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7 BEFORE THE CITY COUNCIL

8 FOR THE CITY OF TACOMA

9 IN THE MATTER OF "THE POINT AT NORTHSHORE" APPLICATION FOR REZONE MODIFICATION, PRELIMINARY PLAT AND SITE PLAN APPROVAL, VARIANCES AND SEPA REVIEW BY NORTHSHORE INVESTORS, LLC and NORTH SHORE GOLF ASSOCIATES, INC., Appellants.	FILE NOS.: REZ2007-40000089068, PLT2007-40000089069, SIT2007-40000089067, MLU2007-40000089065, and SEP2007-40000089069 **BRIEF IN SUPPORT OF APPEAL OF THE RECOMMENDATION OF THE HEARING EXAMINER TO DENY APPLICATION FOR REZONE MODIFICATION**

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I. RELIEF REQUESTED

15 Appellants respectfully request that the City Council reverse the Hearing Examiner's
16 Recommendation to deny their request to modify a condition of approval placed on the North
17 Shore Golf Course (Golf Course) as part of a 1981 rezone to Planned Residential
18 Development (PRD) and grant the request. The Examiner solely and wrongly relied upon
19 what he characterized as "a massive outpouring of citizen rage" in reaching his
20 recommendation. "While the opposition of the community may be given substantial weight,
21 it cannot alone justify a local land use decision." *Sunderland Family Treatment Servs. v. City*
22 *of Pasco*, 127 Wn.2d 782, 797, 788, 903 P.2d 986 (1995). The Examiner's Recommendation
23 is unsupported in fact and contrary to the law. If upheld, it will result in an unconstitutional
24 taking of property without just compensation. Unless the City is prepared to purchase the
25 Golf Course, the City Council should reverse the Recommendation and grant the request.
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II. EVIDENCE RELIED UPON

Appellants rely upon the record established before the Hearing Examiner during the public hearing on October 12, 13, 15 and 16, 2009. The record consists of the admitted exhibits and recorded testimony. Appellants understand that, concurrent with the filing of this brief, the Hearing Examiner's office completed preparation of the indexed record of exhibits. Accordingly, Appellants refer to the exhibits according to their exhibit numbers on the list attached hereto as **Exhibit A**. As no transcript of the recording has been prepared as of this filing, Appellants further refer to the recorded testimony of various witnesses, including but not limited to Jennifer Ward, Merita Trohimovich Pollard, Ted Stone, Cheryl Browder, Dennis Hanberg, Kathleen Bradley Reader, and Kurt Wilson. Appellants expressly reserve the right to submit a revised version of this brief on or before April 6, 2010, consistent with TMC 1.710.030 with citations to the indexed record and transcripts.

III. FACTUAL SUMMARY

As a preliminary matter, it should be noted that Appellants are not seeking to rezone the Golf Course. Rather, Appellants are seeking permission to redevelop the Golf Course under the same zoning as applies to the entirety of the North Shore PRD, which is R-2 zoning. The Golf Course is arguably subject to a condition, limiting its use to golf course or open space. Appellants' request is to allow for a different use—residential—allowed under the existing zoning and subject to the same code requirements as all other development within the PRD.

The Hearing Examiner's Decision is effectively summarized in Conclusion No. 17, particularly the final sentence:

> 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.

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> 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.

(Emphasis added.) While the Examiner found that the various applications that comprised the project met essentially every legal requirement, the Examiner nevertheless found that the impacts "to those living in the adjacent plats" was simply to great to meet the public interest criteria. On this basis alone, the Examiner recommended denial of Appellants' Rezone Modification application (and denied the related applications).

Appellants also provide the following brief summary of material facts with citations to the record (per above) in the body of their argument as appropriate[1]. The following facts are supported by substantial evidence and support their appeal:

- the PRD's density did not change and that it was developed well-below the density allowed prior to the 1981 rezone;
- the proposal is a common type of infill development;
- the Golf Course is not part of the adjacent subdivisions or the 1981 site plan—it is only part of the PRD;
- the 1981 rezone condition does not restrict the Golf Course's use in perpetuity;
- there is no compatibility issue with the proposal and the existing adjacent developments, much less one that cannot be resolved through design and mitigation;
- both "changed circumstances" and fulfillment of the City's Comprehensive Plan support the rezone application;
- the Golf Course is failing because the industry is declining;
- there is no mechanism to take care of the Golf Course if it fails;
- the Golf Course owners made significant marketing, sales—including efforts to sell

[1] Appellants note that a hearing brief is option under TMC 1.70.030 (parties to an appeal "may submit written arguments"). As there are no formal briefing guidelines, Appellants have made an effort to provide direction to the record as a matter of convenience for the City Council and without waiver of any right or argument.

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to the City—and maintenance efforts before reluctantly seeking permission to redevelop;

- only limited private views of a very few adjacent neighbors will be impacted by the proposal, and other aesthetic amenities were proposed;
- the Golf Course owners, who reside in the same subdivision of many of those that opposed the proposal, support it;
- and the public interest will be served by the amenities provided by the proposal, including but not limited to school impact fees, parks and trails open to the whole public, park impact fees, improved storm water handling in the area, enhanced critical areas protection, residential density in the City's growth area and more.

In sum, Appellants' proposal, if approved, will retain more than the minimum necessary amount of open space within the PRD while providing for enhanced recreational opportunities and a more efficient use of open space, especially in light of the Growth Management Act's emphasis on reducing sprawl. The project will put residential development in an already-developed area and avoid a potential blight, when the Golf Course either fails or the owners retire with no successor. This is exactly what the Comprehensive Plan calls for, and the Request, if granted, will fulfill the Plan.

IV. STANDARD OF REVIEW

Pursuant to TMC 1.70.010.C, the City Council may grant relief if Appellants carry their burden of establishing that one or more of the following standards are met:

(a) The Hearing Examiner engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The recommendation is an erroneous interpretation of the law;

(c) The recommendation is not supported by evidence that is substantial when viewed in light of the whole record before the Council; and

(d) The recommendation is a clearly erroneous application of the law to the facts.

Issues raised under the erroneous interpretation subsection present a question of law

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for *de novo* review. *See Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assoc.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004)).[2] A "substantial evidence challenge requires the reviewing body to ask whether there is "sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true." *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). A decision is "clearly erroneous when, although there is evidence to support it, the reviewing [body] on the record is left with the definite and firm conviction that a mistake has been committed." *Wenatchee Sportsmen*, 141 Wn.2d at 176.

An appeal before the City Council is limited to the record before the Examiner, and "[n]o new evidence or testimony shall be presented to the Council." *See* TMC 1.70.030. If any of the above standards is met, the City Council shall modify or reject any findings or conclusions and may remand the recommendation of the Hearing Examiner for further hearing. *Id.*

As set forth in the body of their brief, Appellants challenge the following Findings, Conclusions and the Recommendation as being based on an erroneous interpretation of the law, unsupported by substantial evidence and / or based on a clearly erroneous application of the law to the facts: Finding Nos. 13, 16, 36, 47, 57, 65, 71, 72, 74-83, 86-88, 90-94, 97, and 99; Conclusion Nos. 7, 11-19.[3]

V. ANALYSIS AND ARGUMENT

The Hearing Examiner's factual and legal analysis of Appellants' request to modify the open space condition of the 1918 PRD rezone is based on three fundamental errors. First, the Examiner wrongly concludes that the only argument and evidence offered to

[2] Because the City code does not set forth interpretive language for the appeal standards, Appellants have briefed this matter under the standards set forth in Washington case law arising under the Land Use Petition Act (LUPA), RCW Chapter 36.70C.

[3] Appellants hereby incorporate by reference their January 20, 2010 Notice of Appeal of the Recommendation of the Hearing Examiner to Deny Application for Rezone Modification as if fully set forth herein.

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support the rezone modification was "changed circumstances." To the contrary the record is replete with evidence (written and oral) showing that the request fulfilled both the City's land use code requirement under TMC 13.06.650 and fulfilled dozens of the City's Comprehensive Plan policies and goals. Under the City's code and Washington case law, evidence of "changed circumstances" is unnecessary if, as here, a proposal meets the goals and policies of the Comprehensive Plan.

Second, the Hearing Examiner erred as a matter of fact and law in concluding that "changed circumstances" did not warrant approving the modification request. The gist of the Examiner's findings and conclusions on this issue is that public opinion—that is, community opposition—is a sufficient basis to deny the request. The Examiner ignored evidence of significant physical and regulatory in NE Tacoma and significant economic changes affecting the golf industry as a whole and dramatically affecting the North Shore Golf Course. The Examiner also ignored the unrebutted evidence and practical reality that, due to such changes, the Golf Course was no longer viable.

Third, the Hearing Examiner erred as a matter of fact and law in concluding that the request, if granted, would not be in the public interest.[4] The Examiner's reasoning is set forth in Finding No. 94 and Conclusion No. 7, in which he notes: "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. . . . Ultimately this may mean that requests to alter the adjacent plats be made and approved before the subject application can be approved." It is unconstitutional to condition land use approval on the consent of neighboring property owners, and the evidence shows myriad public benefits, including increased recreational opportunities and the abatement of flooding and other storm water-

[4] Appellants note that the Decision refers to the public interest element under the analysis of the Preliminary Plat application; however, as it is an element for a rezone modification application under TMC 13.06.650 and Washington's common law, we address it here, without waiver of any right or argument.

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related issues.

Finally, if the City chooses to uphold the Examiner's Recommendation, it will effectively deprive the Golf Course of all economically-viable use and value. The Golf Course owners unsuccessfully sought to sell the Golf Course to the City and others long before they reluctantly sought to redevelop it. The City refused to purchase the Golf Course. If it upholds the Examiner's Recommendation, it will *de facto* purchase the Golf Course under the principles of inverse condemnation.

For the reasons set forth herein, Appellants respectfully request that the City Council reverse the Hearing Examiner's recommendation, grant the rezone modification request and remand this matter to the Hearing Examiner to process the related applications consistent with its decision.

A. The Recommendation is Unsupported and Unlawful under TMC 13.06.650 and Washington's Common Law Criteria for Approving Rezone Applications.

Appellants provide the following analysis under both the Tacoma Municipal Code (TMC) and Washington's common law. As demonstrated herein, the Hearing Examiner erred factually and legally in recommending denial of the Rezone Modification Request. The City Council should reverse the Recommendation, grant Appellants' Request.

(1) Appellants' request meets the requirements of TMC 13.06.650, so the Examiner's Recommendation should be reversed.

A rezone modification, under the Tacoma Municipal Code (TMC), is treated as a permit modification to an approved permit subject to TMC 13.05.080. The relevant criteria are set forth in TMC 13.06.650, which provides:

> (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**

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