The Honorable Carol Murphy

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

SPANAWAY CONCERNED CITIZENS, Petitioner, v. PIERCE COUNTY; TACOMA RESCUE MISSION; AHBL, INC., Respondents.	NO. 24-2-03310-34 PETITIONER'S OPENING BRIEF

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I. SUMMARY

Tacoma Rescue Mission (TRM) seeks to build and operate a village of 285 homes for the chronically homeless. No one is opposed to building homes for the homeless. The opposition stems from the proposed location: Good project; wrong location.

That the proposed location is a bad location is evident from the historic zoning of the property. Historically, the zoning on this property would not allow for a development of this intensity or density at this remote location. Indeed, that protective zoning remains in effect today. But there was a brief period—six weeks—when the zoning was relaxed. During that brief period—before the County Council recognized and corrected its mistake—TRM filed its application for this project. When the zoning was amended to restore the prior protections, TRM asserted it did not matter—that it was vested to the more relaxed zoning that was in effect when it filed its application.

TRM is correct that filing an application *may* entitle the applicant to have the proposal assessed by reference to the zoning in effect when the application was filed. But that ability to vest is conditional. Per the county code, an application can vest only if, among other things, (1) the application is authorized by all the owners of the land to be developed,[1] and (2) only if the proposal is consistent with the county's comprehensive land use plan.[2]

The parties to this appeal agree that those conditions must be satisfied for the application to vest. The issue is whether they were satisfied here.

Lack of Consent from All Owners

The county code provides that an application is not complete unless it is authorized by all

[1] PCC 18.160.030 (only "complete applications" vest); PCC 18.40.020.C (elements of a "complete application"). Recently, PCC 18.40.020.C was amended. We quote and discuss the version in effect when TRM filed its application.

[2] PCC 18A.75.030.B.1.b; PCC 18A.75.030.K.1.

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owners of the property. PCC 18.40.020.C. TRM's project includes a parcel that was condemned 100 years ago by a public drainage district. TRM has not acquired that parcel. Nor did TRM obtain the signature of the parcel's owner on the application. The county should have rejected TRM's vesting claim because of this omission.

The county hearing examiner rejected our claim by mischaracterizing the property rights obtained when the drainage district condemned the property. (The hearing examiner's error in this regard was understandable. The hearing examiner has expertise in land use codes, not real estate transactions and condemnation.) The examiner decided that the drainage district had condemned only an easement, not fee title. Because the drainage district had not acquired fee title, the parcel was not separately owned and no approval from the parcel's current owner was required—or so reasoned the examiner.

The examiner was wrong. The court filings from the drainage district's condemnation action a century ago are included in the record. They demonstrate that the district condemned a fee interest. The operative words in the condemnation judgment reference the "taking and appropriation of the lands hereinafter described," not a mere easement. Administrative Record (AR) 10091.[3]

No one disputes that neither the district nor its successor-in-interest signed the application. Because the district's property is part of the proposed development and the current owner of that parcel did not consent to the application, the application was not complete per the county code and could not vest to the code then in effect. The county's approval of the application based on the outdated code should be vacated and reversed.

[3] The administrative record was filed by the county on November 27, 2024.

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Inconsistency with the Comprehensive Plan

The second flaw in TRM's vesting claim relates to the county code requirement that allows vesting only for applications that are consistent with the county's Comprehensive Land Use Plan. PCC 18.40.020.B; 18A.75.030.B.1.b; 18A.75.050.K.1. This project is not consistent with the Comprehensive Plan and should not have vested.

The Comprehensive Plan consistency issue relates to the way density is calculated when small dwelling units are proposed. The application sought approval of a project that would include 285 "homes." AR 110; AR 120 (285 "housing units"). To make them as inexpensive as possible, the homes will share kitchen facilities, AR 159, and thus are sometimes referenced as "microhomes." *See, e.g.,* AR 122. The county amended its zoning code to specify that small dwelling units (those with shared kitchen facilities) would count as only one-fourth of a dwelling unit for purposes of the *zoning code* density calculation. But the county did not adopt a similar amendment to its Comprehensive Plan. There is no provision in the Comprehensive Plan that allows small dwelling units to be treated as one-fourth of a dwelling unit for Comprehensive Plan density purposes.

The proposed development meets the Comprehensive Plan's density limits only if the one-fourth of a unit conversion provision added to the zoning code is applied to the Comprehensive Plan, too. The zoning code and Comprehensive Plan are separate legal documents. An amendment of one does not amend the other. Because the county never amended its Comprehensive Plan to include the 4:1 conversion factor for small dwellings, each of TRM's proposed small dwellings should have been treated as a whole dwelling unit for Comprehensive Plan density purposes. Once that mathematical correction is made, the project no longer meets the Comprehensive Plan density limits. Because of that inconsistency with the Comprehensive Plan, the application could not vest to the code then in effect.

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For either or both of these reasons (lack of all owners' consent and comprehensive plan inconsistency), the county's determination that the application vested was in error. The county's approval of the application based on the short-lived, outdated code should be vacated and reversed.

II. FACTS

A. The Zoning Code Amendments

On March 21, 2023, the County Council adopted an amendment to its zoning ordinance. The ordinance changed the method to calculate density in the zoning district that includes TRM's project. TRM's application proposed 285 small dwelling units with shared kitchens. AR 110; AR 120 (285 "housing units"). Previously, in this zoning district each such housing unit counted as a dwelling unit for purposes of calculating density. The zoning code amendment changed that so that in this zoning district such units count as one-fourth of a dwelling unit (a 4:1 conversion). AR 10027 (Ord. 2023-5s); AR 10031 (*id.*, FF 18). The amendment had an effective date of May 1, 2023. AR 10026.

On May 23, 2023, the County Council adopted Ordinance 2023-14 delaying the effective date of the 4:1 amendment to December 1, 2023. AR 10033 – 35. But Ordinance 2023-14 had an effective date of June 16, 2023. Thus, the 4:1 provision was in effect from May 1 to June 15, 2023 (and was slated to be revived on December 1, 2023).

But then, the County Council repealed the ordinance that applied the 4:1 conversion to the subject property, first with an effective date for the repeal of December 15, 2023, AR 10037 – 40, and ultimately with an effective date for the repeal of December 1, 2023. AR 10044 - 45.

The net effect of this convoluted legislative history was that the 4:1 conversion was in effect in this zoning district for just six weeks—from May 1, 2023 to June 15, 2023. Before and after, the density allowed by the county zoning would not have allowed this project.

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TRM's application was filed on May 16, 2023. AR 820. The only way TRM's proposal could be considered under the short-lived 4:1 conversion formula was if the filing of its May 16, 2023 application created a vested right to have that application evaluated based on the zoning in effect on that date. All parties agreed the proposal would not be allowed under the current code. AR 11425 (Examiner Decision, FF 18).

B. The County Repealed the 4:1 Conversion Amendment to Resolve Appeals Challenging the Lawfulness of the Amendment.

The zoning in effect on May 23, 2023 was repealed after its lawfulness was challenged by Futurewise and Spanaway Concerned Citizens (the current petitioner) in an appeal filed with the Growth Management Hearings Board. To resolve that appeal, Pierce County agreed to repeal the ordinance. AR 10039 (Ord. No. 2023-24 at 3).

Futurewise's Petition for Review asserted that Ordinance 2023-5s was inconsistent with numerous policies of the Pierce County Comprehensive Plan and the applicable subarea plan (the Parkland-Spanaway-Midland Community Plan). AR 10049. The Petition for Review filed by Spanaway Concerned Citizens also alleged the ordinance was illegal because it was inconsistent with the Comprehensive Plan, including the Parkland-Spanaway-Midland Community Plan. AR 10062 - 63. The county repealed the 4:1 conversion ordinance to resolve those appeals:

> Whereas, based on the issues presented for review in the consolidated Growth Management Hearings Board Case No. 23-3-005c, the Pierce County Council has determined that repealing the provisions of the Pierce County Development Regulations that allow shared housing villages in the Residential Resource Zone of the Parkland, Spanaway, Midland Communities Plan area of unincorporated Pierce County is in the County's interests; and
>
> Whereas, repealing Ordinance No. 2023-5s is intended to resolve all legal issues associated with the consolidated Growth Management Hearings Board Case No. 23-3-005c; . . .

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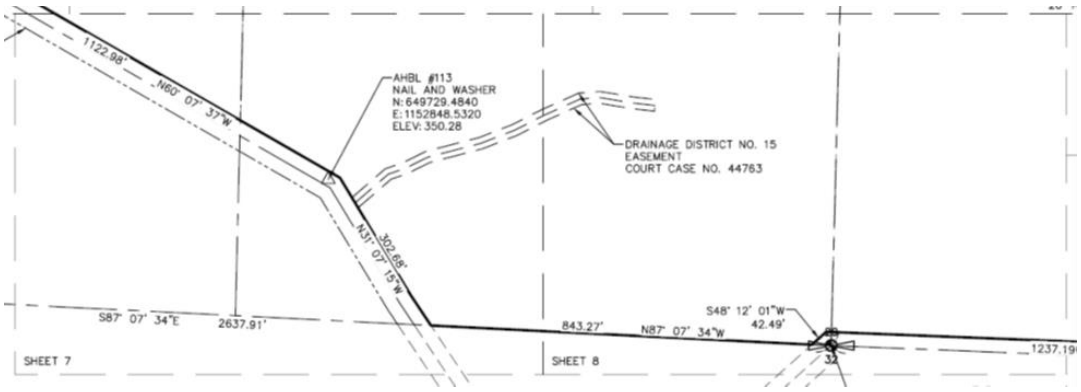
AR 10039 (Ord. No. 2023-24 at 3).

C. Facts Related to Ownership of the Disputed Parcel

A portion of the property included in TRM's proposal was owned by a now defunct drainage district (Drainage District No. 15). When TRM was acquiring property for its proposal, it failed to acquire the property that had been condemned and owned by the drainage district. Nor did TRM determine the current owner of that land and obtain the current owner's consent to the application.

1. The Drainage District Land was Excluded from the Property TRM Acquired.

TRM's application includes land that was appropriated by Drainage District No. 15 in 1920. The land appropriated by the drainage district in 1920 is depicted near the bottom middle of the application site plan.



AR 194.

The application identifies the land condemned by the drainage district as an "easement." But as will be discussed below, the application's description of the land as an "easement" is a mischaracterization. As more accurately set forth in the legal description and the superior court decree, the drainage district had appropriated a fee interest.

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TRM acquired the land surrounding the drainage district property from a Mr. Ober. TRM acquired Mr. Ober's property via a deed on May 15, 2023 (a few days before the application was filed). But the former drainage district was excluded from the deed:

> ALSO EXCEPT THAT PORTION APPROPRIATED BY DRAINAGE DISTRICT #15, IN PIERCE COUNTY SUPERIOR COURT CAUSE NUMBER 44763.

AR 10082 - 83.

No evidence exists that TRM otherwise acquired the former drainage district parcel.

2. The Drainage District's Condemnation of a Fee Interest

Filings from the superior court action referenced in the Ober deed (Pierce County Superior Court Cause No. 44763) demonstrate that the drainage district condemned a fee interest, not a mere easement. The court entered an order of public use and necessity on February 20, 1920, where it decreed that the property "should be appropriated" and that the drainage district "shall have the right to acquire the same by condemnation." The property was described with a metes and bounds description. There is no reference to an "easement." AR 10087 – 89. Following the metes and bounds description, the operative language states that the "property above described" (*i.e.*, the metes and bound described property – no reference to an easement), "shall be appropriated":

> ORDER, ADJUDGE AND DECREE that the construction of said drainage system or ditch, above referred to, is of public concern, use and benefit, and doth further ORDER, ADJUDGE and DECREE that the real property, particularly above described, is necessary for the construction of said drainage improvement, and that it is necessary and proper that it should be appropriated and used for said purpose.
>
> It is further ORDERED, ADJUDGED AND DECREED that petitioner shall have the right to acquire the same by condemnation, in the manner provided by law . . .

AR 10089 (Order and Judgment Decreeing Necessity (Feb. 20, 1920)).

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Thereafter, a jury trial was held and the amount of compensation to be paid for the land was entered as reflected in the Decree filed on March 8, 1920. AR 10091 – 95. The Decree again refers to the appropriation of the land, not the mere taking of an easement:

> This cause coming on regularly for trial . . . to determine the damages to be awarded to defendants respectfully by reason of the taking and appropriation of the lands hereinafter described, which said lands the court had heretofore by its judgment duly entered of record herein, adjudged and determined were necessary to be taken and appropriated by petitioner . . .

AR 10091.

The decree included the same metes and bound descriptions of the property as had been provided in the order of public use and necessity. AR 10092, 10093. The decree refers to "lands" that were deemed necessary to be taken, not an easement across those lands.

The decree includes the word "easement"—but not in its description of the land being condemned. Rather, the parties had agreed that upon condemnation of the land, the condemnee (Schulz) would have a right to use the condemned land for limited purposes. AR 9843, line 26 – AR 9844, line 10. Thus, in the operative words of the decree, after stating that the district was entitled "take, use and appropriate" the "lands and premises . . . above described," AR 9845, lines 16 – 21, the decree acknowledges the parties' stipulation and, based on that, grants to condemnee Schulz limited use rights. Schulz's post-condemnation limited use rights include an "easement"—in favor of Schulz— "to cross said lands and premises." AR 9845, lines 25 -26. The decree does not state that the district was condemning an easement. The easement was in favor of Schulz, in the wake of the district's condemnation of Schulz's fee interest in the land.

A title search indicates that there has been no further transfer of the fee interest in this property since the drainage district acquired it in 1920. In particular, there is no evidence provided by the

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applicant (TRM) or its agent (AHBL) that TRM owns the land that the drainage district condemned 105 years ago. Rather, as reflected by the legal description in the May 15, 2023 deed (and the survey filed with the application, AR 194), the land condemned by the drainage district in 1920 is not part of the lands TRM acquired on May 15, 2023—even though that land is included within TRM's development proposal.

The title report TRM received on the property before purchasing it alerted TRM that Ober did not own the property that had been appropriated by the drainage district. TRM's application included a legal description of the property. That description acknowledges that the property does not include the land the drainage district had appropriated: "EXCEPT THAT PORTION APPROPRIATED BY DRAINAGE DISTRICT #15, IN PIERCE COUNTY SUPERIOR COURT CAUSE NUMBER 44763." AR 10102 (capitalization in original). The application identifies the source of that information as a title report from Chicago Title: "PER ALTA COMMITMENT FOR TITLE INSURANCE PROVIDED BY CHICAGO TITLE COMPANY OF WASHINGTON, COMMITMENT NUMBER 0243215-TR." AR 10101 (capitalization in original).

In sum, TRM's proposed development encompasses land it does not own—and TRM had been told by its title company that it did not own that land. As discussed below, under the county code, if an applicant does not own the property to be developed, the application still can vest if the owner of the property consents to the application or if the applicant has a real estate contract to acquire the property. But the application does not include an attestation from the owner of the drainage district parcel that the current owner consents to TRM's application. Nor does the application include a statement that TRM had an agreement to purchase that property.

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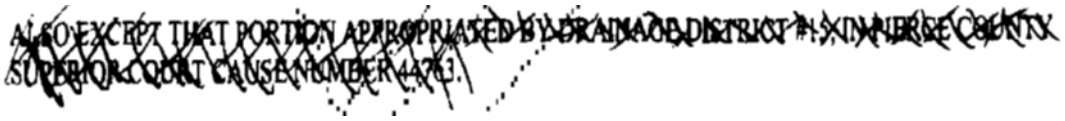
Ten days after recording the Ober deed, TRM re-filed the deed. In the re-recorded deed, someone has scratched out the language in the legal description that omitted the drainage district property from the conveyance:



AR 10106.

This manipulation is of no effect. First, there is no indication that the parties to the transaction approved of this revision. Without such mutual assent, there is no modification. As the Court of Appeals explained in rejecting a similar unidentified alteration in a subsequent recorded real estate document:

> There are no initials next to any of the alterations evidencing that the parties to the deed approved the alteration. Similar to unauthorized alterations in a contract, the unauthorized alterations in the third recorded DOT [deed of trust] had no legal effect.

Lawson v. Banker Insurance Co., ___ Wn. App. 2d ___ (Jan. 21, 2025) (slip op. at 11).

Second, Mr. Ober could not convey land that he did not own. There is no record that Mr. Ober acquired the drainage district parcel in the ten days between the recording of the first deed on May 15, 2023 and the second deed on May 25, 2023. For that matter, there is no evidence that Mr. Ober ever acquired the former drainage district land. Nor is there any evidence in the record that TRM sought to identify the true current owner of the parcel or obtain the current owner's consent to the application.

Despite the potential confusion introduced by the re-recorded deed, the bottom line remains the same: TRM has no evidence that Mr. Ober or any of his predecessors ever acquired the drainage district land or that any of TRM's other predecessors-in-interest ever acquired that land either. Because the former drainage district land is part of the project but there is no owner attestation for that land and

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no TRM contract to buy it, the application was incomplete and could not vest. PCC 18.40.020.C.2; PCC 18.160.050.

D. The County's Process for Reviewing the Application

The county code provides that the county's hearing examiner decides whether to approve applications of this type. In advance of the hearing examiner's consideration, the county planning department reviewed the application for code compliance and environmental review purposes. The department solicited and obtained comments on the application from the public, the Parkland-Spanaway-Midland Land Use Advisory Commission, and other agencies. The department submitted a staff report to the examiner summarizing its findings. Staff recommended approval of the project with conditions. AR 21 – 104.[4]

E. The Hearing Examiner's Decisions

The hearing examiner held a multi-day hearing. The examiner approved the application (with conditions) and denied the SEPA appeal. AR 11403 *et seq.* On the vesting issue, the examiner decided that the drainage district had condemned only an easement, not a fee interest:

> The Hearing Examiner finds that the 1920 decree conveys to the drainage district an easement to build a drainage ditch, not a fee interest in the land itself. The right granted by the court to the drainage district was not the unlimited rights associated with fee ownership but rather the limited right to construct a drainage ditch, nothing more.

AR 11423.

[4] Staff also was responsible for determining whether an environmental impact statement (EIS) would be prepared to provide a more thorough assessment of the proposal's environmental consequences. Staff decided that detailed review was not necessary. That determination was appealed on grounds that the State Environmental Policy Act (SEPA) required an EIS. The hearing examiner heard that appeal in conjunction with the hearing on the underlying application. The examiner denied the SEPA appeal. That ruling by the examiner was initially included in this appeal but is no longer being pursued.

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Spanaway Concerned Citizens (the petitioner here) requested reconsideration. AR 11186 – 89. In support of the reconsideration request, the group submitted additional documents bolstering the original evidence that a fee interest had been condemned. AR 11352 – 11353 (cover letter); AR 11192 – 11211 (the proffered exhibits). TRM also sought reconsideration.

Shortly after issuing his original decision, the examiner resigned. The county appointed a new examiner to rule on the reconsideration motions. The new examiner denied Spanaway Concerned Citizens' request for reconsideration. AR 11075 *et seq.* In doing so, he declined to consider the new exhibits that had been submitted in support of the reconsideration request. AR 11087.

III. STANDARD OF REVIEW

The Land Use Petition Act (LUPA) governs judicial review of land use decisions by counties and cities. It is like the Administrative Procedure Act (APA) which governs judicial review of decisions by state agencies.

LUPA sets forth the standards of review this Court must apply when reviewing a local land use decision. RCW 36.70C.130. Review is appellate review on the record created by the county. RCW 36.70C.120.

The issue of the meaning of the words in the drainage district's 1920 condemnation decree is a question of law. *Gimlett v. Gimlett*, 95 Wn.2d 699, 705 (1981). "Normally the court is limited to examining the provisions of the decree to resolve issues concerning its intended effect." *Id.* Questions of law decided by a hearing examiner are reviewed de novo by the superior court. RCW 36.70C.130(1)(b). No deference is provided to the hearing examiner's decision. (Deference may be given to a county's interpretation of its own code. RCW 36.70C.130(1)(b). But determining the property rights condemned (fee interest or easement) as set forth in the 1920 superior court condemnation pleadings does not involve the construction of a local code.)

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The issue of the proposal's consistency with the Comprehensive Plan does involve construction of the county code and the county's comprehensive plan. For that issue, the court may provide some deference to the county's decision. But deference should not be equated with abandonment of judicial oversight. Case law makes clear that even when local codes are being construed, deference is not always due and never is absolute.

First, deference is not triggered unless the local ordinance is ambiguous. *Waste Mgmt. of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 628 (1994). We discuss below the lack of any real ambiguity in the terms at issue here.

Second, even if the local code is ambiguous, the municipality's construction of its code is entitled to some deference only if the municipality can demonstrate a history of construing the ambiguous term in a certain way. "One off" constructions receive no deference:

> But it is undisputed that we will never defer to ad hoc agency determinations adopted during the course of litigation on the very topic of that litigation. We will only consider deferring to an agency's "uniformly applied interpretation." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992) (agency cannot "bootstrap a legal argument into the place of agency interpretation"); *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007) (agency interpretation not given deference because "claimed definition was not part of a pattern of past enforcement, but a by-product of current litigation").

Alaska Airlines, Inc. v. Dep't of Labor & Indus., 1 Wn.3d 666, 683 - 684 (2023).

Given the lack of any evidence that the county has previously construed its code and Comprehensive Plan as it now intends, its construction developed in the context of this appeal should not receive any deference.

Third, even if the agency can meet those requirements, the agency's construction receives some deference, but not blind acceptance. *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325–

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26 (1982), *cert. den*., 459 U.S. 1106 (1983). The reviewing court retains the ultimate authority to interpret the law. *Id.*

Fourth, only pure issues of law potentially trigger deference. Where the issue posed is the application of law to the facts, review is under the "clearly erroneous" standard. RCW 36.70C.130(1)(c). A decision is clearly erroneous when the court is left with a definite and firm conviction that a mistake was committed even if some evidence supports the decision. *Norway Hill Preservation and Protection Ass'n v. King Cty Council*, 87 Wn.2d 267, 274 (1976). "[T]he court is expected to do more than merely determine whether there is substantial evidence to support an administrative or governmental decision. The entire record is opened to judicial scrutiny and the court is required to consider the public policy and environmental values of SEPA as well." *Sisley v. San Juan Cty*, 89 Wn.2d 78, 84 (1977).

Findings of fact are reviewed for "substantial evidence," requiring a sufficient quantum to persuade a fair-minded person of the truth or correctness of the finding. RCW 36.70C.130(1)(c); *Thornton Creek Legal Def. Fund v. City of Seattle*, 113 Wn. App. 34, 61 (2002).

IV. ARGUMENT

A. Vesting Should be Applied Sparingly Because It Comes at a Cost to the Public Interest.

Vesting protects property owners from changes in local land use laws that occur after the application is filed. But that protection comes at a cost to the public interest:

> Development interests and due process rights protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.

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Erickson & Associates v. McLerran, 123 Wn.2d 864, 875 (1994).

In refusing to expand the vesting doctrine in that case, the Supreme Court acknowledged the need to respect the Legislature's enactment of the Growth Management Act and its core requirements to protect "entire communities," not just the interests of developers:

> The Legislature's passage of both the Growth Management Act and the State Environmental Policy Act of 1971 (SEPA) reflects public recognition that the influences of population growth, industrialization, and urbanization require us to place greater emphasis on natural resource protection and urban planning. . . .
>
> * * *
>
> The legislative findings in both SEPA and the Growth Management Act demonstrate the Legislature's understanding that greater regulation of property use is necessary to accomplish the goals set forth in both Acts. Additionally, these findings reflect a legislative awareness that land is scarce, land use decisions are largely permanent, and particularly in urban areas, land use decisions affect not only the individual property owner or developer, but entire communities.

Id. at 875–76.

B. An Application is Not Complete (and Cannot Vest) Unless It is Approved by All Owners of the Property.

The Pierce County Code addresses vesting in Chapter 18.160. Because PCC 18.160.030 authorizes vesting only for "complete applications," the Code's definition of a "complete application" in PCC 18.40.020 is pivotal. Those complete application requirements provide significant detail regarding the need for a signed attestation when the subject property is not already owned by the developer:

> Check for Complete Application. The Department shall review applications for completeness prior to acceptance for filing. An application shall be considered complete when it contains the following, unless otherwise authorized by the Director:
>
> 1. Signature of person legally authorized to sign for applicant;

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> 2. Signed attestation by applicant or authorized agent with regard to applicant's title, legal interest, or contractual right to any real property that the applicant's application for land use permits proposes to develop ("subject property").
>
> a. If the applicant is the owner of the subject property, the application must attest that the applicant holds title to the subject property.
>
> b. If the applicant is a tenant of the owner of the subject property, the application must reference the lease that provides that right to develop the subject property and attach the written consent of the owner of the subject property.
>
> c. If the applicant is under contract with the owner of the subject property to purchase the subject property, the applicant must reference the contract, the outside closing date, and attach the written consent of the owner of the subject property.
>
> d. If the applicant has a permanent easement over the subject property that provides the right to develop the subject property, applicant shall so attest and include the easement's recording number;
> . . .

PCC 18.40.020.C.

In essence, an application must be approved (signed or attested) by every owner of the land included in the proposal. Otherwise, the application is incomplete and it does not vest.

C. The Application Did Not Vest Because TRM Never Acquired Ownership of the Drainage District Parcel nor Obtained the Consent of the Owner of that Parcel.

The essence of the issue is whether TRM's application was incomplete because it was not signed or attested by the owner of a parcel of land within the project that had been condemned in 1920 by Drainage District No. 15. This requires an examination of the property rights condemned by the drainage district in its condemnation action: Did the district condemn a fee interest or merely an easement?

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1. The statutory condemnation process

The first step in a condemnation is for the court to make a determination that the condemning party is taking property for a public use. That "public use and necessity" determination precedes the trial to determine value. The statute in effect a century ago (similar to current condemnation statutes) first required an order of public use and necessity: The statute "contemplates the entry, during the course of the proceedings, of three separate and distinct judgments: First, by section 925, Rem. & Bal. Code, a judgment finding that the contemplated use for which the property sought to be appropriated is really a public use, and the necessity for its taking for that use." *Chicago, M. & P.S. Ry. Co. v. Slosser*, 82 Wash. 467, 470 (1914).[5]

An order of public use and necessity that identifies the public use that justifies the condemnation does not serve to limit the condemnation to acquisition of only an easement for the specific use. It simply satisfies the statutory prerequisites for proceeding with the condemnation action—that the land being taken will be used for a public purpose.

In contrast, when only an easement is being acquired, the order of use and necessity and the judgment entered at the conclusion of the valuation proceeding expressly state that only an easement is being acquired. *See, e.g.*, *Petition of Puget Sound Power & Light Co.*, 28 Wn. App. 615, 617 (1981) (order of use and necessity for easement for power line facilities including transformers, switches, and pads); *Port of Chelan Cty. v. Maydole*, 4 Wn. App. 129, 129 (1971) (condemnation of avigation easement); *State, Parks & Recreation Comm'n v. Schluneger*, 3 Wn. App. 536, 538 (1970) (condemnation of easement for water line); *City of Kent v. Padua*, 77 Wn.2d 499, 499–500, (1969) (condemnation of both fee interest of some land and easement over other land); *State ex*

[5] The referenced statute applies to condemnations by private corporations, but the condemnation statute for drainage districts adopted that procedure by reference. Pierce's Code of Wash., §1945-12. *See also State ex rel. Abbott v. Superior Court of Skagit County*, 119 Wash. 26, 28 (1922).

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rel. Devonshire v. Superior Court, 70 Wn.2d 630, 635, (1967) (city had power to condemn easement where statute authorized condemnation of "easements or property"). *See also, State v. Hutch,* 30 Wn. App. 28, 37 (1981) (distinguishing condemnation of fee interests and easements).

2. Drainage District No. 15 condemned a fee interest.

As described above, when Drainage District No. 15 condemned a strip of land for use in its drainage system, the public use and necessity order and the decree state that the district is condemning land described by metes and bound. The order and decree do not state that only an easement is being condemned. There is no ambiguity in the decree.

TRM has pointed to the statement made in the district's condemnation papers that it needed the land for a drainage ditch. That is a meager foundation for a claim that only an easement was condemned. That statement was made to satisfy the threshold statutory prerequisite that the land was being condemned for a public use. It was not a statement that the district was condemning only an easement.

When an agency describes the proposed use for purposes of satisfying the threshold "public use and necessity" showing, it does not thereby limit the 'take' to only an easement for that use. When an agency condemns land for a sewage treatment facility or a prison, and states that the land will be used for that purpose, that does not mutate the take into only an easement for that use. Yet that was the examiner's reasoning, AR 11423, and now, we assume, the argument that will be advanced by the respondents. That argument has no credence and should be rejected.

The public use and necessity order for the take in question was entered by the superior court on February 20, 1920. The court identified the public use that justified the taking as a drainage ditch for the drainage district's use. AR 9838 – 9840. That finding of public use did not serve to limit the condemnation to acquisition of only an easement for that specific use.

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Thus, the 1920 public use and necessity order's reference to a drainage ditch was in no way a limitation on the real property interest to be acquired by the drainage district through the condemnation process. It was merely identifying the public use that served as the necessary factual premise for the condemnation.

Indeed, the order goes on to describe the property being condemned without any hint that the property being condemned was only an easement and not a full fee interest. The property being condemned was described in a metes and bounds description on page two of the order. The entire fee interest was described, not a mere easement. The property (not just an easement across the property) was said to "be adjudged to be necessary for the purpose of making of said improvement." The order concludes that "the real property, **particularly above described**, is necessary for the construction of said drainage and then it is necessary and proper that it should be appropriated and used for said purpose." (Emphasis supplied.) The particular property described above in that document was a broad statement of "the property"—a metes and bounds description—without any limitation as being only an easement. The last paragraph of the order reiterates that the district has "the right to acquire the same by condemnation, . . ." The "same" means the entire fee described in the metes and bounds description earlier in the order.

Following the entry of the order of use and necessity, a trial was held to determine valuation. The decree entered after the trial reiterates the findings from the earlier order of use and necessity. The decree states that the earlier order had concluded that those lands were necessary for the construction of drainage improvements. AR 10091.

The decree's restatement of the finding in the order of use and necessity did not serve to impose any limitations on the property being appropriated. To the contrary, the decree refers to the taking and appropriation "*of the lands* hereinafter described." AR 10091 (emphasis supplied). The "lands

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hereinafter described" were set forth in the metes and bounds description on the next two pages of the decree. AR 10092 - 93. As with the earlier order of use and necessity, the metes and bounds description is a description of the entire fee interest. There is no reference in that description to an easement of any kind. Thus, when the decree states that the compensation was "by reason of the taking and appropriation *of the lands* hereinafter described" (emphasis supplied), the decree was stating that the land described in the following the metes and bounds description was being taken and appropriated, not a mere easement.

That the district was acquiring the land and not just a right to use it also is evident in the last paragraphs of the decree. The next to last paragraph states the district is "entitled to appropriate, take and use the lands and premises . . ." This sentence states that "land" is being taken, not a mere easement. It also states that the district is entitled not just to "use" the land, but to "appropriate" and "take" it. The examiner's conclusion that the decree reflects the taking of only an easement was a clear error of law.

3. The examiner was confused by the decree's reference to an easement reserved to the condemnee.

The examiner provided scant explanation for his conclusion that only an easement was condemned. After partially summarizing the parties' positions, AR 11422 – 23 (FF 8 -12), the examiner stated that only an easement had been condemned based on this rationale:

> The Hearing Examiner sees this right as a non-possessory right, that is, the right to use the land in a certain way, namely, for a drainage ditch but not for anything else. The rights reserved in perpetuity to then-owner Schulz—to build bridges across the ditch and to cultivate crops in the appropriated area so long as the bridges and cultivation do not interfere with the ditch—operate as limitations on the easement granted to the drainage district, not as an easement granted by the drainage district to Schulz.

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AR 11423 (FF 12).[6]

The heart of this rationale is the examiner's reference to a right reserved to the then owner (Schulz) to build bridges across the drainage ditch and a limited right to cultivate crops in the appropriated area (so long as the farming does not interfere with the drainage district's ditch). AR 11423. But this was an easement granted *to the condemnee* to have some limited use rights after title was transferred to the district. The decree first states that the district appropriates "the lands and premises" and then makes that take of the fee subject to limited use rights of the condemnee:

> [I]t is now in accordance [with the jury verdict] ORDERED, ADJUDGED AND DECREED that petitioner [the district] shall upon delivering to the defendants Schulz and wives, its warrant drawn on the County Treasurer in the sum of Three Hundred Dollars ($300.00), henceforth and thereafter be entitled to take, use and appropriate for the purposes of constructing its drainage ditch or improvement over, across and upon the lands and premises of the defendants . . . **subject however**, to the rights of said defendants, their successors or assigns, to build such bridge or bridges across said ditch improvement, as may be necessary and convenient for their use and purpose **with an easement on the part of said respondents** to cross said lands and premises at any place or places and at all ties as they may see fit, . . .

AR 10094 (emphasis supplied).

Clearly, this is an easement in favor of the condemnee. The decree approves the district's take of the "lands and premises," but subjects that to an easement in favor of the condemnee to build a fence and plant crops. The examiner had things backwards when he construed the decree to grant an easement to the district. The decree did the exact opposite.

[6] Though characterized as a factual finding, FF 12 is a conclusion of law and should be treated as such. *Goodeill v. Madison Real Estate*, 191 Wn. App. 88, 99 (2015).

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4. The exhibits provided in support of the motion for reconsideration buttress the conclusion that a fee interest was condemned.

In support of the motion for reconsideration, several additional documents were submitted by Spanaway Concerned Citizens. The foregoing analysis in this brief makes no reference to those documents. The documents in the record prior to the motion for reconsideration were sufficient to demonstrate that the examiner erred in concluding that only an easement was condemned.

But the additional documents submitted with the reconsideration request buttress the conclusion that the examiner erred. The proffered documents had been obtained from various public record archives. AR 11352 – 11353. The new examiner refused to consider them because he viewed them as being submitted too late. AR 11087. We first address that procedural objection and then address the substance of those documents.

a. Pierce County's hearing rules do not preclude the submission of new evidence in support of a motion for reconsideration.

The Pierce County Code prescribes the procedures for hearing examiner hearings. Ch. 1.22 PCC. Following entry of a hearing examiner's decision, a motion for reconsideration may be filed. The reconsideration rule provides includes no limitation on new evidence in support of a motion for reconsideration:

> Any aggrieved party or person affected by the decision of the Examiner may, within seven working days of the date of the Examiner's written decision, file with the Planning Department a written request for reconsideration based on any one of the following grounds materially affecting the substantial rights of said party or person:
>
> A. Errors of procedure or misinterpretations of fact, material to the party seeking the request for reconsideration.
>
> B. Irregularity in the proceedings before the Examiner by which such party was prevented from having a fair hearing.

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> C. Clerical mistakes in the official file or record transmitted to the Examiner, including errors arising from inadvertence, oversight, or omission, which may have materially affected the Examiner's decision on the matter.
>
> Upon receipt of a request for reconsideration, the Examiner shall review said request in light of the record and take such further action as is deemed proper; including, but not limited to, requesting a response from another party, denying the request, granting the request, with or without oral argument, and may render a revised decision. The decision of the Examiner shall be subject to reconsideration only one time, even if the Examiner reverses or modifies the original decision.
>
> If a request for reconsideration is filed, a decision is not final for purposes of further appeal until the Examiner issues a final order on the request for reconsideration.

PCC 1.22.130.

The new examiner read into the rule a requirement that new evidence must be justified by a showing that there was an irregularity in the proceedings. AR 11087. He then determined that there had been no irregularity in the proceedings and, therefore, refused to consider the exhibits. *Id.* Because the rule contains no limit on offering new evidence in support of a motion for reconsideration, the examiner committed a clear error of law in reading that requirement into the unambiguous code.

The examiner also overlooked that if the code somehow could be read to limit the introduction of additional evidence in support of a motion for reconsideration, then new evidence would be allowed not just upon a showing of a procedural irregularity, PCC 1.22.130.A, but alternatively, upon a showing of a mispresented fact. PCC 1.22.130.B. TRM had misrepresented that it owned the land that had been condemned by the drainage district (and the examiner adopted that misrepresentation in his findings). The additional evidence should have been allowed to address those factual errors.

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b. *The proffered documents buttress the evidence that a fee interest was condemned.*

The documents submitted with the motion for reconsideration, all obtained from public records (AR 11352), included the March 20, 1920 verdict that followed the 1920 condemnation trial. AR 11210 - 21. The wording of the verdict is consistent with our analysis above. The verdict awards damages to the property owners (William and Bertha Schulz) "by reason of the appropriation, taking and using of the following described real estate…" AR 11210. There follows the same metes and bounds description of the property referenced in the order of public use and necessity and the decree. The verdict makes no reference to an easement nor any other reference that the jury award was for a limited use of the property. Rather, the verdict is simply for "the appropriation, taking and using" of the "real estate" with no reference to any specific intended use.

The other particularly weighty document is a letter from A. W. Schlegel who was then (in 1954) a Pierce County Commissioner. AR 11201. He is writing to the then Pierce County Prosecuting Attorney regarding the property at issue here. He states that "[a]t the time of formation of Drainage District No. 15 **the following described property** was acquired by the District through condemnation, under case No. 44763-3 . . ." *Id.* (emphasis supplied). Commissioner Schlegel does not state that the district acquired an easement in the property. Rather, the letter states that the district acquired the "following described property" (which is described with a metes and bounds description) "through condemnation." He is requesting advice as to how to deal with the property that the district had acquired now that the district was being dissolved.

Of further import, Mr. Schlegel references information he received from Mr. Chester Thompson. Mr. Schlegel states that Mr. Thompson was one of the "last commissioners" of the drainage district. Indeed, Mr. Thompson was a commissioner upon the formation of the district in

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1919 and was still a district commissioner in 1923. AR 11199, 11207. Thus, he was a commissioner at the time of the 1920 condemnation at issue here. Mr. Schlegel recounts that Mr. Thompson, with his historic knowledge of the district, was raising the question of the disposal of the "property previously described [in this letter] which still remains in the name of the Drainage District." Again, the "property previously described" was not a mere easement, but a tract of land described by metes and bounds.

The questions raised by County Commissioner Schlegel and former Drainage District Commissioner Thompson are premised on the same foundation that we lay out above, *i.e.*, that the Drainage District had acquired real property in fee, not a mere easement. If only an easement had been acquired, there would have been no need to contact the county prosecuting attorney regarding disposition of the condemned property.

D. No Vesting Because the Proposal is Inconsistent with the Maximum Density Allowed by the Comprehensive Plan.

A second ground requires a determination that the application did not vest. The County Code precludes the County from accepting applications which are inconsistent with the Comprehensive Plan:

> Proposals that are inconsistent with the use and/or density provisions of the Comprehensive Plan and/or development regulations shall not be accepted.

PCC 18.40.020.B.

The evidence at the hearing demonstrated that the proposal is inconsistent with the maximum density allowed in this area by the Comprehensive Plan. This should have been a straightforward mathematical exercise. Instead, the examiner tangled an analysis of the Comprehensive Plan's density

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requirements with the density requirements in the zoning code. The examiner erred in borrowing provisions from the zoning code and applying them to the Comprehensive Plan.

Unlike the zoning code, the Comprehensive Plan does not include a 4:1 conversion allowance for small dwelling units. Unlike the convoluted history of the zoning code's density provisions described above, the history of the Comprehensive Plan's density provisions is straightforward: The Comprehensive Plan never included a 4:1 conversion factor for density calculations. It did not include that provision before, on the day of, or after TRM's application was filed. The absence of a 4:1 conversion factor in the Comprehensive Plan is not disputed.

With no 4:1 conversion factor in Comprehensive Plan, there is no dispute that the proposal fails to comply with the density limits in the Comprehensive Plan —unless a 4:1 conversion factor is read into the Comprehensive Plan from elsewhere. Faced with that fatal flaw, TRM rationalized that the examiner should borrow the 4:1 conversion factor that existed for six weeks in the zoning code and apply it to the Comprehensive Plan. The examiner bought that argument. AR 11428 (FF 27). As demonstrated below, the examiner's rationale for that contrivance does not stand up to scrutiny.

1. *The Comprehensive Plan establishes a maximum density for the subject property of one to three units per acre.*

Pierce County's Comprehensive Plan includes multiple subarea plans. Appendix I of the Comprehensive Plan is the Parkland-Spanaway-Midland (PSM) Community Plan. TRM's project falls within the geographic scope of the PSM Community Plan.

The PSM Plan includes a land use map that designates various types and intensities of uses

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within the subarea. The subject parcel is mapped as "Residential Resource." PSM Subarea Plan at I-51 (Map I-4).[7] The Residential Resource designation is used in areas with "environmentally sensitive" lands:

> The Residential Resource (RR) zone classification should be used in areas where environmentally-sensitive systems that are large in scale and complex are located.

PSM LU-26.3.

Given the environmentally sensitive nature of these lands, lower than ordinary densities are established:

> In order to provide additional protection from the impacts of development within these environmentally sensitive areas, RR zoned areas should develop at densities of one to three dwelling units per acre.

PSM LU-26.3.1.

Thus, given the Residential Resource designation for these lands and the limits imposed by PSM LU-26.3.1, the maximum density on the subject property should not exceed three dwelling units per acre if consistency with the Comprehensive Plan is to be achieved.

2. TRM's proposed density far exceeds the Comprehensive Plan maximum.

Contrary to the three dwelling units/acre limit in the PSM Subarea Plan, TRM proposed a density of nearly four units per acre. The gross inconsistency is justified by TRM on grounds that each "sleeping unit" should be treated as only one-fourth of a "dwelling unit." That mathematical sleight of hand was authorized *in the development regulation* (the zoning code) by the ordinance to which TRM claims vested rights. Ord. 2023-5s. Using that 4:1 mathematical conversion authorized in the zoning code in effect on May 23, 2023, the staff report "does the math" and reports that the number of

[7] The PSM Subarea Plan is available at https://www.piercecountywa.gov/DocumentCenter/View/38490/ADOPTED-Parkland-Spanaway-Midland-Communities-Plan?bidId=.

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proposed dwelling units (217) is just below the allowed cap (218) using the zoning code formula. AR 17.

3. Using the zoning code's 4:1 conversion to calculate density allowed by the Comprehensive Plan is not allowed.

The problem for TRM is that when the County Council temporarily amended the zoning code to apply the 4:1 conversion factor to this property, it did not adopt also a similar amendment to its Comprehensive Plan. In the Comprehensive Plan, there is no allowance for treating a small dwelling unit with shared kitchen facilities as only one-fourth of a dwelling unit—especially not in the "environmentally sensitive" lands where only three dwelling units per acre are allowed.

The staff reports acknowledged the "likely risks of harm to the environment as a result of quadrupling the typically permissible density." *Id.* But the County Council never addressed those risks in the context of the Comprehensive Plan. In particular, the County Council did not consider how to address those risks given the subject property's designation in the subarea plan as "environmentally sensitive," PSM LU-26.3, where density should not exceed one to three units per acre, PSM LU-26.3.1.

The amendment of the zoning code without a corresponding amendment to the Comprehensive Plan created an inconsistency between the zoning and the Comprehensive Plan. Indeed, it was probably because of this inconsistency between the Comprehensive Plan and the zoning code that the County Council quickly repealed the zoning code amendment. The Growth Management Act requires development regulations, like zoning ordinances, to be consistent with the adopted Comprehensive Plan. RCW 36.70A.040(3)(d). Development "regulations should at all times be consistent with the comprehensive plan." WAC 365-196-805. The inconsistency between the Comprehensive Plan and the zoning was one of the primary issues raised by Futurewise and Spanaway

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Concerned Citizens when they challenged the zoning amendment. AR 10049, 10062 - 63. The County Council's repealing ordinance states that the repeal was "in the County's interest" to resolve those legal issues. AR10039 (Ord. 2023-24 at 3). Because the zoning code amendment created an inconsistency with the Comprehensive Plan, it was illegal. When confronted with the two appeals, rather than defend its action, the County repealed the illegal zoning code amendment.

One "good government" feature of the Growth Management Act is its prohibition on helter-skelter amendments of the Comprehensive Plan. With few exceptions, Comprehensive Plan amendments may be considered only once a year and all must be considered at the same time. RCW 36.70A.130(2)(a). This serves to avoid hasty amendments with limited public input. There is not a similar requirement for such a deliberative process for zoning code amendments. But the requirement for consistency between the plan and the zoning regulations accomplishes the same purpose. The consistency requirement assures that only zoning code amendments consistent with the existing Comprehensive Plan provision may be adopted.

But instead of amending the Comprehensive Plan to first insert the 4:1 provision there (and figure out how to justify that given the subarea plan's call for low densities in this environmentally constrained area), the County Council pushed the process (and the public) through a rapid, dizzying array of code amendments, amendments to code amendments, and amendments to those amendments, with ever-changing effective dates for the ordinances. A much more orderly process would have been required and used if the proposed change had first been considered in the context of the Comprehensive Plan. The county code includes a detailed and extensive public participation process prior to considering and adopting Comprehensive Plan amendments. *See* ch. 19C.10 PCC. The county's efforts to avoid that more deliberative process came up short. The County ended up with a

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hastily adopted zoning code amendment that was inconsistent with its Comprehensive Plan. That inconsistency led to the quick repeal of the zoning ordinance amendment.

Once that 4:1 conversion is dropped from the calculation, the proposal's inconsistency with the Comprehensive Plan is clear. Treating each sleeping unit as a dwelling unit means that there are 289 dwelling units. The resulting density (289 units/72.71 acres) is 3.97 units per acre—far more than the three unit per acre cap in the Comprehensive Plan.

Because the density sought by TRM is not consistent with the density authorized by the Comprehensive Plan, *i.e.*, the PSM Subarea Plan, the application failed to satisfy the vesting requirement that only applications consistent with the Comprehensive Plan are allowed to vest. PCC 18.40.020.B. The examiner's decision to the contrary should be reversed as a matter of law.

4. The examiner's rationale for applying the zoning code amendment to the Comprehensive Plan was wrong.

The examiner recognized there is no 4:1 conversion provision in the Comprehensive Plan. But he proceeded to borrow the substance of the convoluted 4:1 zoning code amendment process and injected the zoning code amendment into the Comprehensive Plan. AR 11428 (FF 27). Using zoning code amendments as if they were also amendments to the Comprehensive Plan is not authorized by any provision of the GMA or the county code. The Comprehensive Plan and the development regulations (*e.g.*, the zoning code) are completely different land use tools. An amendment of one does not amend the other. The examiner erred in reading the zoning code amendment into the Comprehensive Plan.

The examiner rationalized that the Comprehensive Plan density limit is worded in terms of "dwelling units." He opined that TRM was not proposing the construction of "dwelling units." Yet the application described the proposal as consisting of 285 "homes," AR 110, and alternatively as 285

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"housing units," AR 120. "Homes" and "housing units" are dwelling units—the term used by the Comprehensive Plan. There was no ambiguity. The examiner lacked authority to implicitly amend the plan on his own and treat the homes and housing units in TRM's proposal as anything other than the "dwelling units" referenced in the plan. And given that the examiner's interpretation is a "one-off" interpretation (*i.e.*, no consistent history of the county construing its Comprehensive Plan in this manner), the examiner's novel interpretation is entitled to no deference. *See* Section III (Standard of Review), *supra.*

V. CONCLUSION

TRM's application was not vested to the zoning code that was in effect for six weeks in the spring of 2023. It should have been evaluated per the zoning code that existed before and after that brief interlude. If it had been, the proposal would have been denied. It also should have been denied because the proposal's inconsistency with the Comprehensive Plan precluded vesting. The examiner's decision approving the proposal should be reversed.

Respectfully submitted this 21st day of January, 2025.

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