

**OFFICE OF THE HEARING EXAMINER**

**CITY OF TACOMA**

**FINDINGS, CONCLUSIONS, RECOMMENDATION AND DECISIONS**

**APPLICANTS:** Northshore Investors LLC

**PROJECT:** The Point at Northshore

**LOCATION:** Northshore Golf Course located at 4101 Northshore Boulevard NE and 1611 Browns Point Boulevard NE. The project site is located within an "R-2 PRD" One-Family Dwelling and Planned Residential Development District.

**SUMMARY OF REQUESTS:**

**File No. REZ2007-40000089068:** Rezone Modification - a request to modify an existing condition of approval placed on the golf course site in connection with Northshore Country Club Estates PRD in a previous rezone which occurred in 1981 and established the PRD designation for the site.

**File No. PLT2007-40000089069:** Preliminary Plat - a request to subdivide the Northshore Golf Course site into 860 lots containing 366 single-family detached homes in the southerly portion of the site and 494 attached townhomes in the northerly portion of the site. In addition, the applicant proposes 65 separate tracts to serve various uses, such as private access roads, open space, storm water facilities, slopes, and critical areas/buffers.

**File No. SIT2007-40000089067:** Site Plan Approval - a request for site plan approval for development of the golf course, accompanying the rezone request.

**File No. MLU2007-40000089065:** Variances/Reductions - a request for variances to building setback requirements, reductions to minimum lot area and minimum lot standards

**File Nos: WET 2007-40000105839 and WET2007-40000105876:** Wetland/Stream Assessments, and Wetland/Stream Exceptions - identification of regulated systems on the golf course and request for exemption of such systems from a Wetland Development Permit; request for interrupted buffers on two Category IV wetlands.

## **PUBLIC HEARING:**

After reviewing the Staff Report of the Department of Public Works, the Hearing Examiner Pro Tempore conducted a public hearing on the applications. Hearing sessions were held on four days - October 12, 13, 15 and 16, 2009. The record was held open for response by the City to conditions proposed by the applicants. The record closed on October 23, 2009.

Two hundred, seventy-six (276) exhibits were admitted. Six of these exhibits are volumes containing several hundred public comment letters.

At the hearing Aaron M. Laing and Thomas Bjorgen, Attorneys at Law, represented the applicants. The City was represented by Jay Derr, Attorney at Law. Save NE Tacoma was represented by Gary Huff, Attorney at Law. Thirty-four (34) persons presented public testimony.

## **RECOMMENDATION:**

**File No. REZ2007-4000089068:** Rezone Modification - The application should be denied.

## **DECISIONS:**

**File No. SIT2007-4000089067:** Site Plan Approval - The Site Plan approval is denied, effective on the date the City Council acts on the Rezone Modification recommendation.

**File No. PLT2007-4000089069:** Preliminary Plat - The Preliminary Plat is denied, effective on the date the City Council acts on the Rezone Modification recommendation.

**File Nos: MLU2007-4000089065, WET2007-40000105839, WET2007-40000105876:** Variances/Reductions, Wetland/Stream Assessments, Wetland/Stream Exemptions - Because of the decisions on the Site Plan Approval and Preliminary Plat these matters need not be reached.

## **FINDINGS OF FACT**

### **General Description of Proposal**

1. Northshore Country Club Estates (Country Club Estates) is an approximately 338-acre<sup>1</sup> planned residential district consisting of residential areas and an 18-hole golf course, located at 33d Street NE and Norpoint Way NE and west of 45th Avenue in the City of Tacoma.

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<sup>1</sup> Different numbers have been used by the Applicants and the City. The differences are the result of the variations in historical records, GIS data, Pierce County Assessor data, property descriptions and surveys. The Examiner is using the number provided by City Staff in their Staff Report.

It is located within an "R-2 PRD" One-Family Dwelling and Planned Residential Development District.

2. The R-2 PRD zoning for the area was approved in 1981, along with general approval of Divisions 2, 3 and 4 of Country Club Estates, with specific Preliminary Plat approval of Division 2A. Since that approval, Divisions 2, 3 and 4 have been finally platted and developed around and within the golf course.

3. The golf course (Northshore Golf Course) is a privately owned 18-hole golf course which is open to the public. Since before the 1981 rezone through the present, the surrounding residential areas and the golf course area have been in separate ownership.

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

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

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

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

8. The golf course occupies approximately 116 acres<sup>2</sup> of the overall 338-acre PRD. The instant application, in short, proposes to fill the present golf course site with houses. To do so will require considerable grading to re-contour the rolling terrain of the course for level building sites and the installation of utilities. While perimeter trees will be retained as practical, interior trees will be removed. Landscaping, of course, will accompany the new development.

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<sup>2</sup> Several different figures have also been used for the golf course's size. The Examiner has used the number initially used by the City Staff in their Staff Report.

9. The *Comprehensive Plan* designates the site as a "Low Intensity" housing area, suitable for single-family home development. The Generalized Land Use Element provides that overall densities for a low intensity residential development can range up to 15 dwelling units per acre. The existing density at the current level of PRD build-out is approximately 3.57 units per acre. The proposed development of 860 units would produce a density of about 7.4 units per acre on the 116-acre golf course area. Thus there is no density issue either with the proposal in isolation or as it would affect the PRD as a whole.

10. The applicants have presented analyses intended to show that their proposal can be built consistent with PRD regulatory open space requirements. Their view is that private yards may be counted as "usable landscaped recreation area," a phrase which is at the core of the open space definition to which the applications are vested. Under this interpretation, even though the golf course is eliminated, the proposed development and the pre-existing developments will provide enough open space within the PRD to satisfy the definition.

11. The 1981 Hearing Examiner recommendations, adopted by the City Council, called for approval of the rezone and the Preliminary Plat of Division 2A subject to the following condition:

The applicant shall submit a legal agreement, which is binding upon all parties and which may be enforced by the City of Tacoma. It should provide that the property in question will maintain and always have the use of the adjacent golf course for its open space and density requirement which has been relied upon by the applicant in securing approval of this request. In this regard, the agreement attached to File No. 128.9 may be used in concept . . . . However, the Examiner believes that there must be more certainty provided to insure the golf course use, which was relied upon to gain the density for this request, is clearly tied to the applicant's proposed use in perpetuity.

12. The restriction of the golf course to golf course (open space) use was implemented by means of an Open Space Taxation Agreement (OSTA) between the owners of the golf course and the City, as well as a Concomitant Zoning Agreement (CZA) between the developers and the City. Under the OSTA, the City must approve any change in the use of the golf course. The CZA requires adhering to the approved Site Plan which includes the golf course.

13. The current Rezone Modification application seeks to eliminate the Hearing Examiner's condition for the original PRD approval, to nullify the OSTA and to modify or remove the CZA condition that requires adhering to the approved Site Plan. In short, it asks for the City's approval to remove the golf course's open space designation. The primary asserted justification for making such a change to the original provisions of the PRD zone is that conditions have substantially changed.

14. The instant Preliminary Plat application relates solely to dividing the land on the golf course. There is no application to modify the terms of plat approval for Division 2A or any of the other Divisions of Country Club Estates.

## **Historical Background**

15. The area rezoned to R-2 PRD was zoned R-2 in 1953. By 1981, Division 1 of Country Club Estates had been approved and was under construction. Except for Division 1, the area around the golf course was at that time undeveloped forest area.

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Procedural Background for the Subject Application**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Conduct of the Hearing**

38. The public hearings were conducted in the standard manner for pre-decision permit matters. The City Staff presented an overview of the project and summarized its Staff Report. The applicants made their presentation introducing a redesign of the proposal that it called the "Perfect Alternative." Public testimony was taken from 34 citizens, most of them residents of Country Club Estates. Included in the public testimony was a presentation by counsel on behalf of Save North East Tacoma, a neighborhood group organized in opposition to the proposal. Argument was heard from both the City and the applicants.

39. The Staff Report consisted of 118 pages devoted to describing the project, giving the history of the site, providing the regulatory framework for the application, and analyzing the proposal under the relevant Code provisions. The Staff found some areas of inconsistency with applicable standards, but overall provided no recommendation for action by the Hearing Examiner.

40. If the Examiner were to approve the applicants' requests, the Staff spelled out some 120 recommended conditions of approval. Many of these conditions reflect actions the Staff concluded the applicants should take in mitigation of the impacts of the proposal.

41. Evidence was presented of mitigation agreements acceptable to the City with regard to traffic ( City of Federal Way) and schools (Tacoma School District). With appropriate conditions, the Staff was satisfied that adequate mitigation can be implemented for impacts from earthwork and grading and from impacts to storm water management and critical areas.

42. A mitigation agreement with the Metropolitan Parks District had not yet been

concluded as of the dates of hearing. The applicants are offering a payment of \$250 per unit in addition to the established \$25 per unit impact fee. The Parks District has a concern with the timing of the payments, i.e., at the time of building permit issuance.

43. The applicants presented the "Perfected Alternative" as a proposal designed to approach the reduced impact of the EIS Alternative, but without shrinking the development to the same extent. This would be achieved by positioning larger lots to the perimeter and smaller lots to the interior, reorienting buildings in relation to open space and adjacent uses, adding 7,900 lineal feet of trails, and providing variable buffers around the perimeter on the recommendation of a landscape architect with site-specific planting screens and fences.

44. The applicants' view is that the "Perfected Alternative" better approximates the original proposal's objectives than does the EIS Alternative. The "Perfected Alternative" includes 804 residential lots, resulting in a density for the golf course area of 6.9 dwelling units per acre. This is 56 lots fewer than the original proposal, equating to an eight percent reduction. The perimeter transition zone (buffer) areas would be 22.9 acres, in comparison to 24.7 acres in the EIS alternative. A total of 3.2 acres in park and landscape tracts is offered.

45. The record and testimony supports a finding that the applicants' proposal and revised proposal would, with associated infrastructure, be adequate to accommodate the impacts of the development on public facilities. Public water, sewer and roads systems, as improved, would have adequate capacity for this development.

46. During the course of the hearings, the applicants and Staff offered and responded to several iterations of proposals for project conditions. Ultimately, concerns with roads, cul-de-sacs and turnarounds were resolved. The applicants withdrew some variance requests, but persisted in asking for five foot side yard setbacks and reduction to minimum lot size and width.

47. The public testimony at the hearing covered a vast array of objections, including impacts on schools, aesthetics, trees, views, and mental health. Some felt the golf course was priced too high and that it could be sold as a golf course. Others questioned the adequacy of the proposed facilities to handle reasonably anticipated storm water in this glacial till environment. A recurring perception was that the City in accepting the golf course as the open space for Country Club Estates had made a commitment to the people who invested in homes there to preserve it as open space. It is apparent that many, if not most, of the people who bought into Country Club Estates did so because of the green open space provided by the golf course. Petitions of protest with thousands of signatures were introduced. Volumes of letters were submitted. There was not, in all of this, the faintest whiff of public support for the proposal.

### **Criteria for Approval**

#### **48. Rezone Modification**

A rezone modification, under the Tacoma Municipal Code (*TMC*), is treated like a permit modification. The applicants seeks to eliminate a condition from the zoning approval that created the R-2 PRD district. The subject request, therefore, constitutes a major modification

(See *TMC* 13.05.080) and the standards for original approval apply. The relevant criteria are set forth in *TMC* 13.06.650, as follows:

- (1) That the change of zoning classification is generally consistent with the applicable land use intensity designation of the property, policies and other pertinent provisions of the comprehensive plan.
- (2) That substantial changes in condition have occurred affecting the use and development of the property that would indicate the requested change of zoning is appropriate. If it is established that the rezone is required to directly implement an express provision or recommendation set forth in the comprehensive plan, it is unnecessary to demonstrate changed conditions supporting the requested rezone. (Emphasis added.)
- (3) That the change of the zoning classification is consistent with the district establishment statement for the zoning classification being requested. (Emphasis added.)
- (4) That the change of the zoning classification will not result in a substantial change to an area-wide rezone action taken by the City Council in the two years preceding the filing of the rezone application. Any application for rezone that was pending and for which the Hearing Examiner's hearing was held prior to the adoption date of an area-wide rezone, is vested as of the date the application was filed and is exempt from meeting this criteria.
- (5) That the change of zoning classification bears a substantial relationship to the public health, safety, morals, or general welfare. (Emphasis added.)

A PRD zone, originally or as modified, must meet the relevant standard for open space. The standard to which the subject application is vested is for "usable open space." As set forth at former *TMC* 13.06.140(F)(6), the definition, in pertinent part, reads:

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

#### 49. Site Plan Approval

Under *TMC* 13.06.140(B), an application for site plan approval shall accompany a request for reclassification to a PRD District. In acting upon such a request the Hearing Examiner shall consider, but not be limited to, the following criteria:

1. The site development plan shall be consistent with the goals and policies of the comprehensive plan.
2. The plan shall be consistent with the intent and regulations of the PRD

district and any other applicable statutes and ordinances. (Emphasis added.)

3. The proposed development plan for the PRD District is not inconsistent with the health, safety, convenience or general welfare of persons residing or working in the community. The findings of the Hearing Examiner . . . shall be concerned with, but not limited to, the following:

- a. The generation of noise or other nuisances . . .
- b. Availability and/or adequacy of public services . . .
- c. Adequacy of landscaping, recreation facilities, screening, yard setbacks, open spaces, or other development characteristics necessary to provide a sound and healthful living environment and mitigate the impact of the development upon neighboring properties and the community.
- d. The compliance of the site development plan with any conditions to development stipulated by the City Council at the time of the establishment of the PRD District. (Emphasis added.)

#### 50. Preliminary Plat

The request to subdivide the golf course area into residential parcels within the R-2 PRD District is subject to the general criteria for approval of preliminary plat set forth at *TMC* 13.04.100(E). The preliminary plat shall not be approved unless it is found that:

1. Appropriate provisions are made for made for the public health, safety, and general welfare, and for open spaces; drainage ways; streets or roads; alleys; other public ways; bicycle circulation; transit stops; potable water supplies; sanitary wastes; parks and recreation; playgrounds; schools and school grounds' and all other relevant facilities, including sidewalks and other planning features which assure safe walking conditions for students who walk to and from school and for transit patrons who walk to bus stops or commuter rails stations. (Emphasis added.)
2. The public use and interest will be served by platting of such subdivision and dedication. (Emphasis added.)

#### **Environmental Impact**

51.. The applicants throughout the permit process have proceeded on the assumption that a commitment to appropriate mitigation measures could and would reduce the environmental impact of this proposal to below the level of "significance."

52. The applicants' position is that the various mitigation efforts it has offered or agreed to implement, as expressed through the "Perfected Alternative" plan and through its latest

response to the City's proposed conditions, represent a reduction of impacts to a level lower than "significance."

53. In most areas, the City and the applicants agreed that the mitigation offered will eliminate significant adverse impacts.

54. In terms of adverse impacts, the "Perfected Alternative" lies somewhere in between the applicants' proposal and the EIS Alternative. As noted, the FEIS concluded that, in the category of land use compatibility and aesthetics, neither the applicants' proposal nor the EIS Alternative would reduce the adverse impacts of replacing the golf course with residential development to a non-significant level.

55. "Significant" under WAC 197-11-794 means "a reasonable likelihood of more than a moderate adverse impact on environmental quality." It involves context and intensity and does not lend itself to a quantifiable test. The context may vary with the physical setting. Intensity depends on the magnitude and duration of the impact. Severity should be weighed along with the likelihood of occurrence.

56.. If the application were granted, replacing the golf course with residential development would be absolutely likely to occur. The impact would occur in a physical context where the change would radically alter the setting from green open space to housing, with attempts at screening and buffering. From higher elevations, much of what now appears as trees, grass and open vista would be replaced by roofs. The duration would be, more or less, permanent. The magnitude of the change would be profound. Simply put, the people living in and around the golf course would be looking at and experiencing adjacent land use that is quite different from the present.

57. The applicants contend that the various housing types, sizes and groupings contemplated by the proposal would be compatible with surrounding development. Even if so, this is not the appropriate comparison here. This is not a case of infill on a vacant lot where development is allowed and anticipated by the land use regulatory regime. Here the golf course is subject to a condition, purporting to guarantee that it remains as open space -- a condition that has been a critical factor in determining the character of the environment as perceived by those who live in the adjacent developed areas. To eliminate this open space raises a compatibility problem that cannot be resolved by residential design, housing scale or housing arrangement. The proposal and its variation are incompatible with the original design concept and, in context, this is a significant impact.

58. The quality of a significant impact is a matter of judgment, rather than objective measurement. Based on the record, the Examiner is not able to say that the FEIS evaluation of the impacts the proposal and the EIS Alternative on land use compatibility and aesthetics is in error. The impacts would be more than moderate and, again in the particular context, they would be adverse. Further, the Examiner finds that the "Perfected Alternative", as conditioned and revised, would not reduce the level of adverse impact below the level of "significance."

59. However, the SEPA process is about informed decision making. SEPA does not require that all significant adverse impacts be mitigated or, if such impacts exist, that a project be denied. The existence of significant adverse impacts is simply a factor to be considered in the evaluation process. Denial of a project must be based on some independent provision of adopted law or policy.

### **Comprehensive Plan**

60. The DSEIS contains a comprehensive compilation of applicable *Comprehensive Plan* policies filling some 20 pages. In summary, the proposal was found to be consistent with many *Comprehensive Plan* policies or would be consistent with such policies if recommended mitigation were implemented. The Staff Report lists a number of policies with which the project might be considered inconsistent, including several policies from the neighborhood element for Northeast Tacoma

61. The *Comprehensive Plan* itself is a melange of policies both encouraging growth and promoting the protection of established neighborhoods. Those policies with which Staff finds the project arguably inconsistent tend to be in the latter category, as well as directed toward the preservation of natural values and open space. The policies, in general, speak in precatory rather than mandatory terms.

62. The proposal and the "Perfected Alternative" are both clearly consistent with the land use intensity designation of the *Comprehensive Plan*. Looking at the entire list of applicable *Comprehensive Plan* policies, the project does not appear on balance to be so contrary to the spirit of the planning document that it should be found to be inconsistent with it for regulatory purposes.

### **Definition of Open Space**

63. The applicants' proposal is predicated on the assumption that private yards may be counted as "usable landscaped recreation area," under the former definition of "usable open space" quoted above. (See former *TMC* 13.06.140(F)(6). This is the definition to which the applicants vested. Under this interpretation, the minimum open space requirements for the PRD can be satisfied without even using the golf course.

64. However, the development concept on which the 1981 rezone was based was that the golf course would supply the open space needed for the PRD. Exactly how this worked out in terms of the minimum required open space was not addressed. It was apparently assumed that including the golf course would provide enough open space and that it was needed for that purpose.

65. Whether private yards could be included as open space was not addressed in the 1981 decision. From the manner in which the golf course was then treated, it can be inferred that no one considered the use of private lawns.

66. In the years between 1981 and 2007 there was apparently an evolution in the thinking of Staff about what could be considered to satisfy the requirement for open space. Over time, the City allowed the open space requirement to be satisfied both through the provision of common open space and through the use of private yard and road areas. In recent years, new PRD developments have provided relatively small amounts of common open space and have relied heavily on private roads and private yards to meet the requirement.

67. In the summer of 2007, after the instant application became vested, the open space definition was changed to "clarify" that, among other things, private yards are not to be counted in open space calculations. In the amended definition, the term "usable open space" is no longer used, nor is the formulation "usable landscaped recreation area." Instead, the open space requirement is expressed as "common open space," meaning space open to all owners or to the public generally.

68. Further, under the amended definition, the minimum required for "common open space" is a significantly larger area than formerly needed for "usable open space." Under the prior definition open space was 1/3 of whatever was left after buildings and public streets were subtracted, necessarily an area less than 1/3 of the whole. Under the 2007 amendment the minimum open space needed is now 1/3 of the gross site area of the PRD District.

69. There is nothing in the former definition that limits its applicability to "common" or "public" use. The Examiner is not persuaded that by including private lawns and roads the Staff was, under the past definition, making a mistake. The former language was broad enough to encompass the interpretation that Staff made.

70. The 2007 amendment changed both the descriptive language and the minimum size of required open space. The "common" or "public" use limitation was not required by the plain meaning of the prior definition. The Examiner concludes that the post-vesting definition must be seen as a change in the law, not as simply as an explanation of what the law meant all along.

71. In the instant case, however, the question of what minimum open space was required under the prior definition is germane only if reducing the PRD's open space is somehow necessary. The golf course was designated as open space and that land use designation was by the conditions of approval to remain in perpetuity. The open space for the PRD whatever its size, is what it is. The setting aside of more open space than the minimum does not, ipso facto, require or imply that the excess should be converted to another use.

### **Changed Circumstances**

72. The change in zoning sought by the applicants is, in effect, a request to be free of the condition imposed by the Hearing Examiner in 1981. The Examiner, then, wanted certainty to be provided that the golf course use was tied to the adjacent residential use in perpetuity. Under the OSTA, the golf course owners and their successors may not use the golf course for another use without the express consent of the City. The City is now being asked to consent to using the golf course for another purpose on the basis that "substantial changes in conditions affecting the use and development of the property" has occurred.

73. The applicants showed that the golf course, while initially successful, has been less so for a number of years. The number of rounds played there annually has been going down.

74. At the same time, there is evidence that the North Shore course has declined in terms of upkeep and quality over time. While it is expensive to run a golf course, there was no showing of any vigorous effort to upgrade the facility.

75. Evidence was presented of a decline in the national popularity of playing golf. However, the experience in this State may be to the contrary. The record shows that a number of new golf courses have opened in the local region in recent years. No specific information was given on how these newer golf course operations are faring.

76. Overall, the record is unclear as to whether the decline in popularity of the North Shore Golf Course is the result of implacable market forces or self-induced. The course's exact financial status is not known. Moreover, there was no analysis of what an infusion of investment in the quality of the course might do to improve its financial fortunes.

77. The golf course ownership has not changed. Now the owners want to retire. By a recent letter, the owners said that they had no intention of perpetually operating a golf course on the property. But, there is no record of any such sentiment being expressed in 1981. Then, they agreed be part of the PRD and to use the golf course as open space. They did not appeal the rezone. They registered no objections to the conditions of approval for the PRD.

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

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

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

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

82. The Staff Report states the following:

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

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

#### **PRD Intent**

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

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

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

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

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

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

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

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

### **Public Interest**

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

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

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

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

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

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

### **General Discussion**

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

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

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

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

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

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

## CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

### **RECOMMENDATION**

The Hearing Examiner recommends that the Rezone Modification be denied.

### **DECISIONS**

The Preliminary Plat is denied.

The Site Plan approval is denied.

**SO ORDERED**, this 7<sup>th</sup> day of January, 2010.

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**Wick Dufford, Hearing Examiner Pro Tempore**