - on January 8, 2008, the parcel was removed from the Graham Rural Activity Center and placed in Rural 10 zoning. AR 424. In Rural 10, commercial centers of any size are prohibited, and a minimum ten-acre lot size is required. PCC 18A.24.020.

approach to completeness.” *Friends of the Law v. King County*, 123 Wn.2d 518, 523 n.3.

Washington's vested rights doctrine allows developers to have a land development proposal processed under the regulations in effect at the time a complete application for the proposal is filed, regardless of subsequent changes in zoning or other land use regulations. *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180, 182 (2009); *Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864, 873-74, 872 P.2d 1090 (1994). Vesting means that a developer who has submitted a complete application knows that they can build what they have proposed, even if the laws change after their application is complete.⁷

Although vesting provides developers with certainty that the proposal that is approved can be built, it comes at a significant cost to neighbors and the citizens of a community when regulations change after the application is filed. *Abbey Road*, 167 Wn.2d at 251, 218 P.3d at 183. The effect of recognizing a vested right is to sanction a new nonconforming use. As the Washington Supreme Court has noted, “[a]

⁷ Most states do not permit vesting until after substantial construction has been completed. *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180, 182 (2009). Attempts to expand Washington's already liberal vesting rule, as has been done by the Hearing Examiner here, are regularly rejected by Washington courts. *E.g.*, *Abbey Road*, 167 Wn.2d 242; *Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864, 873-74, 872 P.2d 1090 (1994).

proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws.” *Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 873-74, 872 P.2d 1090. Granting vested rights too easily means the public interest could be subverted. *Abbey Road*, 167 Wn.2d at 251, 218 P.3d at 183.

Washington law provides strict limits on what can vest. Vesting is codified at RCW 58.17.033, which provides that an application vests “at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official.” RCW 58.17.033(2) provides that the requirements for a fully completed application shall be defined by local ordinance. Under the code in effect at the time the application was submitted, the application was required to include:

[A]n application, paying the application fee, filing 16 copies and 1 reproducible copy of the proposed preliminary plat, submitting a list of adjacent landowners as specified herein, submitting an approved Environmental Worksheet and when appropriate, an application for zone amendment.

PCC 16.06.020 (1996 version). This court has recognized that “[t]he purpose of a “complete application” requirement is to allow the local jurisdiction to determine what the developer has applied for and what rights have accrued in order to evaluate whether the proposed improvements will be properly constructed.” *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668, 674, 86 P.3d 1169 (2004). For example, in *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 218 P.3d 180, the court found that a master use permit application did not vest, because the applicant failed to adhere to RCW 19.27.095’s requirement that building permit applications also be filed before the application was deemed complete. By contrast, in *WCHS*, the court found that an application for a building permit application was complete even though the applicant did not yet have state certification to operate its chemical dependency treatment facility, because the City of Lynnwood’s code did not include a requirement for state certification. *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668.

In this case, the application was incomplete before the zoning code changed on May 1, 1996. F.G. Associates misrepresents the record by claiming, without citation to any document or testimony, that the “application was filed and deemed complete by the County on April 25,

1996.” Brief of Appellants, pp. 16, 27. Although Pierce County later inexplicably determined that the application should be considered complete on April 25, 1996, the initial determination of completeness was noted as May 23, 1996 – the date F.G. Associates paid the proper fee. AR 620. Although F.G. Associates claims that Pierce County’s 1996 code was “unclear” as to what was required, PCC 16.06.020 unequivocally required “paying the application fee.” F.G. Associates only paid fees for a five-lot development, not the six-lot development for which they were requesting approval. F.G. Associates explained to the Hearing Examiner why the problem occurred: they sent an “agent” to handle the application, intending the application to be for six lots. 7/23/09 RP at 44. But the plat request submitted by the agent was on the form for a “five-lot plat,” with the fee calculated for the smaller number of lots. 7/23/09 RP at 47; AR 270. F.G. Associates engages in lengthy briefing on the “mystery” of how the improper fee was paid, and attempts to blame the County for the error. But there is no mystery. Although F.G. Associates notes that the drawings in the application package are for a six lot plat, the form used was for a five lot plat. AR 271. 7/23/09 RP at 47; AR 271, 282. The County produced a receipt to the applicant for 5 lots, and the first line of F.G. Associates’ “master application” stated, in handwriting and signed by

F.G. Associates' agent, that the request was for a "Pre[liminary] Plat for 5 lots in RAC class on 20 acres." AR 271, 282. Although these documents were later corrected to show six lots, the Administrative Record demonstrates that F.G. Associates provided information to Pierce County staff on April 23, 1996 indicating that it was a five lot plat. AR 271, 282. At best, F.G. Associates presented contradictory information to Pierce County staff at the permit counter. Because the record includes a receipt showing that the amount paid was for five, rather than six lots, F.G. Associates cannot blame the County for the failure to pay the proper fee. AR 271. Moreover, F.G. Associates provides no authority for the proposition that an incomplete application can vest under any circumstances. F.G. Associates' error meant that "all applicable fees" were not paid until May 23, 1996, after the land use regulations changed. AR 271; AR 620.

F.G. Associates' lengthy briefing on "unfairness" overlooks the fact that the failure to pay the fee could be, and was, promptly and easily remedied. But they waited nearly a full month [April 25 to May 23rd] to do so. Once it was remedied, the project vested as of the date the application was complete. F.G. Associates fails to provide any authority, nor is there any conceivable policy reason, why the vesting rules should be

ignored simply because enforcing them has an impact on what F.G. Associates can build now.

In addition to failing to pay the proper fee, the application was incomplete because the environmental worksheet was incomplete. F.G. Associates' claim that "SEPA-related challenges are not properly before the court" in an attempt to justify its failure to complete the environmental checklist is bizarre. Brief of Appellants, p. 34. First, this argument was not raised to the Superior Court, and may not be raised on appeal now. Second, the issue before the Hearing Examiner and Superior Court was whether the application was complete according to the standard set forth in Pierce County's code, which requires that F.G. Associates submit "an approved Environmental Worksheet." PCC 16.06.020. It is the failure to complete the environmental worksheet, not later SEPA review, that is the subject of this court's review.⁸

F.G. Associates properly concedes that the 1996 checklist "cannot be held up as a model of professionalism" and that "some of the answers . . . were flippant." Brief of Appellants, p. 16. F.G. Associates further

⁸ The SEPA review described by F.G. Associates occurs much later, and involves a review of the checklist, any supporting documents and further studies, and the issuance of a determination of non-significance or a determination of significance. That determination is not at issue here, and F.G. Associates' attempt to mislead the court on the issues should be rejected.

conceded the inadequacy of the 1996 checklist by submitting a new one in 2009, noting that “[p]revious SEPA checklist prepared but found to be incomplete.” AR 127-38. This concession is well-founded.

In reviewing whether the application was complete, the Hearing Examiner made no attempt to apply Pierce County’s code to the facts of the case, instead purporting to resolve the vesting issue by noting that a county staff employee “clearly testified that the County’s method of determining whether or not the application is complete for vesting is whether or not the applicant has submitted the proper number of copies of documents required by the code. If they do it is deemed complete.” AR 38. But whether County staff is following the code is what the Examiner was supposed to evaluate, not merely ask them what they did and then accept that as compliant. As the Superior Court recognized, simply counting the number of forms are “lax practices [that] are inconsistent with the requirements of the Pierce County Code. In any event, it is the Code, not the custom, of county employees that governs.” Order, at p. 3. Under F.G. Associates’ theory, a speculator could turn in *blank* forms, as long as they included the correct number of copies. This is an absurd reading of the code’s requirements for documents, and should be rejected.

F.G. Associates relies heavily on *Friends of the Law*, 123 Wn.2d 518, in support of its argument that the County's purported practice of just counting forms excuses the failure to comply with the code. But in *Friends of the Law*, the Washington Supreme Court considered whether an application submitted to King County was complete for purposes of vesting. At the time the application was submitted, King County did not have an ordinance governing when an application was complete. The petitioners in *Friends of the Law* scoured the county's code, and discovered a 1948 ordinance which "purported to require '[b]uilding setback lines, showing dimensions'" *Id.* at 523-24. The *Friends of the Law* court found that this reference, *contained outside of a definition of completeness*, was insufficient to create a requirement for building setback lines given that the ordinance had not been enforced for 24 years. That is simply not the situation here. Pierce County does have a completeness ordinance, and it is the plain language of that ordinance that is at issue. As the *Friends of the Law* court held, "once King County made clear the requirements for a fully completed application in KCC 19.36.045, the unequivocal terms of that ordinance govern vesting." *Id.* at 526. Washington's "zero tolerance approach to completeness" mandates that

this court strictly apply the requirements of PCC 16.06.020. *Friends of the Law v. King County*, 123 Wn.2d at 523 n.3.

Similarly, *Schultz v. Snohomish County*, 101 Wn. App. 693, 5 P.3d 677 (2000), does not support F.G. Associates' argument that they are entitled to ignore portions of PCC 16.06.020. In *Schultz*, the Snohomish County code set forth a two step process for evaluating an application's completeness. First, County staff evaluated the papers filed to determine if they were complete. Second, Snohomish County performed a "second step where actual conditions are evaluated in the field." *Id.* at 698. The *Schultz* court noted that vesting was complete after the first step, the paper review, was performed. *Id.* But in this case, it is the first step – complete paperwork – that the applicant failed to complete until long after May 1, 1996. Graham Neighborhood Association has never claimed that Pierce County was required to evaluate actual conditions in the field. Instead, it is the paper and the application fee that must have been complete.

Any argument that the environmental worksheet was "complete" because there was writing on it must be rejected. The description of proposal and uses contained only the words "do not know." AR 272. The vast majority of questions were answered with "none known" as to the environmental impacts of this proposal. AR 272-80. Regarding

stormwater, the applicant stated only that “[p]roperty is vacant. Stormwater will flow as it always has.” AR 275. In terms of noise impacts, the applicant stated that “Screams of exasperation from filling out tedious environmental (sic) check list questions for preliminary plats” were the only impacts. AR 277. The proposed measures to reduce or control noise impacts were “sedatives.” AR 277. Responding to whether the site had ever been used for agriculture, the developer said “yes. 20 years ago a few cows ate some of the grass on the site.” AR 277. The applicant answered “n/a” to questions about the type of buildings proposed, and claimed that there would be no light and glare, aesthetic, transportation, earth, air, water, plants, animals, energy, natural resources, environmental health, historic/cultural preservation, or public services impacts. AR 272-80. The purpose of SEPA is to “provide decisionmakers and the public with information about potential adverse impacts of a proposed action.” *Glasser v. City of Seattle*, 139 Wn. App. 728, 736, 162 P.3d 1134 (2007). The environmental worksheet is used by Pierce County to determine if further review is needed, and is part of the public record available for review and comment by concerned citizens and neighbors. In this case, the worksheet did absolutely nothing to inform.

The applicant has acknowledged that his April 25, 1996 worksheet was incomplete when he filed a new one on January 6, 2009. AR 127-38. This new checklist notes that “[p]revious SEPA checklist [was] prepared but found to be incomplete.” AR 127. The new checklist replaced “screams of exasperation” on the noise question with:

Temporary construction noise will be usually created between the hours of 7 A.M. until 6 p.m., 5-6 days a week. Long term noise will come from the daily visitation of vehicles to the various commercial bldgs. and the service trucks that make deliveries.

AR 133, 134. Other questions marked “N/A”, “none known,” or similar in the 1996 checklist are completely filled out in the 2009 version, and now correctly indicate that there would be earth, air, water, and plants, environmental health, land and shoreline use, aesthetic, light and glare, and transportation impacts. Compare AR 272-80 with AR 127-38.

There can be no question that the 1996 checklist incompletely described the impacts of the proposal. The proposal is for a large commercial strip mall, with five large businesses and hundreds of cars. Constructing it will entail months and probably years of heavy equipment and construction noise and pollution. Earth will be displaced. Trees cut. Animal habitat destroyed. Transportation will be impacted; presumably,

F.G. Associates wants hundreds of customers to visit their strip mall, each of which must arrive by automobile or public transit in this rural area. Parking lot lights will add light and glare impacts. Simply put, the SEPA checklist filed in 1996 is no better than a blank piece of paper.

Further, the application failed to describe the uses on the property, as required by PCC 16.06.020. There can be no question that the April 25, 1996 application did not contain a detailed description of the request to build massive stores. Instead, it only described the subdivision in the description of request section, and not the uses thereon. AR 121. Supporting materials provided no further information. The environmental worksheet stated “[d]o not know” in response to the “Description of proposal and uses” section. AR 272. The plat drawing only showed lots, not buildings, and listed the use simply as “commercial.” AR 168, 595.

Up until a staff change after the turn of the century, county staff believed that the application was incomplete in time to vest to the uses proposed later by F.G. Associates. In May, 1996, county staff issued a letter to F.G. Associates stating that the application was complete on May 23, 1996, the date the county received payment for the six-lot plat. AR 620, 285. An “application data sheet” noted that the fees were paid on May 23, 1996, and contained a note that the “appl. complete –

C. Sundsmo turned in final payment receipt (copy)” on that date. AR 269. By 2008, though, with no explanation, staff listed “application complete” dates of both April 25, 1996, and May 23, 1996, and a vesting date of April 25, 1996. AR 57, 58.⁹

D. The Application was Cancelled and Could Not be Revived

The Superior Court ruled that the application did not vest, and did not reach other challenges raised by Graham Neighborhood Association. This court may sustain the Superior Court’s ruling on any basis supported in the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). Even if the permit had vested in 1996, it was null and void in 2006 and could not be “revived” two years later by County staff. On June 6, 2005, the County sent a certified letter to the applicant and property owner telling them that:

⁹ F.G. Associates relies heavily on the testimony of a County staff member, Terry Belieu, regarding the interpretation of PCC 16.06.020 and when the application was complete. But the question of whether an application is complete is one of law, and a staff member’s opinion on the law is entitled to no weight. *Friends of the Law v. King County*, 123 Wn.2d at 523. Further, Mr. Belieu was not working on this application when it was filed, and his testimony regarding what happened was based purely on a review of the file – the same inquiry the hearing examiner, and this court, can engage in. 7/23/09 RP at 5-6. More importantly, his claim that at the time the application was submitted the County only counted the number of forms, and did not read them, in order to determine completeness is nothing more than evidence of bad management practices. As the *Friends of the Law* court noted, “the duty of those empowered to enforce the codes and ordinances of the [county] is to ensure compliance therewith and not to devise anonymous procedures available . . . in an arbitrary and uncertain fashion.” *Id.* at 525.

In accordance with Title 18.160.080, the above-described applications shall become null and void one year from the date this registered notice is mailed to the applicant and property owner.

Once an application is determined to be null and void, all future land uses (sic) applications shall be reviewed for consistency with the applicable development regulations that are in effect on the date the application is accepted.

AR 301. The letter accurately described the law. Pierce County's code unequivocally provides that an application "is null and void" one year after registered notice is provided to the property owner unless an extension request is granted by the Hearing Examiner, or a public hearing is held. PCC 18.160.080. F.G. Associates neither completed the required submittals for its application to go to a hearing, nor moved for a continuance from the Hearing Examiner, and thus the application was null and void in 2006.

F.G. Associates argues, in a footnote, that this ordinance does not apply because the ordinance was adopted after the application vested. Brief of Appellant at 41, n. 10. Arguments raised only in footnotes may be ignored. *Clark County Public Utility Dist. No. 1 v. State of Washington Dept. of Revenue*, 153 Wn. App. 737, 761, 222 P.3d 1232 (2009). Further,

this argument is simply wrong. A development application only vests to the “subdivision or short subdivision ordinance and zoning or other land use control ordinances, in effect on the land at the time a fully completed application” has been submitted. RCW 58.17.033(1) (emphasis added). This court considered the scope of “land use control ordinances” in *New Castle Investments v. City of La Center*, 98 Wn. App. 224, 989 P.2d 569 (1999). In *New Castle*, the court held that “it is important that the vested rights doctrine not be applied more broadly than its intended scope,” and limited vesting to regulations that “limit the use of land” or “resemble a zoning law.” *Id.* at 232.

PCC 18.160.080 does not limit the use of land, nor does it resemble a zoning law. It does not limit what the developer can build nor govern the use of his land in any way. Instead, it is a procedural regulation governing how the application was handled once it was submitted. As County staff testified at the hearing, PCC 18.160.080 was passed by the County Council to resolve exactly the problem created by F.G. Associates: a last-minute, incomplete application thrown across the counter right before the code changed, and then sitting dormant for over a decade. 7/23/09 RP at 15-16. F.G. Associates is no more entitled to rely on the 1996 regulations governing when they had to submit paperwork in 2006

than they would be to claim this court must dig up its dusty 1996 court rules to govern the hearing in this matter.

The Examiner's factual conclusion that "[t]here was no evidence submitted throughout the hearing process that the applicant ever received any notice of this cancellation" is completely mistaken. AR 39. Pierce County code requires that "registered notice is mailed to the applicant and property owner" that the application will become null and void in one year. PCC 18.160.080. The notice was properly mailed. AR 120 (Application listing identity of applicant and owner); 301 (letter).

The Examiner's conclusion that "it would be unconscionable to cancel this project because of the computer glitch" is baffling. AR 39. There was no "computer glitch." Instead, F.G. Associates was issued a letter, written by a human staff member, telling them they had one year to complete the application process or receive a continuance from the Hearing Examiner. The failure to do either meant that the application was cancelled automatically.

Further, the applicant's failure to appeal the 2006 cancellation of the permit means that the permit could not be revived, but instead a new application must be submitted. *Chelan County v. Nykreim*, 146 Wn.2d 904, is dispositive. In *Nykreim*, the Washington Supreme Court held that

any land use decision, whether described as “quasi judicial” or “ministerial” that falls within LUPA’s parameters must be appealed within 21 days or it is final. In *Nykreim*, a county official granted a boundary line adjustment. The court held that this decision was final, *even if parties did not have notice of the decision*. *Nykreim*, 146 Wn.2d 904. Noting that LUPA was the “exclusive means of obtaining judicial review of land use decisions” and that it must be given “full effect, even when its results seem harsh,” the court found that boundary line adjustments fell within the parameters of LUPA, and that an appeal of any “final action” thereon must therefore have been brought within 21 days. *Id.* at 922, 926 (internal citation and quotations omitted). Here, the County cancelled the application based on valid authority. F.G. Associates must have appealed that cancellation within 21 days, or it became final.

F.G. Associates’ reliance on the testimony of County staff member Terrence Belieu asserting that the cancellation of the application was in error is misplaced. Mr. Belieu provided absolutely inexplicable testimony regarding the method by which he chose to handle this application. With no reference to the County code nor to any recognized basis, he testified that he personally chose to change an automatic computer entry that properly noted that the application had become null and void one year

after the PCC 18.160.080 notice was sent because in his view the applicant had been in constant communication with Pierce County on other applications related to this one. 7/23/09 RP at 16-26. Mr. Belieu's unilateral and legally unsupported decision to ignore his clear duties under the code cannot provide a basis for this court to ignore PCC 18.160.080.

Moreover, Mr. Belieu misrepresented the record in claiming that F.G. Associates "had continuously been in contact with the Department through various applications associated with this project." 7/23/09 RP 26. The record reveals only two communications between the date of the notice and June 6, 2006, when the application became null and void. One is a one-page note to County staff, asking for a 180-day extension on the deadline to provide additional information on the wetland report. AR 459. Even then, that information was not provided within the requested extension period. The other communication is a one-sentence letter authorizing a new agent to represent the applicant. AR 140. But there is no evidence of any action during the one year period by that agent.

E. Even if the Application Vested, It Vested Only to the Division of Land, Not the Uses Later Proposed.

Even if the application had vested and was not cancelled, F.G. Associates vested only to the division of land, not the massive stores

revealed as the plan for the site in 2009 and prohibited under the current code. What F.G. Associates can build on the site is governed not by the laws in effect when F.G. Associates asked for the division of land, but rather by the laws in effect when F.G. Associates disclosed the proposed use. *Noble Manor Co. v. Pierce County*, 133 Wn.2d 259, 284, 943 P.2d 1378 (1997). Here, F.G. Associates only disclosed on the application that the land would be divided. AR 283. The SEPA checklist was even more blunt, stating that F.G. Associates “did not know” what would be built on the site. AR 272.¹⁰ F.G. Associates argument that they adequately disclosed the uses on the site because Pierce County could have asked for more detail at the time the application was submitted misses the point. Pierce County is not obligated to extract, via administrative cross-examination, what the applicant wants to build. Instead, as the Washington Supreme Court has held, Pierce County is obligated to apply the laws in effect at the time an application is complete, only to “what is sought in the application for a short plat,” *Noble Manor Co. v. Pierce County*, 133 Wn.2d at 284, or otherwise disclosed *by the applicant*, at the time the application was filed. *Westside Business Park, LLC v. Pierce*

¹⁰ See also AR 170-71 (October 22, 1997 letter from Pierce County staff noting that “[t]he environmental checklist and master application that was submitted with the preliminary plat did not disclose the intended use for the future building sites as required”).

County, 100 Wn. App. 599, 604-06, 5 P.3d 713 (2000). The applicant's later-disclosed plans for massive stores and other uses¹¹ are simply not permitted under the laws in effect at the time the plans were disclosed, and the preliminary plat approving them must be reversed.

F. Even if the Application Was Complete, and Never Cancelled, Other Bases Support the Superior Court's Decision that the Matter Must be Remanded

Other bases to reverse this flawed application exist. F.G. Associates argues first that this court may not review any challenge to the lack of a stormwater plan¹² because Graham Neighborhood Association failed to raise the issue below. RCW 36.70C.070 mandates that Land Use Petition Act petitioners exhaust administrative remedies. That means that petitioners must pursue all administrative avenues of appeal, such as an appeal to the County Council, if the code required it, before filing a LUPA action and asking this court to review the County's decision. *Citizens for Mt. Vernon v. City of Mt. Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1208

¹¹ The uses were first specified in December 1996 but were not the same uses proposed in 2009. See AR 57, 170. Regardless, they vested after Pierce County's code changed on May 1, 1996.

¹² F.G. Associates does not particularize the stormwater plan as improperly preserved in its appeal to this court, instead lumping a range of arguments argued by Graham Neighborhood Association below together. But only the stormwater plan was cited to the Superior Court as improperly preserved, and F.G. Associates has itself not preserved objections to other issues. CP 137. Moreover, the administrative record demonstrates that all issues were properly raised to the Hearing Examiner. 7/23/09 RP, esp. at 49-55; AR 58-60; 63-65; A-Z; 311-44; 361-420; 514-16 (Comment letters and attachments).

(1997). In this case, though, there were no administrative appeals available. The Hearing Examiner, not the Planning and Land Services Department, issued the approval, and the appeal was straight to Superior Court. Because the only administrative avenue available was public comment, Graham Neighborhood Association need not have preserved issues in a technical sense – it is enough that they identified the issue, and made their objection to it clear. *Citizens for Mt. Vernon*, 133 Wn.2d at 870. In this case, the petitioners raised water flow issues on the property in great detail, and specifically requested further and more detailed study. 7/23/09 RP at 49-55; 58-60. Like *Citizens*, the petitioners amply provided notice to the County and F.G. Associates that more study needed to be done on water flow on the site.

G. The Applicant Cannot Simply Put the Stream in a Pipe.

F.G. Associates argues at length that no fish and wildlife variance was required because there are no fish in the stream bisecting the property. But Graham Neighborhood Association has never argued that there were. Instead, F.G. Associates makes no response to the claim actually raised: that the Pierce County Code, both that effective in 1996 and today's version, requires a buffer from the "Ordinary High Water Mark" of any stream on site. PCC 21.18.060, effective in 1996. (Att. B).

The Washington State Department of Fish and Wildlife determined that the stream on site is a Water of the State, defined by RCW 77.55.011(18) to be “all salt and fresh waters waterward of the ordinary high water line and within the territorial boundary of the state.” AR 327; 571.¹³ The state, the county biologist, and even the applicant’s biologist who prepared a 2004 Wetland Verification Report all concur that there is a stream on the proposed site. AR 456, 571. The Tacoma-Pierce County Health Department wrote in a September 1996 letter that the “‘existing drainage’ is, in effect, a year-round creek” and has not since deviated from that stance. AR 331. A 1908 timber cruiser map demonstrates that this creek was flowing in 1908, and aerial and ground level photographs in the record demonstrates that it continues to flow today. AR 319; 322; A-I. Aerial photographs conclusively show that its Ordinary High Water Mark runs right through where the applicant would like to place a massive building. Compare AR A-I (photographs) with AR 257 (site plan). The stream cannot be re-routed. The law in effect in 1996 provides for no variance to physically move a Water of the State, but instead requires a 35 foot buffer from its ordinary high water mark. PCC

¹³ The Pierce County Code bolsters this determination, stating that “Waters of the State shall include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters, and all other surface waters and watercourses within the jurisdiction of the state of Washington.” PCC 11.05.030(HH)(10).

21.18.060, effective in 1996 (Att. B). The buffer must consist of “undisturbed, natural vegetation” and extend “landward from the ordinary high water mark of the water body.” *Id.* Even if the plat had vested and had not been cancelled, it must be reversed to correct this glaring violation of law.

H. The Hearing Examiner Erred as a Matter of Fact and Law in Finding that the Proposed Development could be Approved Without a Hydraulic Project Approval.

A hydraulic project approval must be obtained prior to any “construction or performance of other work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state.” WAC 220-110-020-30. F.G. Associates has continuously insisted that no Hydraulic Project Approval is required based on a mistaken assertion that there are no waters of the State onsite. The Examiner dismissed contrary evidence, claiming that “[i]nformation which was submitted with reference to the drainage ditch and conversations of individuals at the State level lack the quality of evidence necessary for this Examiner to give much weight to them.” AR 40.

But the documents described above describing the creek disprove this theory. Although the Washington Department of Fish and Wildlife indicated in November, 2008 that an HPA was not required based on the

plans they reviewed, that note was made assuming there was to be no work within the Ordinary High Water Mark of the stream. AR 310. The letter from WDFW expressly states that “[i]f the plans change or work is to occur within the Ordinary High Water Mark of state waters, WDFW will need to review the new plans and issue an HPA.” AR 310.

WDFW’s belief may have been based on bait-and-switch tactics on the part of F.G. Associates. A 2007 plat showed the stream intact, with appropriate buffers. AR 2-7. But an aerial photograph of the site at AR 19 shows a meandering stream running from the southeast of the site to the west. AR 21 shows an 80,000 square foot grocery store and separate “sit down” restaurant on the stream site. Compare AR 21 (current plan) with AR 207 (2007 site plan showing stream in its natural watercourse, and a stream buffer). According to an August 4, 2008 letter from County staff, the “project proposes to locate approximately 700 feet of the Type 5 water in a culvert” and establish “an approximate[ly] 25 to 30-foot buffer on the open portion.” AR 670. An HPA is required.

F.G. Associates’ claim to the trial court that it is WDFW that must decide if an HPA is required rather than the Hearing Examiner fails. While true that WDFW has the ultimate authority to decide if an HPA is required and if it will be granted, it is the Hearing Examiner’s duty to

determine if the plat can be built as proposed. *Topping v. Pierce County Bd. of Commissioners*, 29 Wn. App. 781, 783, 630 P.2d 1385 (1981). Here, WDFW has unequivocally stated that an HPA must be obtained if work is to occur within the OHWM, and F.G. Associates' plans for the site leave no doubt that the stream will be moved. An HPA is required, and the application must be reversed to require it.

I. The Hearing Examiner Further Erred in Concluding as a Matter of Fact and Law that Storm Drainage will be Provided on Site According to County Standards

The Hearing Examiner's Decision notes that "[a] storm drainage plan must be submitted to the Development Engineering Section as part of the site development plans." AR 46. But if the Examiner opted to order a storm plan, it was required prior to preliminary approval of the plat under the 1996 code, and the Examiner cannot simply request that one be later provided. PCC 15.42 (Ordinance 90-132, at pp. 45-46) provides:

Conceptual Storm Drainage Plan: In certain situations, a conceptual storm drainage plan will be required *before the project is given preliminary approval*. . . . A conceptual storm drainage plan will be prepared by the engineer and must show that it is feasible to mitigate all storm drainage impacts associated with the project. The report must describe the methods or improvements that will be used to negate the drainage or flooding problems . . .

In this case, although the Examiner correctly noted that a storm drainage plan was required, there is no storm plan in the record. Although AR 257 is a map with the word “storm” written on it, it does not “show that it is feasible to mitigate all storm drainage impacts associated with the project,” but instead only marks where channels and drains will go. Further, the storm plan in AR 257 shows a man-made, east west “storm run” that has pipes below ground at either end and is simply a relocated creek into man-made pipes and trenches. But the site development ordinance in effect at the time states that “offsite water should be routed through the project site in its natural, undisturbed condition”. Ordinance No. 90-132 at pp. 41, 12a. F.G. Associates here is not routing the offsite water – the creek – through its “natural, undisturbed condition.” Instead, they are moving the creek and creating a man-made labyrinth of pipes and concrete “storm runs.” There is no provision in Pierce County’s 1996 or current code for doing so, and the Examiner erred in finding that the “storm plan” met County standards.

J. The Public Interest Would Not be Served by This Sprawling Strip Mall in a Rural Area

PCC 18F.40.030(c) requires that the Examiner “shall inquire into the public use and interest proposed to be served by the establishment of

the subdivision and dedication,” and not grant approval unless the public interest is served. Separately, the Examiner must “assure that the proposal conforms with the intent of the Comprehensive Plan, applicable community plans, and other applicable County codes and state laws.” PCC 18F.40.030(d).

This is a separate requirement from compliance with the letter of the zoning regulations; the Examiner was required to independently evaluate the public interest and the nature of the site and decide, independent of whether the project was vested to 1996 regulations, whether it fit the character of the neighborhood, and whether the public interest required yet another sprawling complex of parking lots and big-box stores in the rural area. In this case, the Examiner made a factual finding that the proposal was “almost an addition to an existing established permitted real and office use and consists of infill as opposed to spreading out along a narrow roadway”¹⁴ and then simply recited the code (leaving aside relevant punctuation):

The applicant’s request is consistent with the provisions of 1608030 in that it makes appropriate provisions for public health safety and general welfare for open spaces drainage way streets or roads alleys other public waste transit stops portable water

¹⁴ AR 43.

supplies sanitary waste parks and recreation through the payment fees will provide sidewalks and other planning features to assure safe walking conditions for individuals who use the facility. AR 45.

These pro-forma “findings” are flawed in several respects, and must be reversed. First, the Examiner’s conclusion that the proposal “was almost an addition” to an existing strip mall is belied by aerial photographs of the site. AR 19 shows that while one corner of the property touches another commercial area, the parcel is surrounded on two sides by open, apparently agricultural properties. To the north is a residential neighborhood. Far from being “almost an addition,” this new development will mushroom up in a rural area, pressed hard against a rural residential neighborhood and inflicting its light, noise, and increased traffic on long-established homes.

Second, information in the record expressed grave concerns with the affects of the project’s massive septic tanks and septic drainfield on water quality, and on the effect the massive increase in impervious surface would have on flooding in the area, and on the fact that soils on the lot are unsuited for septic drainfields. AR 63-65; 416-419. In addition to concerns with the massive flow of storm and wastewater, the project adds a huge amount of impervious surface to an already sodden area. The

property is in FEMA flood zone B, and already has “quite a bit of water” on it. AR 63. As F.G. Associates correctly notes, the parcel to the north and west of the property is owned by Pierce County for flood control purposes. AR 12. F.G. Associates’ plans to run stormwater through a pipe into vaults, and then release it “following the original route” stormwater has historically travelled – *e.g.*, into neighboring parcels. AR 64; 19. Even if the metering and vaulting systems work, the area is in a flood zone, and liable to flood. If any part of the system fails, or fails to perform as well as planned, massive amounts of stormwater will flow onto adjacent properties. As one Graham Advisory Commission member noted, “the neighbors may have water in the backyard.” AR 65. The Examiner fails to explain, other than a note that “storm drainage on the site will be to County standards” how adding a massive amount of impervious surface, right next to property sodden enough to be designated for flood control, aids the public interest in limiting flooding.

Third, the Examiner’s approval ignores the requirements of Pierce County’s comprehensive plan and development regulations that limit the Rural Activity Center to the built environment as of 1990, and limit development in the Rural 10 zone (the zone in which the property is currently located), to rural uses. The Graham Rural Activity Center is a

form of Limited Area of More Intensive Rural Development (LAMIRD), a zoning device acknowledging that there are nonconforming areas of urban development in the rural area. AR 70-71; RCW 36.70A.070(5)(d). They are banned by statute from growing beyond the built area as of 1990; while specific buildings can be updated or replaced within the boundaries of the Rural Activity Center and infill development can occur, the Center itself is designed to remain basically intact. RCW 36.70A.070(5)(d). As the County recognized in removing this parcel from the Rural Activity Center in January, 2008, this tract of vacant land adjacent to open fields and residential development is not part of the built environment as of 1990, nor is it appropriate for infill development. AR 59.¹⁵

Fourth, public testimony clearly showed that neighbors are concerned about this proposal, and believe that it will adversely affect their quality of life. In addition to concerns with septic and water flow, neighbors noted that there already was “a lot of noise from Safeway (an existing store, nearby) as well as the sports bar and restaurant.” AR 64. Another resident noted that Safeway’s septic system alarmed for hours in

¹⁵ Staff, ignoring the wishes of the Graham Advisory Commission and the clear directive of the Pierce County Council that this parcel does not belong in the Rural Activity Center, continues to argue that the “classification and use of the site as Rural 10 (R10) from RAC is not appropriate.” AR 70. Staff and the Hearing Examiner are mistaken, and this clear error of judgment should be reversed.

the middle of the night with no contact person. *Id.* Adding this new development – with yet another grocery store and restaurants, presumably serving alcohol and open late – will exacerbate and not aid existing noise and light pollution in this rural area.

The public interest is quite simply harmed by this proposal. F.G. Associates wants to drop a massive strip mall into a rural area. The attendant traffic, noise, and increased stormwater flow and pollution hardly aid the rural residents in the area. The presence of similar businesses in the nearby Rural Activity Center mean that this is not a situation wherein a home improvement center, grocery store, or a “sit down restaurant” will dramatically improve the quality of life – Pierce County is far from short of the type of urban sprawl proposed here. For these reasons, the Hearing Examiner erred in concluding without analysis that the public interest was served by this development, and that allowing it to be built 13 years after it was proposed, in an area now zoned rural conformed with the intent of the Comprehensive Plan.

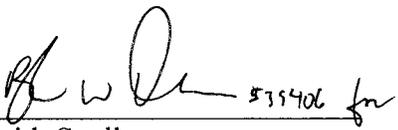
V. CONCLUSION

For the reasons argued herein, the Superior Court’s order should be affirmed.

DATED this 20th day of August, 2010.

Respectfully submitted,

GENDLER & MANN, LLP

By:  \$35406 for
Keith Scully
WSBA No. 28677
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ATTACHMENT A



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ATTACHMENT B

Title 21

CRITICAL AREAS AND NATURAL RESOURCE LANDS

CHAPTERS:

- 21.01 CRITICAL AREAS AND NATURAL RESOURCE LANDS
AUTHORITY AND PURPOSE.**
- 21.10 CRITICAL AREAS AND NATURAL RESOURCE LANDS GENERAL
REQUIREMENTS.**
- 21.14 GEOLOGICALLY HAZARDOUS AREAS.**
- 21.16 AQUIFER RECHARGE AREA.**
- 21.18 FISH AND WILDLIFE HABITAT AREAS.**
- 21.20 FLOOD HAZARD AREAS.**
- 21.30 AGRICULTURAL LANDS.**
- 21.32 FOREST LANDS.**
- 21.34 MINERAL RESOURCE LANDS.**
- 21.36 PROPERTY ADJACENT TO DESIGNATED RESOURCE LANDS.**

21.18.060 Habitat Protection for Rivers and Streams.

Regulated activities proposed along rivers and streams shall provide for habitat protection.

A. Habitat Protection for Rivers and Streams Shall be Provided Through Buffers.

1. The buffer, consisting of undisturbed natural vegetation, shall be required along all streams, as classified by the DNR water typing classification system (WAC 222-16-030). The buffer shall extend landward from the ordinary high water mark of the water body.
2. The buffer of a river or stream shall not extend landward beyond an existing substantial improvement such as an improved road, dike, levee, or a permanent structure which reduces the impact proposed activities would have on the river or stream.

B. Critical Fishery Rivers and Streams Requiring Buffers. The following river and stream (segments) have been identified by the various Indian tribes, particularly the Puyallup Tribe, as being critical to anadromous fish and, therefore, requiring a larger buffer protection. Specific salmon species identified by the Tribes in March 1992 are listed in Appendix C. Critical fishery rivers and streams include:

Stream Name	WRIA	Buffer Width In Feet	Tribe Identifying
South Prairie Creek	10.0429	150	Puyallup
Carbon River	10.0414	150	Puyallup
Clearwater River	10.0080	150	Puyallup
Puyallup River	10.0021	150	Puyallup
White River	10.0031	150	Puyallup
West Fork White River	10.0186	150	Puyallup
Green Water River	10.0122	150	Puyallup
Voights Creek	10.0414	150	Puyallup
Huckleberry Creek	10.0253	150	Puyallup
Chambers Creek	12.0007	150	Puyallup
Nisqually River	11.0008	150	Nisqually
Mashel River	11.0101	150	Nisqually

C. Other Rivers and Streams Requiring Buffers. For rivers and streams not governed by 21.18.060 B above, the buffer width shall be as follows:

DNR Water Type	Buffer Width in Feet
1 through 5	35

(Ord. 91-120S5 § 1 (part), 1992)

21.18.062 Habitat Protection for Lakes.

A. Regulated activities proposed on lakes that are urban in character will not be subject to the buffering requirements of this Chapter. The following lakes are urban in character:

- | | |
|------------|----------------------|
| American | Tanwax |
| Clear | Tapps |
| Crescent | Ohop |
| Gravelly | Spanaway |
| Louise | Stansberry (Holiday) |
| Steilacoom | Whitman |

For proposed single-family residences on lakes that are urban in character, habitat protection shall be provided through education and/or voluntary agreements. However, existing law, as referenced in 21.18.050, may affect such proposals.

For proposed regulated activities other than single-family residences, on lakes that are urban in character, habitat protection shall be provided through education, voluntary agreements, and existing laws as referenced in 21.18.050.

B. Regulated activities proposed on lakes that are not urban in character shall be subject to a 35 foot buffer requirement. The buffer, consisting of undisturbed natural vegetation, shall extend landward from the ordinary high water mark of the water body. Buffers may be altered only as provided in Sections 21.18.067 and 21.18.069.

(Ord. 91-120S5 § 1 (part), 1992)

21.18.065 Habitat Protection for Ponds and Puget Sound.

Regulated activities proposed on ponds and Puget Sound will not be subject to the buffering requirements of this Chapter. Habitat protection for ponds and Puget Sound shall be provided through education, voluntary agreements and existing laws as referenced in 21.18.050. (Ord. 91-120S5 § 1 (part), 1992)

21.18.067 Provisions for Buffers, Where Required.

A. Building Setback and Construction near Buffer. A minimum setback of 8 feet from the buffer shall be required for construction of any impervious surface(s) greater than 120 square feet of base coverage. Clearing, grading, and filling

within eight feet of the buffer shall only be allowed when the applicant can demonstrate that vegetation within the buffer will not be damaged.

- B. Marking of the Buffer Area.** The edge of the buffer area shall be clearly staked, flagged, and fenced prior to and through completion of construction. The buffer boundary markers shall be clearly visible, durable, and permanently affixed to the ground.
- C. Fencing from Farm Animals.** Permanent fencing shall be required from the buffer when farm animals are introduced on a site.
- D. Enhancements to natural buffers consistent with the education program (such as revegetation or nest boxes) are allowed.**
- E. Allowable Activities Within Buffers.** The following activities may occur within the buffer after notification to the Department, provided that any other required permits are obtained.
 - 1. Removal of diseased trees and trees that present a threat to properties.
 - 2. Repair of existing fences.
 - 3. Construction, reconstruction, remodelling, or maintenance of docks and bulkheads as authorized and pursuant to Title 20 PCC (Shoreline Management Regulations).
 - 4. Construction of a pervious path for purposes of private access to the shoreline.
 - 5. Trimming of vegetation for purposes of providing view corridors, provided that trimming shall be limited to view corridors of 20 feet or less and provided that benefits of the buffer to fish and wildlife habitat are not reduced. Trimming shall be limited to pruning of branches and vegetation. Trimming shall not include felling or removal of trees.
 - 6. Construction of public trails.
 - 7. Roadways, bridges, rights-of-way, and utility lines where no feasible alternative exists, and where the development minimizes impacts on the stream and buffer area.

(Ord. 91-120S5 § 1 (part), 1992)

21.18.069 Variances from Buffer Requirements.

The Examiner shall have the authority to grant a variance from the buffer width provisions of this Chapter. In order to grant a buffer width variance, the applicant must demonstrate and the Examiner must find that the requested buffer width modification preserves adequate vegetation to: (1) maintain proper water temperature, (2) minimize sedimentation, and (3) provide food and cover for critical fish species. Variance applications shall be considered according to the variance procedures in Section 18.10.630 of the Pierce County Zoning Code. (Ord. 91-120S5 § 1 (part), 1992)

21.18.070 Appendices.

- A. Endangered, Threatened, Sensitive, Candidate, and Monitored Species Recorded in Pierce County, January 1992.**

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 By Legal Messenger
 By Facsimile
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 By Electronic Mail

By United States Mail
 By Legal Messenger
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 By Federal Express/Express Mail
 By Electronic Mail

DATED this 20th day of August, 2010, at Seattle, Washington.


DENISE BRANDENSTEIN

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