

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

The Honorable Russell W. Hartman

FEB 04 2009

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

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

Plaintiff,)

No. 08-2-04025-4

and)

JOHNNIE E. LOVELACE, an individual;)
LOIS S. COOPER, an individual; and JAMES)
V. LYONS and RENEE D. LYONS, a marital)
community,)

Intervenor Plaintiffs,)

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND DEFENDANTS'
JOINT MOTION FOR SUMMARY
JUDGMENT

v.)

[PROPOSED]

NORTHSHORE INVESTORS, LLC, a)
Washington limited liability company,)
NORTH SHORE GOLF ASSOCIATES,)
INC., a Washington corporation, and)
HERITAGE SAVINGS BANK, a Washington)
Corporation)

Defendants.)

THIS MATTER came before the Court on Plaintiff City of Tacoma's Motion for
Partial Summary Judgment and Defendants North Shore Golf Associates, Inc. ("NSGA")
and Northshore Investors, LLC's ("Investors") reciprocal Motion for Summary Judgment
pursuant to CR 56.

ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT
[PROPOSED] - 1

GordonDerr
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ORIGINAL

1 1. This Judgment affects the following described real property, commonly referred to
2 as the North Shore Golf Course (“Golf Course”):

3 **Parcel A:**

4 Parcel B of City of Tacoma Boundary Line Adjustment
5 Recorded September 13, 1995 under Recording Number
6 9509130149, Records of Pierce County Auditor.

7 Excepting therefrom that portion conveyed to United
8 Properties Linkside, Inc., by deed recorded under Recording
9 Number 9711210225.

10 Situate in the City of Tacoma, County of Pierce, State of
11 Washington.

12 **Parcel B:**

13 Lot 2, Pierce County Short Plat Number 8704240392,
14 according to the plat thereof recorded April 24, 1987, Records
15 of Pierce County Auditor.

16 Situate in the City of Tacoma, County of Pierce, State of
17 Washington.

18 2. Plaintiff City of Tacoma and Defendants seek the following relief:

19 a. **For Plaintiff City of Tacoma.**

20 (1) A judgment that:

21 (i) The Open Space Taxation Agreement (“OSTA”) between
22 Plaintiff City of Tacoma and Defendant NSGA, dated
23 September 21, 1981, created a non-possessory property
24 interest for Tacoma in the North Shore Golf Course
25 property;

 (ii) The restrictions upon the Golf Course in the OSTA remain
binding and enforceable by Tacoma unless and until
Tacoma approves a different use of the property;

 (iii) The OSTA cannot be unilaterally terminated by NSGA or
its successors or assigns;

 (iv) The R-2 Planned Residential District (R-2 PRD) rezone of
the Golf Course and surrounding property was conditioned
upon maintenance of the Golf Course as open space;

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- (v) The North Shore Concomitant Zoning Agreement (CZA) dated November 6, 1981, implemented the legislative rezone decision and remains binding even if not signed by the Golf Course owners; and
 - (vi) The provision in the CZA that requires development consistent with the approved site plan is sufficient to impose the golf course use restriction.
- (2) Dismissal of Defendant NSGA's counterclaim for Inverse Condemnation.
 - (3) Reserving for trial the issue of whether Defendants are estopped to deny that they and the Golf course are bound by the CZA and the issue of whether Plaintiff City of Tacoma is entitled to quiet title in an interest in real property in the Golf Course.

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

- (1) The 1979 Agreement Concerning North Shore Golf Course has expired by its terms and does not restrict the Golf Course to open space use in perpetuity;
- (2) The 1978 Real Estate Contract between NSGA and Tacoma Land Company, Inc., has expired by its own terms and does not restrict the Golf Course to open space use in perpetuity;
- (3) The OSTA does not constitute a property interest in the Golf Course; it is a revocable agreement that does not restrict the Golf Course to open space in perpetuity;
- (4) The CZA does not constitute a property interest in the Golf Course; it is a zoning enactment that does not restrict the Golf Course to open space use in perpetuity; and
- (5) Dismissal with prejudice of all of Intervenor-Plaintiffs' claims, which request and relief shall be addressed by separate order.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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- d. Defendants' takings claim arising out of the 1981 PRD zoning decision is barred by the statute of limitations, pursuant to *Orion Corporation v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987).
- e. To the extent necessary, the OSTA satisfies all elements of the requirements for a deed set forth in RCW 64.04.020.
- f. The CZA applies to the Golf Course, notwithstanding that Defendant NSGA did not sign the document. NSGA and Nu-West were joint applicants for the PRD re-zone. NSGA promised to be bound by the master planning process in the 1979 Agreement, which provided that Nu-West may subject the Golf Course property to the master planning process as though it were owned by Nu-West. It is undisputed that the 1979 Agreement was presented by the parties and considered during the PRD approval process. Accordingly, the OSTA, CZA, and 1979 Agreement establish a legal relationship that binds the Golf Course to the land use designation set forth in the CZA.
- g. The Defendants do not have the right to unilaterally terminate the OSTA. The express language of the OSTA provides that the use of the Golf Course shall be restricted solely to golf course and open space use unless and until the City of Tacoma consents otherwise. Inclusion of this restriction, which resulted from the land use process, in the OSTA does not violate RCW Ch. 84.34 *et seq.*
- h. The open space land use designation on the Golf Course property set forth in the OSTA and CZA does not constitute a property interest held by the City of Tacoma in the Golf Course property.

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

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

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- c. The R-2 Planned Residential District (R-2 PRD) rezone of the North Shore Golf Course and surrounding property was conditioned upon maintenance of the Golf Course as open space. The PRD master plan land use designation for the Golf Course is open space;
- d. The North Shore Concomitant Zoning Agreement (Recording No. 8111120139) (CZA) implemented the City of Tacoma legislative rezone decision and remains binding on North Shore Golf Associates, its successors and assigns;
- e. CZA condition 2(tt) requires development consistent with the approved site plan and designates the Golf Course as open space;
- f. The open space and golf course use restrictions placed upon the Golf Course in the OSTA and CZA constitute land use designations.
- g. Defendants may request that the City of Tacoma amend, nullify or alter the land use designations set forth in the OSTA and CZA through the land use process. NSGA and Investors are in no different position than any other property owner within the PRD with respect to requesting to change the land use designation of and to re-develop real property within the Country Club Estates PRD. The City of Tacoma's processing of and decision in response to such a request is subject to the provisions of the City's PRD regulations as well as general land use laws, including the rules of inverse condemnation. The City must process NSGA's and Investors' pending land use application as though it would an application from any other property owner within the Country Club Estates PRD, that is, consistent with the provisions which are set forth in the planned residential development ordinance.

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

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

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

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

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

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

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

GORDONDERR LLP

By: J.P. Derr 30 January 2009
Jay P. Derr, WSBA #12620
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Approved as to form; notice of presentation waived:

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