The Honorable Carol Murphy

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

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| SPANAWAY CONCERNED CITIZENS,<br><br>Petitioner,<br><br>v.<br><br>PIERCE COUNTY; TACOMA RESCUE MISSION; AHBL, INC.,<br><br>Respondents. | NO. 24-2-03310-34<br><br>PETITIONER'S MOTION FOR RECONSIDERATION |

## I. MOTION

Petitioner Spanaway Concerned Citizens seeks reconsideration of the Court's order entered on March 28, 2025 that dismissed the petitioner's appeal in all respects. This motion is based on the Court's apparent application of the incorrect standard of review.

In the Court's remarks from the bench, it stated several times that its job was not to make the decision in the first instance. Rather, the Court would defer to the county's decision if it were a reasonable decision—even if it were not the one the Court would have made if called upon to make the initial decision itself. That is a correct statement of the standard of review for factual issues. Deference may also play a role in limited situations regarding the county's interpretation of its own



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code. However, one of the primary issues advanced by petitioner was a legal issue unrelated to a county code—the interpretation of the 1920 judicial decrees. No deference should have been employed by the Court when reviewing that issue.

The other primary issue related to the meaning of the county's comprehensive plan. While deference sometimes is provided in that situation, there was no showing by the respondents that the prerequisites for giving deference had been met in this instance. Thus, as to the construction of the comprehensive plan, the Court again should have provided no deference to the county's decision.

As to both of these core legal issues, the Court should have resolved the legal issues as a matter of first impression. If exercising its own independent judgment, the Court would have made the same decisions on these legal issues as had been made by the county, then the order of dismissal would stand. But if, as the Court implied might be the case, it would have reached a different decision on the legal issues if it had been making those decisions in the first instance, then the Court should reconsider its decision and grant the petition in whole or in part.

## II. ARGUMENT

### A. Standard of Review for Motion for Reconsideration

CR 59 governs not only motions for new trials, but also motions for reconsideration of other rulings, including summary judgment rulings. *Martini v. Post*, 178 Wn. App. 153, 162 (2013). The Court's ruling in this LUPA administrative review is akin to a summary judgment ruling, *i.e.,* a review of a paper record with no live testimony. Such rulings may be reconsidered based on the standards in CR 59 (7) – (9). *Id.* These grounds include an error of law and that substantial justice has not been done. *Id.* If the Court employed the wrong standard of review, justice has not been done, and an error of law was committed.



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### B. The Standard of Review for LUPA Review

The Land Use Petition Act (LUPA) governs judicial review of land use decisions by counties and cities. LUPA sets forth the standards of review this Court must apply when reviewing a local land use decision. RCW 36.70C.130.

Critical to this motion, LUPA provides that errors of law are generally reviewed by the Superior Court de novo:

> The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:
>
> * * *
>
> (b) The land use decision is **an erroneous interpretation of the law**, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

RCW 36.70C.130(1) (emphasis supplied).

In some instances, the Superior Court may provide some deference, but only to legal issues within that agency's "expertise" (*e.g.*, the meaning of its own code), *id.*, and, even then, only if certain conditions are met, *see infra* at II.D.[1]

The "erroneous interpretation of law" standard is de novo review. "[B]oth history and uncontradicted authority make clear that it is emphatically the province and duty of the judiciary [sic] branch to say what the law is. *Franklin Cnty. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325–26 (1982) *quoting Overton v. Economic Assistance Auth.*, 96 Wn.2d 552, 554 - 555 (1981)).

[1] This also was discussed in our opening brief (at 12 -14).



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### C. Application of the Error of Law Standard to the 1920 Condemnation Judicial Decrees

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.* Determining the property rights condemned (fee interest or easement) as set forth in the 1920 superior court condemnation decrees does not involve the construction of a local code. Because the meaning of these judicial decrees is not within the "expertise" of the county, the county's construction of those decrees is entitled to no deference. Those legal issues should be determined by the superior court de novo. RCW 36.70C.130(1)(b). Just like appellate courts ignore a superior court's summary judgment rulings and determine legal issues de novo, this Court should have ignored the examiner's construction of the 1920 judicial decrees and decided the meaning of those judicial decrees as a matter of first impression, de novo.

The Court's oral remarks during the hearing suggested that if it had been making its own independent determination of the meaning of the 1920 judicial decrees, it may have concluded that the drainage district had acquired a fee interest. (That construction would have been consistent with the decree providing an easement back to the condemnee, Schulz, for some limited use of the land the district acquired.) If that would have been the Court's independent assessment of the legal meaning of those decrees, the Court should not defer to the examiner's contrary determination. Instead, the Court should grant this motion; determine that the district had condemned a fee interest; determine that TRM never provided any evidence that the district's fee interest was later conveyed to TRM (or its



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predecessor-in-interest); and, therefore, determine that TRM's application was not complete and did not vest.[2]

### D. Application of the Error of Law Standard to the Meaning of "Dwelling Unit" in the Comprehensive Plan

The issue of the proposal's consistency with the county's comprehensive plan requires construction of the term "dwelling unit" as used in the comprehensive plan. Because the county has some expertise regarding the meaning of its own plan, deference may be afforded here. But deference is not always provided even when an agency is construing its own rules. Two prerequisites for deference were not established here.

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 demonstrated that given the comprehensive plan's expansive description of "dwelling units" to include "a variety of non-traditional housing,"[3] there was no ambiguity as to whether the units proposed here—describe by TRM as "dwelling units"[4]—fall within the plan's description of "dwelling units."

Second, and decisively, even if the plan's use of the term "dwelling unit" were viewed as ambiguous, the county's construction of its plan is entitled to deference only if the municipality can

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[2] No one disputes the axiom that subsequent grantors in a chain of title cannot convey more title than they own: "A landowner cannot convey by deed a greater interest in property than she possesses." 26A Corpus Juris Secundum, Deeds § 277. Thus, TRM's extensive discussion of subsequent deeds (and title insurance) is wholly irrelevant given the break in the chain of title, *i.e.,* the lack of any evidence that the land condemned by the district ever was conveyed to TRM or one of TRM's predecessors-in-interest. *See P*etitioner's Reply Br. (Mar. 13, 2025) at 11 – 12.

[3] "Housing is typically thought of in terms of multifamily apartment developments, duplexes and triplexes, and single-family homes. It includes stick-built homes, modular homes, manufactured housing and mobile homes. The arrangement of dwelling units includes traditional units, accessory units, and a variety of non-traditional housing techniques designed to provide for people's wants and needs at a wide range of costs." Pierce County Comprehensive Plan, Housing Element at 9-2. (The excerpt was attached to our reply brief as Appendix B and is attached again to this motion as Appendix A.)

[4] AR 822 (application); AR 8754 (contract term sheet).



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demonstrate a history of construing the ambiguous term in that 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).

Here, it was undisputed that the county never had construed the plan's use of the term "dwelling unit" as it did in this case. This was a "one-off" interpretation. Given the lack of any evidence that the county has previously construed its comprehensive plan as it now contends, its construction developed in the context of this appeal should not have been given any deference.

Consequently, the Court should have determined the meaning of the term "dwelling unit" de novo, as a matter of law, with no deference provided to the county's construction. As with the 1920 judicial decree legal issue, the Court's oral remarks suggested that the Court may have adopted the county's reading of the comprehensive plan <u>not</u> because that would have been the Court's reading, but because it was a reasonable reading to which the Court should defer. If that was the Court's reasoning, the Court should reconsider its ruling, apply the de novo standard of review of legal issues, and conclude that the comprehensive plan's use of the term "dwelling unit" includes the "dwelling units" proposed by TRM. Upon so ruling, the Court should conclude that the proposal exceeds the comprehensive plan's density cap for "dwelling units."



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## III. CONCLUSION

The Court should reconsider its order of dismissal; apply the de novo standard of review to the two legal issues discussed above; determine that the county's reading of the 1920 judicial decrees and its comprehensive plan were incorrect as a matter of law, and grant the petitioner the relief it seeks: rescission of the county's approvals of TRM's proposal.

Respectfully submitted this 4th day of April, 2025.

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# APPENDIX A

# Comprehensive Plan

Pierce County, Washington

## Honor the Past › Look Ahead

**Ordinance Number:** **2015-40**

**As Amended by Ordinance Numbers:**
**2016-34s**
**2017-23**
**2018-39s**
**2019-15s**
**2020-16s**
**2020-103s**
**2021-26s**
**2021-49**

**Effective Date:** **October 1, 2021**

## Introduction

Housing is one of the most regulated commodities in our society to ensure the health, safety, and general welfare of its inhabitants. Housing of all types is closely related to economic and social conditions. Availability is influenced by national, regional, and local conditions. A complex series of costs affecting housing production result from changes to government assistance programs, private investment, interest rates, lending practices, local government zoning codes, environmental regulations, development and building costs, market, and availability. Price increases adversely affect the ability of households at or below median income levels to obtain adequate housing.

Housing is typically thought of in terms of multifamily apartment developments, duplexes and triplexes, and single-family homes. It includes stick-built homes, modular housing, manufactured housing, and mobile homes. The arrangement of dwelling units includes traditional units, accessory units, and a variety of non-traditional housing techniques designed to provide for people's wants and needs at a wide range of costs.

Other types of housing are necessary to meet the needs of the changing population and social conditions. Planning for housing means more than providing enough land for residential development; it means encouraging the construction of housing to meet the needs of a changing population.

## Housing Profile

The housing stock in unincorporated Pierce County comprised of 140,160 dwelling units in 2010. This was a 21.6% increase from the 2000 housing unit estimate of 115,227. Table 9-A shows that single-family (one unit) housing was the predominant housing type equaling 72.8% of the total housing stock.

**Table 9-A: Number of Dwelling Units by Housing Type (Unincorporated Pierce County)**

| Housing Type | Number of Units | Percent |
|---|---|---|
| **One Unit** | 102,070 | 72.8% |
| **Two or More Unit** | 15,722 | 11.2% |
| **Mobile Homes and Specials** | 22,368 | 16% |
| **Total** | **140,160** | **100%** |

Source: OFM reporting of 2010 Census

Table 9-B shows that of the total dwelling units, 129,236 were occupied. The 2010 vacancy rate of 7.79% exceeded what is considered a *healthy* vacancy rate (6%). Household size decreased from 2.81 persons per household in 2000 to 2.77 in 2010.