☐ **EXPEDITE** (if filing within 5 court days of hearing)
☐ Hearing is set:
Date: _____
Time: _____
Judge/Calendar: _____
☑ Hearing is not set:

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

SPANAWAY CONCERNED CITIZENS,

Petitioner,

v.

PIERCE COUNTY; TACOMA RESCUE MISSION; AHBL., INC.,

Respondents.

NO. 24-2-03310-34

TACOMA RESCUE MISSION'S BRIEF IN RESPONSE AND OPPOSITION TO LAND USE PETITION ACT APPEAL

Petitioner Spanaway Concerned Citizens (SCC) has abandoned all of its substantive LUPA allegations, so there is no claim that the project harms the environment or fails to meet the County's land use codes. SCC's two remaining claims challenge whether Tacoma Rescue Mission (TRM) submitted a "complete" application, even though Pierce County deemed it complete in May of 2023. Both claims are untimely and unsupported.

INTRODUCTION

TRM, with over 100 years serving the unhoused, was selected by Pierce County to construct and operate a shared housing village in the Spanaway area of Pierce County, modelled after a successful project in Austin, Texas. The village project, approved by the County Hearings Examiner on June 3, 2024, will provide dignified housing with onsite mental health and addiction treatment services, a focus on community, an opportunity for meaningful work,

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and a requirement that residents pay rent and be good neighbors.[1]

1. 4:1 EQUATION ISSUE

The village project (the Village) is a Shared Housing Village use under the Pierce County Code (PCC). This use type was established by the Pierce County Council in 2022 under Ordinance 2022-49s. Under that ordinance, a Shared Housing Village must be consistent with the density provision for the underlying zone. However, because the tiny homes, or individual "sleeping units," that make up a Shared Housing Village, house one individual and share communal kitchens and bathrooms, the Council determined that each sleeping unit "shall be equivalent to 0.25 dwelling units for purposes of calculating density." This makes sense, as four sleeping units are roughly equivalent to a single-family home in size and occupancy (though arguably with less impact due to shared facilities, smaller footprints, etc.).

This 4:1 equation was never challenged or appealed. It is a final development regulation that implements Comprehensive Plan land use goals county-wide and cannot be collaterally challenged now. Yet that is what SCC attempts to do. They seek a declaration from this Court that the 4:1 equation adopted in 2022 is inconsistent with the Comprehensive Plan.

Not only is such a challenge untimely, it is also outside this Court's jurisdiction, as such a challenge must be to the Growth Management Hearings Board (GMHB). There is good reason such claims are to the GMHB. The remedy SCC requests would have far-reaching consequences, affecting many uses and properties across Pierce County, as Shared Housing Village is an allowed use in the majority of Community Plan areas of Pierce County (e.g., South Hill, Parkland-Spanaway-Midland, Graham, Frederickson), and the 4:1 calculation for density applies by code to all of these. SCC's requested relief would have impacts across the county. SCC cannot bring a broad and untimely challenge, in the wrong forum, under the guise of a

[1] This is an introduction and citations to the record and law are set forth in subsequent more detailed sections.

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"vesting" argument. This claim should be rejected.

2. DITCH DISTRICT ISSUE

SCC's other "vesting" argument is equally flimsy. It challenge's the County Planning Staff's determination back in 2023 that TRM's Planned Development District (PDD)/Conditional Use Permit (CUP) application was complete for purposes of review timelines and procedures. Under the County's code, applications that are not complete "shall not be accepted," but once accepted and deemed complete, that determination is final. Timelines start, review begins, and expenditures of time and money (for the County, the owner, reviewing agencies, and the public) are made. Finality is so important under the code and state law that if Planning Staff fails to make a determination of completeness one way or another within 29 days of receiving an application, the application is deemed complete regardless of any deficiencies.

SCC did not challenge the determination of completeness of TRM's application when it was made. Instead, it raised the issue ***11 months later*** in a citizen comment one week before the Hearing Examiner hearing on the PDD/CUP application. The claim is untimely.

Moreover, the basis for the claim is unfounded. SCC claims that 100 years ago a now-long-defunct ditch district obtained and still holds an ownership interest in a nominal portion of TRM's property. SCC argues that the defunct district or some unnamed successor was thus required to "attest" to the ownership and consent to the application submittal. But the defunct drainage district does not have an ownership interest that either allows or requires any district participation in the permit process. TRM holds a warranty deed, supported by title insurance for the entire property without any exception for any alleged defunct drainage ditch district ownership interest. TRM's deed and title insurance is consistent with all prior vesting deeds in the chain of title. TRM attested that it holds title to the property, which is true, and that attestation was sufficient to meet the application requirements under the code.

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SCC has no standing to challenge TRM's title and ownership. Nor did the Examiner have jurisdiction to decide ownership rights as the jurisdiction to adjudicate title lies with a superior court. Even if SCC had standing and could show some long-unclaimed interest held by a long-defunct ditch district, nothing under the code allows SCC to challenge the completeness determination, made by the agency with sole discretion to determine completeness, nearly a year after it was made. This claim should also be rejected.

SCC has opposed this project at every turn. They appealed Pierce County's State Environmental Policy Act (SEPA) threshold determination and vigorously opposed the PDD/CUP applications in the two-week consolidated hearing that culminated in the Examiner's approval of the project and denial of SCC's SEPA appeal. Having lost on all substantive claims and challenges, and having abandoned all claims of environmental harm, they are now desperately trying to make something out of procedural nothings. This Land Use Petition Act (LUPA) appeal should be denied.

FACTS

1. ORDINANCE 2022-49S

In 2021, the Washington Legislature changed the way communities are required to plan for housing by amending the Growth Management Act (GMA) to instruct local governments to "plan for and accommodate" housing affordable to all income levels. This significantly strengthened the previous goal, which was simply to encourage affordable housing.

The Pierce County Council responded to this mandate by adopting Ordinance 2022-49s, which created Shared Housing Villages as a new housing type and authorized Shared Housing Villages in many zones within several Community Plan areas of unincorporated Pierce County. Shared Housing Village is defined under the code as:

> [A] type of permanent community housing where detached, private living accommodations, primarily in the form of sleeping units, are arranged on a site and kitchen and/or sanitary facilities are shared. "Shared housing village" may include

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> some dwelling units. "Shared housing villages" may include tiny house communities.

Ordinance 2022-49s also added PCC Ch. 18A.45 "Shared Houring Villages" to the code. PCC 18A.45.030.A created a density calculation for individual sleeping units within a Shared Housing Village.

> A. *Density*. A shared housing village shall be consistent with the density provisions of the underlying zone. For living accommodations composed of sleeping units, each sleeping unit shall be equivalent to 0.25 dwelling units for purposes of calculating density.

Neither Ordinance 2022-49s, nor this fundamental 4:1 calculation adopted in Ordinance 2022-49s, was ever appealed or challenged by any party to the GMHB, which has exclusive jurisdiction over such issues. The deadline for filing a petition to the GMHB is 60 days from publication of the local jurisdiction's final action, RCW 36.70A.290(2), and so Ordinance 2022-49s is now beyond collateral attack. As adopted in 2022, PCC 18A.45.030.A is still in effect.

2. ORDINANCE 2023-5S

On March 21, 2023, the County Council passed Ordinance 2023-5s. (AR 9818-9826.) Ordinance 2023-5s did not amend the Comprehensive Plan or change any zoning. Nor did it change the 4:1 calculation under PCC 18A.45.030.A. It simply made Shared Housing Villages an allowed use with a Conditional Use Permit (CUP) in the Residential Resource (RR) zone in the Parkland-Spanaway-Midland Communities Plan area – an urban zone classification.[2]

Futurewise and SCC challenged Ordinance 2023-5s through appeals to the GMHB pursuant to RCW 36.70A.280. (AR 9798-9826.) The Appeals were consolidated under GMHB Case No. 23-3-0005c. The petitioners in the GMA appeals asked the GMHB to enter an Order

[2] It also further clarified that sleeping units must be 300 square feet or less and may not include a kitchen, bathtub, shower or otherwise qualify as an independent dwelling unit, but that sleeping units could have the bare minimum for basic human hygiene – a toilet, sink, and countertop. By limiting sleeping units to 300 square feet, Ordinance 2023-5s was more restrictive than 2022-49s. The repeal of 2023-5s removed the 300 square foot restriction, but had no bearing or impact on the 4:1 equation that remains to this day.

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of Invalidity with respect to Ordinance 2023-5s.

3. ORDINANCE 2023-24

The County and the parties settled the GMHB case, and Futurewise and SCC dismissed their appeals. As part of a settlement agreement between the GMHB petitioners and Pierce County, the County agreed to repeal Ordinance 2023-5s, which it did by adopting Ordinance 2023-24 (overriding an Executive veto) on August 22, 2023. But, by then, TRM's PDD/CUP application had already vested pursuant to PCC Ch. 18.160. Contrary to what SCC implies in its brief there was nothing sneaky or nefarious about that process.[3]

The only reason or analysis provided in Ordinance 2023-24 for the repeal was that:

> [R]epealing Ordinance 2023-5s is intended to resolve all legal issues associated with consolidated Growth Management Hearings Board Case No. 23-3-005c…

Ordinance 2023-24 at 3. There was no "recognition" of a mistake in Ordinance 2023-24, as SCC claims. Nor did the ordinance repeal or change the 4:1 equation in effect under PCC 18A.45.030. Rather, the Council simply repealed 2023-5s to resolve that pending litigation.

4. TRM'S APPLICATION FOR PROPOSED SHARED HOUSING VILLAGE

A Shared Housing Village is an allowed use in the RR zone with a CUP under Ordinance 2023-5s, to which the project vested with its complete application. The application was deemed complete by the County well before the August repeal. A PDD was required to achieve the maximum three dwelling units per acre that are allowed under the code and Comprehensive

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[3] As with any litigation, whenever a municipality's comprehensive plan or implementing development regulations are challenged under the GMA, there is a risk the GMHB will find that the challenged ordinance did not comply with the GMA and issue an Order of Invalidity. Such order could result in a loss of state grants during the remand while the municipality takes necessary action to come into GMA compliance and receive a GMHB Final Determination confirming compliance. See RCW 36.70A.300. But the GMA also provides local governments a safe harbor from such potential consequences if, within a certain time following appeal, the municipality voluntarily delays the effective date of the challenged ordinance until after the GMHB Final Determination. RCW 36.70A.300(4)(b).

The County elected to utilize this legislatively conferred safe harbor by adopting Ordinance 2023-14 on May 23, 2023. As the GMHB had established a case schedule to decide the appeal and issue a Final Decision and Order by November 6, 2023, this new ordinance amended the Ordinance 2023-5s effective date to December 1, 2023. The stated effective date of Ordinance 2023-14, which was approved and signed by the County Executive on June 6, 2023, was June 16, 2023.

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Plan for the RR zone (instead of the base of two dwelling units per acre). TRM submitted an application for a PDD/CUP with Pierce County that was deemed complete by Planning and Public Works on May 23, 2023.[4] (AR 10243.)

The proposed Village directly addresses a civic problem – the County's level of homelessness and lack of affordable housing – that the Pierce County Council has identified as needing prompt and effective solutions.[5] In March of 2022, the Pierce County Council adopted its Comprehensive Plan to End Homelessness, which described solutions the County favors, including "permanent supportive housing" and "Community First! style housing," referring to the very successful project in Austin, Texas that is the model for the Village.[6]

TRM was selected to establish and operate the Village. TRM is Pierce County's largest shelter provider with over 100 years of experience and strong track record of working with local governments to find solutions. The County's contract with TRM provides $21 million in public funds for the purchase of the property, design and engineering, and the construction of necessary infrastructure. (AR 9937.)

The project is designed predominantly for those who are chronically homeless – i.e., generally those who have experienced homelessness for an average of 10 years or more. (AR 9895.) This population is on average 55 years of age and older and often have diagnosed health, mental-health, and/or substance abuse issues. (*Id.*) The focus and design of the project is to create a stable and healthy community.

Critical services will be made available onsite, including case management, counseling, mental and physical health care, and job and skills training. (*Id.*) Key partners include

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[4] The Pierce County Code has a broad vesting regulation that applies to "use permits," which includes PDDs and CUPs. PCC 18.160.030; PCC Ch. 18A.75. Under that code, vesting occurs when the "application is deemed complete" by Planning and Public Works. PCC 18.160.050.

[5] Pierce County Resolution 2022-22s.

[6] *Id.*

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MultiCare, Pierce Transit, and Pacific Lutheran University. (AR 9937.) Community gardens and a small farm with an agricultural building will allow residents to grow food and work outside. (AR 11448-11449.) A community center/civic building will serve as a meeting area for residents and for community events. (*Id.*)

The property is in a beautiful location with wetlands and creeks, and those areas and their buffers are set aside and protected. (AR 11402-11449.) Far more open space is being provided, and more trees are being retained, than are required by code. (*Id.*) None of this is disputed in this case.

5. SCC'S APPEAL AND THE CONSOLIDATED HEARING

In December of 2023, SCC appealed Pierce County's SEPA Mitigated Determination of Nonsignificance (MDNS) for the Shared Housing Village. SCC also challenged the PDD/CUP application. The SEPA appeal and PDD/CUP hearing were consolidated.

The Examiner held a pre-hearing conference where he asked the parties if they planned on bringing any motions prior to the consolidated hearing. SCC represented that it was not planning on bringing any jurisdictional or procedural motions prior to or at the hearing.

Months after the prehearing conference, and only one week before the consolidated hearing, SCC challenged whether TRM's PDD/CUP application vested to the development regulations and zoning in place at the time of complete application. (AR 10009-10021.) Completely outside the Hearing Examiner rules, SCC did so not through a motion but as a "citizen comment" from its attorneys. SCC nonetheless asked the Examiner to "consider and decide those issues at the outset of the hearing." (AR 10021.)

The challenge was based on multiple technical arguments. The parties had a "hearing within a hearing" on this issue mid-way through the consolidated hearing that lasted approximately three hours. (*See* Verbatim Report of Proceeding, Vol. 3; Vesting Argument,

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May 1, 2024.) The Examiner rejected SCC's arguments. (AR 11422-11424.)

During the 2-week consolidated hearing on the PDD/CUP application and SCC's SEPA appeal, SCC raised a number of issues/challenges to the PDD/CUP application and made a number of SEPA claims, including as to threatened and endangered species, habitat destruction, wetland ratings and buffers, tree retention, etc. The Examiner ultimately approved the PDD/CUP application and denied SCC's SEPA appeal. (AR 11448-11449.)

SCC originally appealed a number of their PDD/CUP and SEPA claims in this LUPA appeal. They have since dropped nearly all of them, including all claims of environmental harm. The only ones left are these two procedural "vesting" arguments.

6. FACTS RELEVANT TO SCC'S COLLATERAL TITLE CHALLENGE.

Because of the legal arguments below that: a) TRM did attest to ownership of the entire property; b) TRM did hold deeds to the entire property and title insurance to verify that; c) the County did deem the application complete; d) the Examiner lacked jurisdiction to adjudicate title; and e) SCC had no standing to assert any title claim of a defunct District, the Court should not find it necessary to get into the nuances of the title issue. Since SCC has raised the issue though, we do provide these background facts.

The project site is comprised of four contiguous tax parcels, which, combined, are 86.32 acres or 3,760,099 square feet. (AR 109, 846.)[7] Notably, only approximately 37 acres of the 86-acre site will be developed (AR 109, 845.) Approximately 13 acres at the southern portion of the site are environmentally constrained by critical areas, including wetlands and streams; this area will remain undeveloped and also be further protected by the required undeveloped buffers (AR 845, 9760-9881.) A conceptual plan depicting the development, which, again, will

[7] Tax Parcel Number ("TPN") TPN 031929-3004 is 17.39 acres; TPN 031929-3002 is 37.41 acres; TPN 031929-4135, is 28.72 acres; and TPN 031929-4046 is 2.8 acres. (AR 846.) One acre is comprised of 43,560 square feet.

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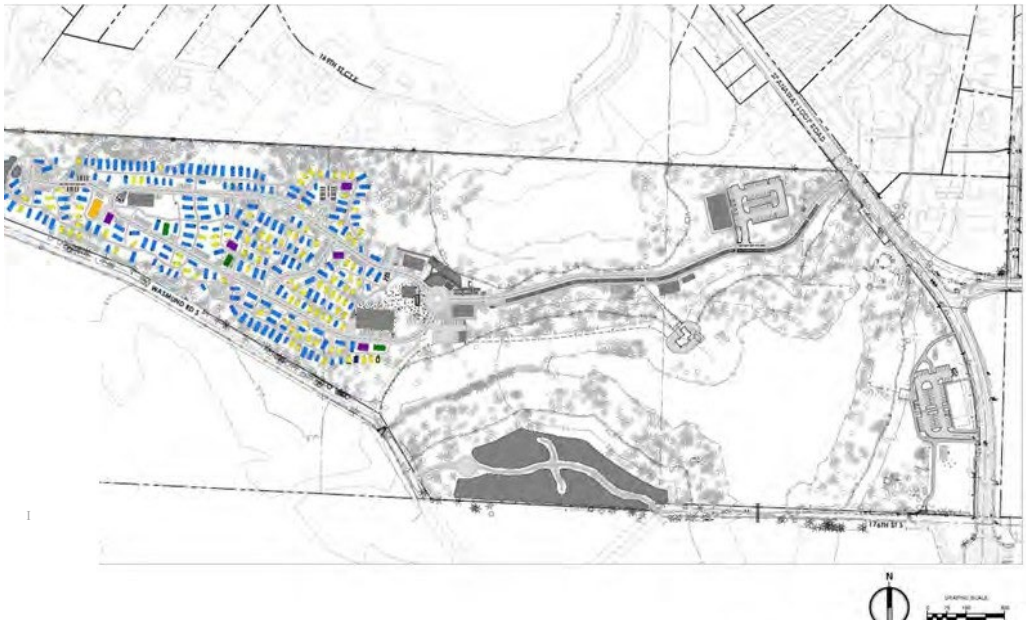
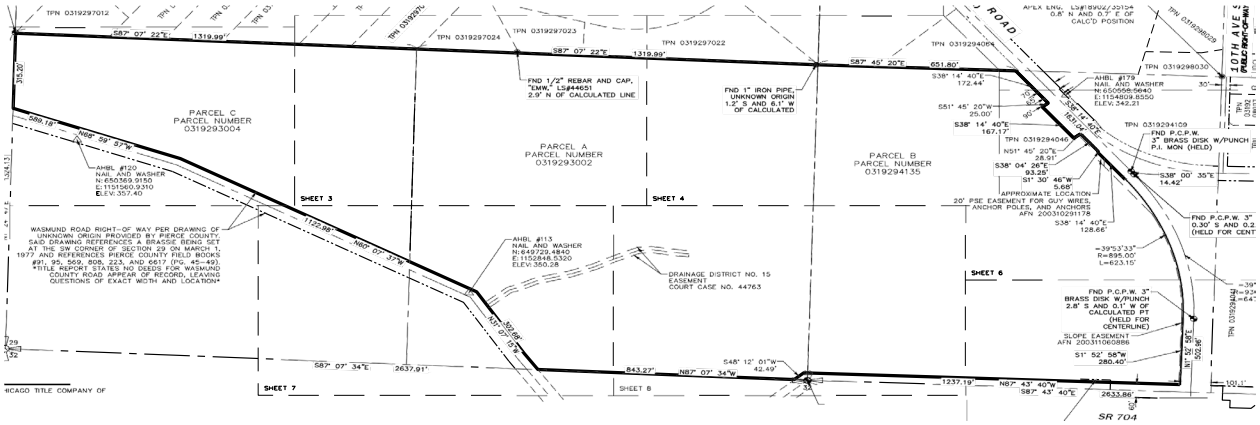
be concentrated at the western portion of the site, is at AR 172 and is also contained below.



SCC's vesting argument is founded upon a fictitious title challenge to TRM's ownership of an approximately 720-foot long, 25-foot wide strip of land, comprising only approximately 18,000 square feet, or 0.048% of the entire site. As described in the Judicial Decree (discussed below), this limited area is comprised of 12½ feet on each side of a then-existing stream that extends 720 feet from the southern boundary of the property (adjacent to the Wasmund County Road right-of way. (AR 10092.) A survey map that depicts the location and size of the drainage ditch is at AR 194 and 10085 and a portion of that survey is also set forth below.



Review of the survey map in comparison to the conceptual site map at AR 172 (and

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depicted on the preceding page) confirms that the drainage ditch is situated within the wetlands and wetland buffers at the southern-most portion of the site where no development will occur. (*See also* AR 9760-9881.) It is TRM's position that it holds title to and owns this small drainage ditch area along with the rest of the parcel; but even if it did not, the very limited strip of property is immaterial to TRM's development proposal.

In any event, SCC argues that a now defunct drainage district acquired fee simple title to this small strip via an ambiguous Judicial Decree entered in 1920. SCC asserts that, even though it does not dispute that TRM owns all other portions of the 86-acre site, TRM's application is nonetheless "incomplete" because Drainage District No. 15, which no longer exists, did not sign an owner attestation form for the project application. The following is a discussion of the relevant title history of the property that disproves SCC's assertion.

TRM acquired the three largest parcels, comprising 83.52 acres of the site (TPNs 031929-3004, -3002, and -4135), via a single statutory warranty deed from Sean Ober dated May 4, 2023. The deed was recorded on May 15, 2023 (AFN 202305150050) and then re-recorded with a correction to the legal description on May 25, 2023 (AFN 202305250456). (AR 10205-06, 10220-22.) The 1920 Judicial Decree, to the extent that it has any effect today, applies to a very small portion of one of the three parcels acquired from Ober. (AR 11422, Finding 9; AR 10171, 10206, 10222.)

While SCC often refers to the drainage ditch area as a "parcel," the ditch area has never been assigned a separate tax parcel number, so there is nothing in the County's Assessor records to indicate separate ownership or separate tax payment responsibility. The first time that the drainage ditch area was noted as a possible exception to title was on the **initial** Commitment for Title Insurance prepared in connection with TRM's purchase of the property. The legal description on this **initial** report contained an ownership exception for a portion of Parcel B of

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the property acquired from Sean Ober (TPN 031929-4135) as "appropriated" by Drainage District No. 15 in Pierce County Superior Court Cause No. 44763. (AR 10168, 10171.) Significantly, prior to this notation on the **initial** title report, the **1920 Decree has never been referenced, as a title exception or otherwise, in any deed in the chain of title leading to Ober's ownership**. (AR 11423, Finding 12, AR 10144-10166.) The exception on the initial title report, as opposed to any prior deed, was the singular source of the notation on the TRM survey (AR10085), and was then erroneously included in TRM's deed as originally recorded (AR 10211-10215, 10220-10222.)

But the insuring title company that issued the initial title report, and made the first exception notation regarding the drainage ditch area, later determined that it had made a mistake. On May 22, 2023, a Senior Title Officer of the insuring title company notified TRM:

> It has come to our attention that Parcel B of our legal description has a minor error as follows: the below does not affect our parcel – I would like your permission to order certified copies of all of the documents, remove this exception and re-record – please advise.
>
> ALSO EXCEPT THAT PORTION APPROPRIATED BY DRAINAGE DISTRICT #15, IN PIERCE COUNTY SUPERIOR COURT CAUSE NUMBER 44763.

(AR 10213.) TRM consented (*id.)*, and, upon receiving the requisite intent, the title company re-recorded the deed, removing the erroneous exception on May 25, 2023.[8] (AR 10220-10222.) The title company also issued TRM an Owner's Policy on May 25, 2023, **insuring TRM's title without the exception**. (AR 10228.) TRM holds a record title to and owns the "ditch property" and has title insurance to confirm that.

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[8] *Lawson v. Bankers Ins. Co.,* ___ Wn. App. ___. ___ P.3d ___ (Case No. 4021304-III, 1.21.25), cited by SCC at page 10 of its brief is not germane to this case. There, the Court addressed the question of whether a deed of trust (DOT) included a sufficiently descriptive and accurate legal description to satisfy the statue of frauds, RCW 64.04.010. The legal description in the DOT was so inaccurate that it did not afford an intelligent means to identify the property, for example it referenced the wrong lot number. The errors were corrected in a re-recorded deed for which there was no evidence of consent. Here, there was a title company error that was corrected by the title company after first obtaining party consent.

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Despite SCC's assertions, the insuring title company's determination that the initial exception was an error, as well as its action to correct the error, were consistent with the language of the 1920 Decree. The specific language and appropriate interpretation of the 1920 Decree is addressed in the Argument section of the brief. But it bears mention that there is no express language anywhere in the Decree that states that fee simple title of the drainage ditch area was conveyed to the drainage district. In fact, the Court will not find the word "fee" or the phrase "fee simple" in the Decree. There is, however, limiting language invoked in the Decree that suggests only a lessor possessory interest was conveyed to the district. (*See* AR 10091-10095.)

The post-1920 Decree chain of title further supports the conclusion that a fee simply interest in the drainage ditch area was not conveyed and a title exception based on the Decree is not appropriate. Schultz, who was a party to the condemnation action and Decree, conveyed the parcel to Helen and Roland Ober by statutory warranty deed in 1945; he did so with no exception for the ditch property. (AR 10144.) The property was later conveyed to a family trust, without a title exception for the drainage ditch area, after Roland Ober died; and after Helen Ober died, was ultimately conveyed to Sean Ober, again without any title exception for the drainage ditch area.. (AR 10146-10166.) Sean Ober received title to the property without a title exception for the drainage ditch area; it was thus appropriate for him to convey the property to TRM without such a title exception.

Irrespective of the exception in the initial title report and deed, there is no dispute that TRM's deed no longer contains the exception, and the title insurance company has insured TRM's title without the exception. (AR 10222, 10228.) As significant, no person or entity other than TRM has asserted ownership or a claim of any other interest in the drainage ditch property. SCC's challenge to TRM's title is thus wholly fictitious.

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Despite this reality, SCC nonetheless acts as the champion for the long-dissolved drainage district, advocating that TRM could never have a complete land use application unless it is signed by the defunct drainage district. But SCC has no legitimate basis, or for that matter standing, to challenge TRM's title in the permit review process.

STANDARD OF REVIEW

The SCC brief sets forth the standards of review under RCW 37.70C.130 but does not discuss, the deferential nature of review under LUPA. Factual determinations must be sustained unless they are not supported by evidence that is substantial when viewed in the light of the whole record. RCW 36.70C.130(1)(c). Thus, findings must be sustained so long as supported by evidence of a sufficient quantity to persuade a fair minded person of the truth or correctness of the finding. *Benchmark Land Co., v. City of Battle Ground,* 146 Wn.2d 685, 694 (2002). The substantial evidence test requires the Court

> to view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the fact finder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.

State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce, 65 Wn. App. 614, 618, review denied, 120 Wn.2d 1008 (1992).

LUPA also directs this Court to accord deference to the County's legal interpretations, since they appointed local experts on issues involving land use regulations. LUPA only authorizes the Court to grant relief from the underlying County decision if "[t]he land use decision is an erroneous interpretation of the law, after allowing for such deference as is due to construction of law by a local jurisdiction with expertise." RCW 36.70C.130(1)(b). The statutory standard review is supported by the common law: "It is axiomatic that courts give considerable deference to the construction of ordinances by those officials charged with their

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enforcement." *Friends of the Law v. King County*, 63 Wn. App. 650, 654 (1991); *See also Hama Hama v. Shoreline Hearings Board*, 85 Wn.2d 441, 448 (1975).

ARGUMENT

1. A NOTE ON VESTED RIGHTS.

It is well-established in Washington that vested rights are valuable property rights.[9] Our Supreme Court explained well the import of these rights and why the deserve and are accorded protection in *West Main Associates v. City of Bellevue*:

> The purpose of the vesting doctrine is to allow developers to determine, or "fix," the rules that will govern their land development. The doctrine is supported by notions of fundamental fairness. As James Madison stressed, citizens should be protected from the "fluctuating policy" of the legislature. Persons should be able to plan their conduct with reasonable certainty of the legal consequences. Society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.
>
> Of course, all institutions, including government, like to keep options open. But while keeping options open normally involves a price, government can keep its options open at no cost to itself in the vesting game because virtually all the risk of loss is initially imposed on the developer. Unfortunately, that loss is still a social cost, ultimately borne by all, whether or not government recognizes it.

106 Wn. 2d 47, 51, 720 P.2d 782 (1986) (citations omitted). SCC's challenges to TRM's important vested status, on the other hand, are founded either upon incorrect information or temporary, technical deficiencies that are immaterial to the substance of TRM's application. Moreover, SCC's "vesting" challenges, raised a year after the TRM application was deemed complete, are untimely, as will be discussed more fully below.

2. SCC'S ARGUMENT RELATING TO THE 4:1 EQUATION SHOULD BE REJECTED.

SCC in its brief makes a number of inaccurate factual assertions. It is necessary to correct some of these before moving forward, as they obfuscate fundamental errors in SCC's

[9] "Although less than a fee interest, development rights are beyond question a valuable right in property." *Louthan v. King Cy.,* 94 Wash.2d 422, 428, 617 P.2d 977 (1980), relying on *Penn Cent. Transp. Co. v. New York,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, *reh'g denied,* 439 U.S. 883, 99 S.Ct. 226, 58 L.Ed.2d 198 (1978).

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arguments.

First, SCC claims that the 4:1 calculation was "short-lived" and that the County "repealed the 4:1 conversion amendment" in Ordinance 2023-24.[10] This is incorrect. The County Council established PCC Ch. 18A.45 and the 4:1 conversion in 2022 and they were never challenged and remain in effect. Ordinance 2023-5s merely made Shared Housing Village a conditional use in the RR zone classification for the Parkland-Spanaway-Midland area. The repeal in Ordinance 2023-24 simply removed this allowed use from the RR zone. Neither Ordinance 2023-5s nor Ordinance 2023-24 changed or impacted the 4:1 equation in any way.

Second, SCC claims that inconsistency between the 4:1 equation and the Comprehensive Plan "led to the quick repeal" of Ordinance 2023-5s.[11] This is also incorrect. The Council repealed Ordinance 2023-5s as part of a settlement to resolve litigation, and any claim that there was another reason is pure speculation. The GMHB itself did not make any determination as to Ordinance 2023-5s, as the case was settled prior to the board hearing the matter. In any event, Ordinance 2023-5s did not adopt or change the 4:1 density calculation in any way, so the 4:1 equation could not have played any part in the Council's reason for repealing the ordinance.

A. The Court Does Not Have Jurisdiction Over this Claim and it is Untimely.

The Court cannot reach SCC's "no vesting because of inconsistency with the comprehensive plan" argument. That argument hinges on the Court finding that Ordinance 2022-49s and PCC 18A.45.030 are consistent or inconsistent with the Comprehensive Plan. SCC did not appeal this issue to the GMHB, which has exclusive jurisdiction over such GMA issues and claims. RCW 36.70A.280. And any challenge to a 2022 action would be untimely.

SCC did appeal Ordinance 2023-5s, but that ordinance did not create or change the 4:1

[10] Petitioner's Opening Br. at 5.

[11] *Id.* at 30.

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conversion that forms the basis of the SCC challenge. SCC would have needed to timely appeal Ordinance 2022-49s to make this claim, but failed to do so. SCC and Futurewise dismissed their appeals of Ordinance 2023-5s without any GMHB determination on any issue. SCC's references the Futurewise/SCC appeals to the GMHB are irrelevant to this or any other issue.

SCC's repeated citation to GMA statutes and regulations in its brief underscores the fact that this claim is a GMA issue.[12] Because SCC never appealed the Council's adoption of Ordinance 2022-49s or PCC 18A.45.030 to the GMHB, it cannot do so now in this Court. This untimely claim should be dismissed because the Court cannot decide the issue.

B. TRM's Proposal is Consistent with the Comprehensive Plan.

SCC argues that the proposal did not vest because it is inconsistent with the Comprehensive Plan based on density calculations. To be clear, and as necessarily found by the Examiner, TRM's proposal is fully consistent with the density provisions under the development regulations that implement the Comprehensive Plan. The Community Plan for the Parkland-Spanaway-Midland area says that RR zoned areas should develop at densities of one to three dwelling units per acre. The Pierce County Council determined in 2022 that each sleeping unit in a Shared Housing Village is equivalent to 0.25 dwelling units for purposes of calculating density, and that determination was not appealed. PCC 18A.45.030. As the Examiner found, that calculation is reasonable:

> The Hearing Examiner rejects the Appellant's argument that the density of the proposed shared village is inconsistent with the Comprehensive Plan…. Appellant recognizes the 1:4 conversion allowed for sleeping units in shared housing villages pursuant to the development regulations in PCC 18A.45.030.A. But the Appellant points out that the 1:4 conversion only appears in the development regulations, not the Comprehensive Plan…. The Hearing Examiner does not agree that the 1:4 conversion for sleeping units is inconsistent with the Comprehensive Plan. Sleeping units, by definition in PCC 18.25.030, lack provisions for cooking, eating, or sanitation. For that reason, they cannot be called dwelling units, which by definition

[12] *Id.* at 28-30.

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> in PCC 18.25.030, have facilities for living, sleeping, eating, cooking, and sanitation. The 300 square-foot sleeping units the Applicant proposes are not merely scaled-down versions of single family houses or other, more traditional dwelling units. The sleeping units provide a fundamentally different living experience, in which residents must walk outside to reach a shower building or a kitchen…. The Hearing Examiner finds that the 1:4 conversion provided in PCC 18A.45.030.A is a reasonable conversion ratio and is consistent with the Comprehensive Plan and with the underlying zoning density limits in PCC 18A.15.020.

(AR 1148.) Based on the applicable calculation under the development regulations, the Village's density is consistent with the Comprehensive Plan (i.e., less than three dwelling units per acre). (*Id.*)

At the risk of sounding like a broken record, SCC's issue is not with the proposal, which is completely consistent with density requirements under the code, but is with the code itself – i.e., PCC 18.45.030 and the 4:1 equation. SCC argues repeatedly that the County Council errored by failing to amend the Comprehensive Plan at the same time it adopted the 4:1 calculation. In other words, SCC's problem is with Ordinance 2022-49s and PCC Ch. 18A.45. As discussed, any challenge to that ordinance and those development regulations is untimely.

SCC tries to get around this problem by making it seem like the Council created the 4:1 equation in Ordinance 2023-5s, and that the Council's repeal of that ordinance created confusion that allowed TRM to game the system. SCC states in its brief that:

> [I]nstead of amending the Comprehensive Plan to first insert the 4:1 provision there … 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….. The county's efforts to avoid [a] more deliberative process came up short. The County ended up with a hastily adopted zoning code amendment that was inconsistent with its Comprehensive Plan. That inconsistency led to the quick repeal of the zoning ordinance amendment.[13]

This is factually incorrect. There *was* a deliberate process to adopt PCC 18.45.030 and the 4:1 calculation. SCC simply failed to appeal the result of that process and now must live with it.

[13] *Id.* at 29-30.

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Tellingly, SCC does not once mention Ordinance 2022-49s in 31 pages of its Opening Brief. SCC's arguments and citations to GMA statutes and regulations underscore the fact that this claim (1) had to be made to the GMHB and (2) that it is untimely.[14]

C. Even if the Claim was Timely it Would Fail.

Even if the Court had jurisdiction to provide the relief SCC seeks and accepted SCC's argument that TRM's densities are inconsistent with the Comprehensive Plan (which it should not), there is still no mechanism for the Court to invalidate PCC 18A.45.030, and under RCW 36.70B.040 local governments are to review a project for consistency with local development regulations first and foremost. Only in the absence of applicable development regulation can a local jurisdiction look to the elements of the comprehensive plan. This is consistent with the legal principle that "a county's comprehensive plan is generally to be used as a 'guide' or 'blueprint,' and as such, it is not usually appropriate to use it to make specific land use decisions. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873-74, 947 P.2d 1208 (1997).[15]

In any event, SCC cannot show that the 4:1 equation is inconsistent with the Comprehensive Plan, *see* AR 1148, and it is their burden.

3. SCC'S CLAIM THAT TRM'S APPLICATION IS NOT COMPLETE, AND THUS NOT VESTED, IS UNTIMELY, BEYOND THE EXAMINER'S JURISDICTION, AND LACKS MERIT.

A. SCC's Challenge Was Untimely.

The vested status of TRM's application for the village project is governed by Pierce County's vesting Code, Chapter 18.160 PCC. The Code expressly extends vested rights to "use permits," which includes both conditional use permits and planned development district permits. PCC 18.160.030, Chapter 18A.75 PCC. The Code directs that any use permit "**shall**

[14] *See* Petitioner's Opening Br. at 28-30.

[15] *See also*, *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 182-83, 61 P.3d 332 (2002).

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be reviewed for consistency with the applicable development regulations **in effect on the date the application is deemed complete**." PCC 18.160.050.A (emphasis added). More particularly, an application "that is deemed complete is vested for the specific use, density, and physical development that is identified in the application submittal." PCC 18.160.050.D.

SCC correctly notes that PCC 18.40.020 sets forth the application submittal requirements; and, if the application contains all the submittal requirements checklist, the Code directs that the "application shall be considered complete." PCC 18.40.020. But the triggering event for vesting is the County's Department of Planning and Public Works' (PPW's) **determination** on the issue of completeness. Again, the Code unequivocally states that an application "shall be reviewed for consistency with the applicable development regulations in **effect on the date the application is deemed complete**." PCC 18.160.050.A (emphasis added). This determination sets the course for the entire permit review process, the months of review, analysis and public comment that follows. Pierce County's Code even provides that PPW "shall not commence the review process of any application until the application is deemed complete." PCC 18.60.010.

Once PPW has reviewed an application and deemed it complete, PPW or the Examiner may still "require additional information or studies necessary to ensure a proposal complies with all applicable regulations … at a later date in the review process." PCC 18.60.130.A. But the County's Code does not authorize PPW or the Examiner to rescind a determination of completeness for a use permit. Indeed, such action would contravene the stated purposed of Pierce County's vesting code, which is that it "is intended to provide property owners, permit applicants, and the general public assurance that regulations for project development will remain consistent during the lifetime of the application." PCC 18.160.020. That is especially necessary here, as SCC asserted its challenge nearly a year after TRM's application was deemed

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complete; and the application processing and review was nearly complete, with only the public hearing and SEPA appeal remaining.

Retroactive attacks on a determination of completeness at such late date also violate state law. Chapter 36.70B RCW sets certain state-wide rules for local project permit review. RCW 36.70B.070 establishes clear deadlines for a municipality to determine if a development application is complete. Within 28 days of receiving a project application, the reviewing local government must make a written determination that either the application is complete or that the application is incomplete because procedural submission requirements have not been met. RCW 36.70B.070(1). If the local government does not timely provide a written determination to the applicant that the application is procedurally incomplete, then the application will be deemed complete by operation of law on the 29th day after the application is submitted. RCW 36.70B.070(4); *Schultz v. Snohomish County,* 101 Wn. App. 693, 700-01, 5 P.3d 767 (2000); *Lauer v. Pierce County,* 173 Wn.2d 242, 261, 267 P.3d 988 (2011). "Within the parameters of the doctrine established by statutory and case law, municipalities are free to develop vesting schemes best suited to the needs of a particular locality." *Erickson & Assocs., Inc. v. McLerran*, 123 Wn. 2d 864, 873, 872 P.2d 1090 (1994), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn. 2d 682, 451 P.3d 694 (2019). Pierce County's Code cannot, therefore, be interpreted to contravene RCW 36.70B.070.

There is no legal authority to rescind or reverse PPW's determination that the application is deemed complete a year after the determination was made.

B. SCC Does Not Have Standing Title To Challenge TRM's Title.

PCC 18.40.020.C directs that Planning and Public Works Department to "check" a submitted land use application to confirm that certain required components are included with the application before it is deemed complete. Among the required elements is a:

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> 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. …..

PCC 18.40.020.C.2.[16]

The obvious purpose of this requirement is to provide the County with adequate documentation that the applicant holds the necessary property rights to construct the proposed development on the subject property. If, however, the applicant does not the property owner (e.g. he has only contracted to purchase the property or has leased the property), then the Code directs the applicant to obtain signed consents from the current property owner. *See* PCC 18.40.020.C.2.b-d.

Consistent with that requirement, TRM provided all the necessary signed attestation/agency authorization forms, including one signed by Ober before the sale closed. (AR 10203, 10208, 10108, 10115.) TRM has also provided the County with a statutory warranty deed to the TRM property, which includes conveyance to TRM of the drainage ditch property and is supported by title insurance. (AR 10220-10222, 10224-10238.) This is sufficient to satisfy both the letter and the purpose of the owner attestation requirement; and the Examiner should have concluded that TRM's application was complete on that basis alone.

Even though no party or entity has claimed a competing interest in the TRM property, SCC asked the Examiner, and now asks this Court, to look beyond and scrutinize the title documents and litigate the strength of TRM's title. But SCC did not have standing, and the Examiner did not have jurisdiction to litigate the strength of TRM's title. If a title challenge is asserted, the forum to address the issues is in a quiet title action filed by a party-interest and

[16] PCC was amended in 2024 by Ordinance No. 2025-539s. The amendment post-dated TRM's application and does not apply here. Yet it is noteworthy that, evidencing the lesser import of owner attestation for a complete application, the County Council deleted the subsection 2 owner attestation requirement.

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invoking the superior court's general jurisdiction.

RCW 7.28.010 sets forth the requirements regarding who may maintain an action for quiet title: "Any person have a *valid subsisting interest* in the real property *and a right to the possessions thereof* …." Civil Rule 17(a) provides in part: "Every action shall be prosecuted in the name of the real party in interest." SCC does not qualify to challenge TRM's title.

Likewise, the Examiner' powers and authority is limited. A Hearing Examiner is a creature of the Legislature without inherent or common law powers and they exercise only those powers conferred either expressly or by necessary implication. *See Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984); *Leieune and Wright v. Clallam County,* 64 Wn. App. 257, 823 P.2d 1144 (1992). A Hearing Examiner's determination in an administrative proceeding is typically limited to determining whether or not a particular application for development or decision by the planning department on an application for development is consistent with the state and local laws for the type of development at issue. *Chaussee,* 38 Wn. App at 636. The powers of the Pierce County Hearing Examiner are expressly enumerated in PCC 1.22.080; they do not include title litigation.

It is the superior court, on the other hand, when exercising its general jurisdiction, that has original jurisdiction to decide cases involving the title or possession of real property. RCW 2.08.020. But on a LUPA appeal, the superior court does not invoke its general jurisdiction, but instead acts in its more limited appellate capacity. *Union Bay Preservation Coalition v. Cosmos Devel. & Admin. Corp*., 127 Wn. 2d 614, 617-18, 902 P.2d 1247 (1995); *Overhulse Neighborhood Ass'n. v. Thurston County*, 94 Wn. App. 593, 596-97, 972 P.2d 470 (1999).

In this permitting process, all questions regarding TRM's title were satisfied when TRM submitted its ownership attestation forms and, further, presented an insured statutory warranty

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deed to support the ownership attestation. SCC has no standing to challenge the strength of TRM's deed. Though he ultimately reached the right conclusion, SCC's abstract and fictitious title challenges were not properly before the Examiner and beyond his jurisdiction to adjudicate.

The Court, now acting into its appellate capacity, has no broader authority to adjudicate TRM's title on this LUPA appeal. This Court need not and may not adjudicate TRM's title in this LUPA appeal. It can, however, affirm the Examiner's decision that TRM had a complete, vested application based exclusively on the signed attestation forms and TRM's insured statutory warranty deed.

If this Court chooses to look beyond TRM's deed and adjudicate the meaning and scope of the 1920 Decree, the Court should affirm the Examiner's interpretation of the 1920 Decree.

C. The Examiner's Interpretation Of The 1920 Decree Is Consistent With the Decree's Language, The Law Of Eminent Domain And TRM's Deed.

Significantly, there is no express language in the 1920 Decree that conveyed fee simple title of the drainage ditch area to Drainage District No. 15. In fact, the Court will not find the words "fee simple" anywhere in the Decree. The Decree states at AR 10094:

> And said verdicts having been duly received by the court and ordered filed, it is now in accordance therewith ORDERED, ADJUDGED AND DECREED that petitioner shall upon delivering to 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 its purposes of constructing its drainage ditch or improvement over, across and upon the lands and premises of the defendants** Arthur Schulz and Jane Doe Schulz, his wife, [predecessor owner of Sean Ober's property] and William or Wilhelm Schulze and Bertha Schulz, his wife, above described. (Emphasis added.)

Again, the Decree does not state that fee simple title to the property is conveyed. Given the absence of such express conveyance language, the Decree language is more reasonably interpreted to convey to the District an easement interest authorizing use of the property, more specifically to construct a ditch "over, across and upon the lands and premises."

Further corroborating this interpretation, the Decree specifically reserved use rights to

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the property owners (Schultz). The Decree states at AR 10092-10093:

> IT WAS STIPULATED AND AGREED by petitioner in open court that upon said lands and premises above-described being appropriated by petitioner [Drainage Ditch District No. 15] for use and purposes of said improvement, that said respondents Arthur Schulz and wife, and William or Wilhelm Schulz and wife, and their successors in interest, should have the right in the future to cross said premises at any place or places desired by them, and build and maintain across the ditch over said premises such bridge or bridges as might be desired by them and necessary and convenient for their uses and purposes; that same not to interfere with or obstruct said drainage improvement, and that said respondents, or their successors and assigns, might continue to cultivate and crop in the future such part of said lands so appropriated as could be cultivated and cropped without interfering with said drainage improvement.

Thereafter, the 1920 Decree confirmed at AR10094 that the District took the "appropriated" property interest "subject however, to the rights of said defendants" set forth in the above stipulation. In essence, the District has a limited right akin to a utility easement, which likewise would not affect development.

SCC makes much ado about the fact that the legal description set forth in the Decree is a metes and bounds description, inferring, without any supporting legal authority, that metes and bounds descriptions necessarily describe a fee interest as opposed to an easement interest.

But the legal description serves no purpose other than to describe the area for which a property interest is being conveyed – whether that interest be an easement or fee simple. Irrespective of whether a property interest is conveyed in fee or as an easement, the legal description will remain the same – in fact, there is no other way to describe the affected area. Here, the legal description in both the Necessity Order and the Decree describes a very limited area – effectively the existing stream that crossed the TRM property along with 12 ½ feet on each side of the stream. (AR 1088, 1092.) The specific property interest being conveyed for this limited area must, however, be separately derived from the Decree, which is the instrument of conveyance, and, to a lesser extent, from the Necessity Order.

SCC states (again without substantiation) that the Necessity Order merely "identifies

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the public use that justifies the condemnation" but "it does not serve to limit the condemnation to acquisition of only an easement for that specific use."[17] But significant to TRM's analysis and the Examiner's Finding 13 is the fact that both the Necessity Order and the Decree contain the substantial limiting language, but neither ever affirmatively states that the District is acquiring or appropriating a fee interest. The Examiner's finding, which gives meaning to the limiting language in the Decree and does not infer an unstated fee interest, is consistent with condemnation law.

"The general rule is that the condemnor may take only such an estate in the property sought to be acquired by eminent domain as is reasonably necessary to secure the public purpose desired." 3 NICHOLS ON EMINENT DOMAIN (3rd Ed. 2012) §9.02[1], p. 9-10. Because reasonable necessity is required to condemn private property, "if there is doubt regarding the extent of the condemnation, only an easement or a qualified fee interest is acquired." *Id*. at §9.02[5][a], p. 9-21.

> The reasonable necessity contrasts with voluntary conveyances between or among private individuals. In the case of a voluntary conveyance, whenever it becomes necessary to construe the instrument of conveyance for the purpose of determining the extent of the interest acquired, the rule is that the grantee will be allowed the greatest interest possible. **In cases of uncertainty, indefiniteness, or ambiguity in eminent domain, the presumption is that the owner retains the greatest possible estate and interest in the property to be acquired**.

Id. at §9.02[1], p. 9-12. If the condemnor takes an easement, the owner retains title to the land and the right to make any use of it that does not interfere with full and free use of the public use. *Id.* §9.02[5][a], p. 9-23.

> Where only an easement is acquired, the owner retains title to the land and all that is ordinarily considered part of the land. This means that the owner retains the fee and certain reversionary rights if the condemnor discontinues or abandons the easement.

[17] Petitioner's Opening Br. at 17.

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Id. at §9.02[5][c], p. 9-28. [18]

The Examiner correctly found that the 1920 Decree conveyed to the now dissolved Drainage District 15 only "an easement to build a drainage ditch, not a fee interest in the land itself." (AR 11423, Finding 13.) The Examiner's finding is consistent with the language in the Decree and, consistent with the law, does not infer that the ambiguous Decree conveyed a fee simple interest that was neither stated in the Decree nor necessary to allow the required public use of a drainage ditch. Further corroborating that the Examiner correctly interpreted the Decree are the following facts established by the record:

- None of the deeds in the chain of title subsequent to the 1920 Decree mentioned, much less excepted the "ditch property" from title;
- TRM's statutory warranty deed conveyed to TRM title to the ditch property;
- A title company, with full knowledge of the Decree, issued a substantial insurance policy that includes coverage of title to the "ditch property";
- The "ditch property" has never been assigned a separate tax parcel number; and
- No entity has asserted a claim of interest in the "ditch property."

The Examiner did not misinterpret the facts and SCC's LUPA appeal should be denied.

D. SCC's Attempt To Present New Evidence After The Record Was Closed Was Improper And Appropriately Rejected By The Examiner.

Under the County Code, the "official record" of the Examiner is comprised of "the written and oral information, exhibits, reports, testimony and other evidence submitted in a timely manner and accepted by the Examiner." PCC1.22.020. "The official record is closed at the end of the public hearing, unless the Examiner specifically allows the official record to remain open for a time certain." *Id.* Here, the record was closed at the conclusion of the hearing.

Despite that the record was closed and the Examiner had issued his decision, SCC

[18] SCC cites several cases at page 17 of its Brief in which the condemning authority only appropriate a possessory or easement interest in property. But none of those cases discuss, much less address, how to interpret an ambiguous condemnation decree. Nor do they indicate the requisite language for a decree to convey fee simple title.

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attempted to present new evidence with its reconsideration request. To justify this request, SCC cited PCC 1.22.130 (Reconsideration)[19] and asserted that there had been an irregularity in the proceeding. SCC stated:

> [W]e request reconsideration because the applicant's argument that the 1920 deed did not convey a fee interest was presented only the day prior to the oral argument on this matter. We did not have adequate time to gather all additional factual information responsive to that new argument. **The irregularity in the proceeding by which we were unable to have adequate time to respond to the applicant's information submitted only the day before oral argument justifies your consideration of additional document rebutting those arguments**. Along with the [reconsideration] letter, we are presenting you rebuttal document under the cover of a letter from Mr. George Wearn that provide additional evidence of the error in your finding. (Emphasis added.)

(AR 11186.) SCC offered no other grounds or citations to justify or support its request to present new evidence after the official record was closed. (*Id*., *see also,* AR 1108, Finding 9.)

TRM and the County each separately opposed the request, responding to SCC's asserted grounds of "irregularity in the proceeding" and, further, responding that the Official Record was closed and there was no legitimate basis to authorize the untimely submittal. (AR11323-11324, AR 11332-11336, AR 11083-11084, Findings 10, 11.) After considering the record and the parties' respective arguments, the Examiner rejected SCC's argument that there was an irregularity in the proceedings and, in turn, refused to accept the late proffered new evidence.

SCC does not contest the Examiner's finding that there was no irregularity of proceedings. Instead, SCC now complains that the examiner "read into the rule a requirement that new evidence must be justified by a showing that there was an irregularity in the proceedings."[20] The argument is remarkable, since SCC invited the Examiner to do so. SCC's alleged irregularity of proceedings was the only basis that SCC offered to support its request to

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[19] PCC 1.22.130.A provides that an aggrieved party may request reconsideration based on "[i]rregularity in the proceedings before the Examiner by which such party was preventing from having a fair hearing."

[20] Petitioner's Opening Br. at 23.

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the Examiner to accept new evidence after the record closed. Again, SCC argued: "The irregularity in the proceeding by which we were unable to have adequate time to respond to the applicant's information submitted only the day before oral argument justifies your consideration of additional document rebutting those arguments." [21] (AR11186.) SCC cannot now fault the Examiner for deciding the argument that SCC presented.

SCC's new argument is that there is nothing in the Reconsideration code provision, PCC 1.22.130, that imposes limits on offering new evidence on reconsideration. More pertinent to this issue, however, is the fact that there is nothing in this code provision that even discusses, much less authorizes presentation of new evidence after the record is closed and the Examiner issues his decision..

Finally, SCC claims that the Reconsideration code allows for presentation of new evidence upon a showing of a "misrepresented fact." SCC then summarily asserts that TRM misrepresented its ownership interest in the drainage ditch property.

The argument is offensive. There is no evidence whatsoever that TRM made any misrepresentations. Its actions and statements were wholly consistent with its title documents. Moreover, SCC misstates the code. PCC 1.22.130.A provides that there may be grounds for reconsideration upon a showing of "[e]rrors of procedure or **misinterpretation** of fact." This subsection, like the rest of PCC 1.22.130, does not present any basis or authority to present new evidence after the record is officially closed.

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[21] SCC's complaints about insufficient time to respond to TRM's arguments was appropriately rejected to by the Examiner. SCC made a strategic choice to submit its 13-page "comment letter" (accompanied by 109 pages of attachments) challenging the vested status of TRM's development application on April 22, 2024, only a week before the public hearing began. Though submersed in its hearing preparation, TRM responded quickly. TRM evaluated the vesting challenge, conducted necessary historical title research, conducted necessary legal research, and prepared and submitted a written response in just 8 days. SCC's perceived disadvantage was self-inflicted. SCC made a deliberate choice to wait until a week before the hearing to submit its lengthy challenge to TRM's vested status. It appears that SCC perceived it would be a strategic advantage to surprise TRM with its challenge on the eve of the hearing. But SCC cannot deny that TRM was well within its rights to respond as it did. (*See* AR 11083-11084, Finding 10.)

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E. Even If considered, The New Information Does Not Prove Any Title Deficiencies Or Enhance SCC's LUPA Appeal.

SCC first points to the March 20, 1920 Verdict. (AR 11210) But the Verdict is irrelevant to the issue, as it is merely the mechanism through which damages were assessed and awarded – it was not the instrument of conveyance. The Decree was the only instrument of conveyance. Moreover, there is nothing in the Verdict that contradicts or undermines the language employed in the Decree that limits the property interest conveyed. Correspondingly, there is nothing in the Verdict that contradicts or undermines the Examiner's analysis in Finding 13.

SCC next highlights a 1954 letter from former Pierce County Commissioner Schlegel to former Pierce County Prosecutor O'Connell (AR11201) as "particularly weighty." Notably, this letter (and appended 1952 Resolution No. 4303) confirms that Drainage District 15 was formally dissolved in 1952, though it had been inactive (with no commissioners elected) for 10 years preceding the formal dissolution.[22] The letter also confirmed that the subject drainage ditch was outside Drainage District 15's boundaries and, as a result and unlike property interests within District 15 boundaries, no interest in the "ditch property" was included in the 1942 transfer of property to the US Government as part of Fort Lewis.

Ultimately, the letter shows only that former Pierce County Commissioner Schlegel was raising questions. It appears Schlegel was sharing information learned from and questions asked by another person, a former District 15 commissioner. But no response was presented. We do not know if the information conveyed by Commissioner Schlegel was verified as accurate. Notably, the information regarding the "ditch property" provided in the 1954 letter is not corroborated by the 1952 Resolution; to the contrary, unlike the cash balance, the "ditch property" was not even mentioned, much less identified as a remaining District 15 asset. It is

[22] Notably, Schultz, the predecessor owner of the property and party to the Decree, conveyed the property without a title exception for the drainage ditch area in 1945, after the district had already become inactive. (AR 10144.) This evidences that the district either never took possession of the area and/or constructed a drainage ditch, or it abandoned any rights under the 1920 Decree.

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unknown if the former Prosecutor or any other County official ultimately agreed that any property interests outside the District 15 boundaries remained in District 15's name following dissolution, or if he simply concluded the property interest was abandoned and reverted to the original owners, making further disposition of the property unnecessary. The 1954 letter raises questions (and opportunities to speculate) but presents no answers. It presents no credible evidence sufficient to undermine the substantial evidence that TRM owns the "ditch property."

In the 70 years since it was effectively abandoned, no entity has made a claim to the "ditch property," which, again, lies within the expansive wetlands that will not be altered by TRM's development. The issue of title was correctly evaluated based on the Official Record. There is no basis to re-open the record and re-open the issue to facilitate SCC's speculation that TRM's warranty deed did not effectively convey TRM title to the "ditch property."

The Examiner correctly evaluated the Decree and other evidence in the Official Record and properly found that TRM has title to the "ditch property." SCC's appeal should be denied.

Dated this 20th day of February, 2025.

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DECLARATION OF SERVICE

I hereby declare that on February 20, 2025, in Tacoma, Washington, I caused the foregoing affixed document to be served on the following parties in the manner indicated herein:

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I DECLARE UNDER THE PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

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