Gig Harbor Special City Council Meeting

April 23, 2000

SPECIAL MEETING OF THE GIG HARBOR CITY COUNCIL
March 23, 2000 - 6:00 p.m.
Gig Harbor City Council Chambers

CALL TO ORDER:

NEW BUSINESS:

1. Appeal of the Hearing Examiner's Decision - Harborwest Subdivision.

ADJOURN:

City of Gig Harbor. The "Maritime City"

DEPARTMENT OF PLANNING & BUILDING SERVICES
3125 JUDSON STREET
GIG HARBOR, WASHINGTON 98335
(253) 851-4278

TO: **MAYOR WILBERT AND CITY COUNCIL**
FROM: **RAY GILMORE, DIRECTOR, PLANNING AND BUILDING**
SUBJECT: **CLOSED RECORD APPEAL – HARBOR WEST SUBDIVISION (SUB98-01)**
DATE: **MARCH 20, 2000**

INTRODUCTION/BACKGROUND

Council has been provided several documents relative to the above referenced application, including the availability of a complete transcript of the public hearings. In 1998, Mr. Don Huber and Mr. Clark McGowan submitted an application for a 149 lot subdivision (Harborwest). A public hearing was conducted on the application on May 5, 1999. The public hearing was consolidated with the hearing on an appeal filed on the issuance of a SEPA mitigated determination of non-significance (MDNS). Two additional hearings were conducted on May 19 and May 26. A final hearing was conducted on December 8, 1999 to accept testimony on issues limited to transportation, a habitat assessment prepared by the applicant and to permit interested parties the opportunity to submit questions to the SEPA responsible official.

POLICY ISSUES

Title 19 GHMC, provides for one open record hearing and one closed record hearing of an application subject to review by the City Hearing Examiner. The Hearing Examiner issued a decision on the application on January 31, 2000. Four appeals were filed on this decision. All four appeals were filed by parties of record. Chapter 19.06.005 provides as follows:

> Closed record appeals shall be on the record established at the hearing before the hearing body whose decision is appealed, which shall include the written decision of the hearing body, a transcript or tape recording of the proceedings, and copies of any exhibits admitted into the record. No new testimony or other evidence will be accepted except: (1) new information that was unknown to the parties at the time of the hearing which could not reasonably have been discovered by the parties and is necessary for a just resolution of the appeal; and (2) relevant information that, in the opinion of the council, was improperly excluded by the hearing body. Appellants who believe that information was improperly excluded

must specifically request, in writing prior to the closed record appeal, that the information be made part of the record. The request shall describe the information excluded, its relevance to the issues appealed, the reason(s) that the information was excluded by the hearing body, and why the hearing body erred in excluding the information. No reference to excluded information shall be made in any presentation to the council on the merits, written or oral, until the council has determined that the information should be admitted.

Chapter 19.06 GHMC also provides that parties to the appeal may present written and/or oral arguments to the council. Arguments shall describe the particular errors committed by the hearing body, with specific references to the appeal record. The hearing shall commence with a presentation by the director, or the director's designee, of the general background and the issues in dispute. After the director's presentation, the appellant(s), then the other parties of record shall make their arguments. Council members may question any party concerning disputed issues, but shall not request information not in the record. Staff has included a matrix which summarizes the issues in the appeals.

The council may affirm, modify, reverse, or, upon written agreement by the applicant to waive the statutory prohibition against more than one open record and one closed record hearing, and, if needed, to waive the requirement for a decision within the time periods set forth in RCW 36.70B.090, and remand the decision to the hearing body for additional information.

RECOMMENDATION

Staff has suggested that each appellant be granted 15 minutes to present arguments to the Council. At Council's direction, staff will prepare a resolution supporting the final decision of the Council.

Harbor West Subdivision Preliminary Plat
Appeal Issues

Appeal Issue	NCHOA	PNA	N. Natiello	Huber/McGowan
Density	X	X	X	
Open Space within the Plat	Table 1, page 3 appears to be new information not previously submitted.			
Impervious surface coverage	X			
Transportation Impacts/Impact Fee	X	X	X	
School Impact Fee				X
Parks and Recreation Impact Fee		X		X
Internal Road Curve Radius (standards)	X			
Road Turn Around (standards)	X			
Fire Safety/Access	X	X	X	
Storm Water Drainage Plan	X	X	X	
Wetlands (wetland category)	X	X	X	
Perimeter buffer	X			
Allow up to 4 model homes				X
25' buffer behind lots 146-149 (eliminate)				X
Staff did not read submittals			X	
Resubmit application as a PRD			X	
Illegally built road crossing wetland			X	
HE does not have authority to grant the rezone			X	
HE does not have authority to grant the variance			X	
Lots have more than 40% impervious coverage			X	
Incompatible with existing uses	X		X	
Pierce County should process the application, not Gig Harbor			X	
Comp plan does not allow 10 units per acre			X	
City allowed Wollochet Creek to be impounded.			X	

North Creek Homeowner's Association
Board of Trustees
Post Office Box 2041
Gig Harbor, Washington 98335
253-858-6294

Addendum to notice of appeal dated February 14, 2000

Submitted at the request of City of Gig Harbor Staff in their memorandum of February 29, 2000.
We have revised our original appeal to the City Council on Harbor West (SUB 98-01) to add line numbering to more clearly refer to sections of our appeal and to relate those sections to the facts in the record. The revision is enclosed.
The following will assist the City Staff in verifying that specific issues presented in our appeal to the City council are in fact a part of the record. This addendum is only intended to augment the specific references already imbedded in the original appeal and should be made a part of the official record:

Page number 1.

Line number	Exhibit number	Page number or other identifier
39 – 43	96	Executive summary page 2.
51 – 56	96	Executive summary page 2, 3, and Zoning 1 and 2.

Page number 2.

Line number	Exhibit number	Page number or other identifier
9 – 50	96	Zoning page 1 and 2.
9 – 50	136	Density 1 and 2.
52 – 56	99	Page 15 line 26

Page number 3.

Line number	Exhibit number	Page number or other identifier
7	96	Zoning page 2
7	99	Page 13 – 15
9 – 56	96	Density page 1 and 2.

Page number 3 continued.

Line number	Exhibit number	Page number or other identifier
9 – 56	99	Page 14 and 15.
17 – 56	4	Category area and gen. notes.
51 – 54	96	Executive summary page 3.
27 – 50		See following note

Note:
The chart on page number 3 of the appeal is merely a compilation of data found on the face of the site plan and data found in the hearing examiners decision. Although the staff had recommended certain elements of the various open space requirements in exhibit # 188 the appellants could not have developed this chart before the hearing examiner rendered his decision. In particular are the additional open spaces for Pileated Woodpecker habitat. The appellants anticipated that the hearing examiner would be more specific as to the delineation of this buffer zone expansion. In exhibit # 188, page # 21, the Staff recommends expanding the buffer zones to 100 – 150-feet along the north half of the Type II wetland. We recognized that this expansion would wipe out lots 9, 10, 12, and 13 at least and were waiting for this to be clarified. However, since the examiner did not, we developed the chart with an average size.
The chart could not have been prepared without the hearing examiner's decision and therefore qualifies as ***new information that was unknown to the parties at the time of the hearing which could not reasonably have been discovered by the parties and is necessary for a just resolution of the appeal.*** GHMC 19.06.005 (A) (1)
The appellants have repeatedly pointed out that this project does not offer any benefits to the public beyond what would be required in a "normal" subdivision and regrets not developing a similar chart sooner since it clarifies the issue. But, the appellants do not feel it was their responsibility to develop such an analysis. The Staff's insistence that this project "assures preservation of more common open space than would otherwise be preserved with a normal subdivision" in the face of the appellant's testimony inspired it's creation. Apparently the Staff accepted the applicant's assertions without checking the data.

Page number 4.

Line number	Exhibit number	Page number or other identifier
39 – 40	136	Density 1 and 2. Exhibit 12.
48	96	Conditions of aprvl. page 2.
48	Transcript	Vol. I, page 210, line 15-18

Page number 5.

Line number	Exhibit number	Page number or other identifier
5 – 6	96	Plat stormwater page 2 and 3.
22 – 23	58	Page 5
47	96	Transportation page 1 – 3.

Page number 6.

Line number	Exhibit number	Page number or other identifier
13	65	Page 3.
13	67	page 5.
13	96	Wetlands traffic page 5.
13	96	Conditions of approval.

Page number 6 continued.

Line number	Exhibit number	Page number or other identifier
49	111 should be 6.	Page 2.
55	96	Wetlands traffic page 5.
55	Transcript	Vol. I, page 173, line 8-12
56	Transcript	Vol. I, page 221, line 13-20
56	Transcript	Vol., I page 226, line 15-22

Page number 7.

25	96	Plat stormwater page 3.
39	Transcript	Vol. I, page 191, line 18-24
46, 47,53, and 54	Transcript	Vol. III, page 191, line 7

Page number 8.

Line number	Exhibit number	Page number or other identifier
38	199	Page 5 – 8.
55	96	Wetlands traffic page 1 & 2.
55	136	Wetlands page 1 – 4.
55	159	Page 1 – 3.
55	176	Page 1 – 2.

Page number 9.

Line number	Exhibit number	Page number or other identifier
16	105	Page 3.
32	Transcript	Vol. III, page 168, line 15-25, Page 169, line 1-16

Page number 10.

Line number	Exhibit number	Page number or other identifier
9	105	Page 3.
9	136	Exhibit 7A.
20, 23 & 25	136	Exhibit 7D.
53	176	Page 2.

I, the undersigned, Louis A. Willis, President of North Creek homeowner's Association, have read this addendum to our appeal of PUD 98-01, to the Gig Harbor City Council, dated February 14, 2000 and believe that the contents are true.

Louis A. Willis
President
North Creek Homeowner's association

NORTH CREEK HOMEOWNERS ASSOCIATION
BOARD OF TRUSTEES
POST OFFICE BOX 2041
GIG HARBOR, WASHINGTON 98335

Notice of Appeal

Dated: February 14, 2000

a. Appellant's name, address and phone number.

North Creek Homeowners Association
Board of Trustees
Post Office Box 2041
Gig Harbor, Washington 98335
253-858-6294

b. Statement describing appellant's standing to appeal.

North Creek Homeowners Association (NCHA) and Peter Dale Appellants, tax paying citizens and residents of Gig Harbor, submit for consideration of the Gig Harbor City Council a consolidated appeal. NCHA and Peter Dale are appellants and parties of record on this project. (See exhibit #65 and #66.)

c. Identification of the application which is the subject of the appeal.

Hearing Examiner decision of 1-31-2000 on Harbor West PUD 98-01. (See exhibit #3)

d. Appellant's statement of grounds for appeal and the facts upon which the appeal is based with specific references to the facts in the record.

We asseverate that significant errors in the findings of fact and conclusions, lack of convincing proof that the project conforms to the applicable elements of the City's development regulations as well as exclusions of pertinent facts have occurred in the Hearing Examiner's decision on the Harbor West PUD 98-01 dated 1-31-2000. See Gig Harbor Municipal Code (GHMC) 16.05.004 where it states " The Hearing Examiner shall not approve the preliminary plat unless written findings are made that: (A) The preliminary plat conforms to Chapter 16.08 of the GHMC, general requirements for subdivision approval 16.08.001 "*All subdivisions must meet the following general requirements in order to be approved" A. Zoning. "No subdivisions may be approved unless written findings of fact are made that the proposed subdivision is in conformity with any applicable zoning ordinance, comprehensive plan, or other existing land use controls".*
Summarized below is a listing of the of Hearing examiner errors, facts in the record (referenced in parenthesis), the decision of the Hearing Examiner, a statement from the appellants with specific reference to the Gig Harbor Municipal Code, the Gig Harbor Comprehensive Plan and / or Washington State Law. Excerpts from these references will be italicized.

1. Hearing Examiner Error – Density.

The density of the proposed development is too high and does not fit the character of surrounding neighborhoods. The project should be limited to 3 dwelling units per net acre (gross acreage less roads, parking lots, road easements and submerged lands) for a total of 105 dwelling units. (See exhibit #96 and oral presentation of Peter Dale).
See Hearing Examiner Decision (HED) page 3, item 2. (a).

HED page 12, item 4 states: "The density of the proposed preliminary plat and PUD is 3.51 dwelling units per acre and the adopted Comprehensive Plan anticipated a density for the subject property as 3 to 4 dwelling units per acre. Therefore, the proposed density of the project is consistent with the density anticipated in the adopted City of Gig Harbor Comprehensive Plan.

Fact.

The Comprehensive Plan is very specific about its role. It states under the section *PLAN IMPLEMENTATION AND INTERPRETATION. "The plan does not purport to be the legal instrument to carry out the objectives of the plan". This is the role of the …. Zoning Code, etc.* Additionally, GHMC 19.04.001 (B) specifically states: "*Consistency. During project permit application review, the director shall determine whether the development regulations applicable to the project, or in the absence of applicable development regulations, the City's Comprehensive Plan, etc.*" In this case there is no absence of applicable development standards.
Referring to the Comprehensive Plan to justify exceeding the 3 dwelling units per acre maximum allowed under the R1 zone is a deliberate attempt to circumvent GHMC 17.16.060 *Development Standards*. Those standards are very specific; ***Maximum density is 3 dwelling units per acre.*** There is only **one** exception to this and that is for a Planned Residential Development (PRD).
A PRD has more beneficial and stringent development requirements than a PUD. In a PRD a developer must **earn the right** to exceed the 3 dwelling units per acre maximum allowed in an R1 zone by meeting these stringent requirements (see GHMC 17.89.100).
This explains why the Comprehensive Plan designates properties such as this as RL (urban residential low density). Because, the plan anticipates the possibility that some developer could build a quality project (PRD). An RL zone allows for a PUD (3 dwelling units per acre maximum) or a PRD (up to 4 dwelling units per acre). GHMC (PRD) 17.89.090 has a clear, easy to understand, statement on how one should interpret overlying zone density adjustments. It states: *"(B) Building and development coverage of individual parcels may exceed the percentage permitted by the underlying zone; provided, that overall coverage of the project does not exceed the percentage permitted by the underlying zone".*
The City, long ago, decided this issue. That is why they made a specific exception in the codes to accommodate PRD's. *This exception is in most of the residential codes* (GHMC (R1)17.16.060(H), (R2) 17.20.040(G) and (R3)17.24.050(G).) **There is no exception for PUD's.**
The City staff argues that the difference between the 3.51 dwelling units per acre requested by the applicant and the underlining zone maximum of 3 dwelling units per acre is "**only one-half unit per acre**" and that "**visually this would hardly be noticeable**". (Adopted by the Hearing Examiner on page # 12, item 1).
This ignores the fact that this is a 16% increase in density with corresponding increases in impervious surfaces and in vehicular traffic. This amounts to 248 vehicle trips per day. A significant increase by any standards.
The Staff goes on to state that: "increased density in any zone, including the R-1 zone, can be considered through the PUD process. As stated in Chapter 17.90.010, which defines the PUD intent, … underlying district regulations… may be varied; provided, however, such variances shall not compromise the overall intent of the Comprehensive Plan…" The Staff should have continued the excerpt because it goes on to state "*nor significantly impact existing uses or create adverse environmental effects.*" As I have already pointed out increased impervious coverage and vehicular traffic are, unquestionably, **adverse environmental effects**.
GHMC 17.90.040 (PUD) states: *"(C) Uses at variance with the underlying district shall be compatible with, and no more detrimental than, those uses specifically listed for a district.* **Increased impervious coverage and vehicular traffic is a detriment to the district.**
Inexplicably, the Staff has misled the Hearing Examiner into believing that PUD's can have up to 4 dwelling units in an R1 zone. This is particularly difficult to understand since The Planning Director (Correctly) wrote a letter to the applicant on 5-12-1998 suggesting that they resubmit their application as a Planned Residential Development (PRD).
The Director stated as a reason Washington case law respective to planned unit developments (Citizens v. Mount Vernon, 133 Wn.2d 861, 1997) (SEE exhibit #99 and #188 page 16). In exhibit

#188 the City Attorney explains that the Supreme Court stated: "the legal effect of approving a Planned Unit Development is an act of rezoning." She goes on to outline the required criteria, developed by the Court, that the applicant needs to submit in order to demonstrate the need for a rezone. There is no evidence that the applicant has submitted the required justification for a rezone or has formally requested such action. Furthermore, the Hearing Examiner is **specifically excluded** from making any decisions that would amount to a rezone or authorize any use not allowed in the district. GHMC 17.66.030 (See exhibit #96, #99 and oral presentation of Peter Dale.)

GHMC 17.90.050 states: *In approving the preliminary development plans, conditionally or otherwise, the hearing examiner shall first find that **all** of the following conditions exist: (A) That the site of the proposed use is adequate in size and shape to accommodate such use and all yards ...and other features necessary to insure compatibility with and not inconsistent with the underlying district.* This development is proposing 5000 square-foot lots. Adjacent to the west side of the site is the Rosewood development in Pierce County and Newport Ridge, Gig Harbor Heights and North Creek Estates developments are in the City on the north and east side of the proposed site and all have 12000+ square-foot lots. (See HED page 8, item 4.)

One of the arguments for allowing increased density in this subdivision is repeatedly presented by the City Staff and adopted by the Hearing Examiner throughout this process. This argument is that this project is unique and beneficial to the public because of the large amount of common open space proposed. The Staff states on page 10 of exhibit 188: "This PUD assures preservation of more common open space than would otherwise be preserved with a "normal" subdivision. This is a significant benefit that the Staff has not ignored". **This statement is categorically incorrect!** Ninety three percent of the proposed open spaces in this development would be required in a "normal" development. The following is a list of the "open spaces" for the proposed plat and their designated uses:

Table 1.

DESCRIPTION	SIZE	PUD OR DEVELOPMENT
Wetlands (On Site)	127,000 ft^2	Required in any development
Primary wetland buffer	161,500 ft^2	Required in any development
Open space for Storm Water retention pond	60,000 ft^2	Required in any development
Perimeter buffer	90,000 ft^2	Required in any development
Additional open space required for third Storm Water retention pond not shown on plan called storm basin # 2" on the conceptual plan	60,000 ft^2	Required in any development
Addition mitigation (page 21 of Exhibit # 188 35,000 to 70,000 S.F.) Average	52,500 ft^2	Required in any development
Fire Dept. Mitigation (page #17, Item 3, of HED). Estimated	18,000 ft^2	Required in any development
Open spaces lying on Private easement that Applicant cannot warrant will remain as such. Estimated	18,000 ft^2	Required in any development
Sub-total	**598,850 ft^2**	**Required in any development**
Total open spaces proposed by developer	**648,000 ft^2**	
Total difference	**49,150 ft^2**	**PUD enhancement**

This proposed development has 29 "pocket parks" that average 1694 square feet (S.F.) and 7 pocket parks that lie on the north to south easement. In the majority of cases these are land "remnants" unsuitable for open spaces. See exhibit #188, page 18 where the Staff suggests that portions of the north to south easement could be dedicated to open spaces if the developer

doesn't improve the easement area. Until the easement is properly extinguished it cannot be dedicated to open spaces. The Staff should be aware of this. {See GHMC 17.90.040 (D)}.
Keeping the preceding in mind refer to exhibit #136 which contains an exhibit of it's own entitled exhibit #12. This document is very illuminating. In this memorandum addressed to Phil Canter of McCormick and Canter Northwest the City Planning Department discusses the criteria for qualifying for a PUD. To summarize this memorandum it states: "In effect it appears that the creek area does not preclude achieving maximum density on the site and that more open space could be achieved by limiting the density to the R1 allowance of 12 lots. It is therefore difficult to see any increased benefits to the public as a result of this proposal.
The Staff states on page 8 of exhibit #188: "The proposed development's density is only ½ unit per acre greater than other subdivision development within the area. This is not a significant increase and the visual differences will hardly be noticeable. A difference that will be noticeable is the small lot sizes and the resultant large areas of open space. Because subdivisions are not subject to minimum lot sizes, 5000 square foot lots could be approved even under normal subdivision standards (apart from the PUD process). If a developer chooses small lots in order to preserve open space, then this is the developer prerogative. In fact smaller lots to preserve usable, common open space is preferred."
As shown above in Table 1., only 49,150 square feet of open space pocket parks is the actual PUD enhancement.
Keeping the lots the same size (5000 S.F.), roads the same (364,000 S.F.) all open spaces required for **any** subdivision (598,850 S.F.), the RV parking area (44,500 S.F.) and staying within the R1 subdivision code of 3 dwelling units per acre (128) will provide an additional 204,000 square feet of open spaces. **This is a 239 percent increase in open spaces over the PUD proposal.**
One more exercise to prove our point:
Assume, if you will, that the lot sizes were increased to meet minimum standards for setbacks required under the R1 code, which the PUD proposal does not. Also increase the lot width to 70-feet. Assume also a 1620 S.F. foot- print for the structures on the lot with a 550 S.F. driveway for a side-loaded garage. This would allow a 3,240 S.F. house (including garage) to be built on the lot. Additionally, it would result in 36% imperious lot coverage. This is 4% under the code's maximum. The PUD proposed is estimated to exceed the maximum impermeable coverage allowed in the zone by 5.5% to 12.3% depending on house design.
This would result in 5950 square foot lots and 8-foot side yard setbacks instead of 0 to 5 feet, 25-foot front yard setbacks instead of 12-feet and 30-foot rear yard setbacks instead of 10-feet. Keeping all the same parameters as the non-PUD example above but substituting the larger lots would result in an additional 82,350 square feet of open space. **This is a 60 percent increase over the PUD proposal.**

It is therefore difficult, if not impossible, to see any increased benefits to the public as a result of this proposal for a PUD.

The proposed project is incompatible and inconsistent with the underlying district.
The Staff also incorrectly calculates the density because they failed to subtract lands that should not be included in the gross acreage. I.e.: Streets, submerged lands, etc. The actual coverage is closer to 4.25 dwelling units per acre.
After subtracting roads, Parking lots, road easements and submerged lands our computer analysis determined that there was 35 net acres. 35 net acres times 3 dwelling units equals 105. (See exhibit #96 and oral presentation of Peter Dale.)

2. Hearing Examiner Error – Impervious surface.

The impervious coverage of lots on the site exceeds the maximum allowed in the zone.

Fact.

We testified that our computer analysis showed a low of 45.5% and a high of 52.3% of planned impermeable surfaces (roofs, driveways, sidewalks, etc) for each lot. The applicant stated on the environmental worksheet that impervious coverage was "about 18%".
The City Staff and the Hearing Examiner failed to address this issue. **Impervious surfaces cannot exceed 40% under any condition** {see GHMC 17.16.060 and 17.90.040 (c)}. (SEE exhibit #96 and oral presentation of Peter Dale.)

3. Hearing Examiner Error – Private Internal Streets.

The planned private roads within the development do not meet the stringent criteria required shown under GHMC 17.90.040 (A) 1, 2 and 3. In order to meet these requirements the internal roads *must preclude* the possibility *of future linkage with existing public roads which are part of* the City's adopted road or transportation plan. The street design, pedestrian access and layout must represent a superior design which meets the objectives of the public works standards and a direct and tangible public benefit will accrue from the proposed street design.
The Hearing Examiner found the streets to be **adequate** (see HED page 14 item c. and 15 item b.).

Fact.

Two Pierce County roads dead end at or near the site. These roads are 54th avenue NW and Forest Lane NW. (See exhibit #97 map) Mr. Wes Hill in his memorandum of January 15, 1999 to Mr. Gilmore (See exhibit # 58) clearly and correctly points out that the design is deficient because there is no ingress and egress at the south end of the development and that the **only issue that keeps that from happening is the developer's failure to obtain the necessary right-of-way.**
The over-all goal of Chapter 2 of the Public Works Standards is to "integrate fully accessible public transportation systems that will facilitate present and future travel demand with minimal environmental impact to the community as a whole". In order for private roads within the PUD to be approved "*the **physical** limitations of the site* (must) *preclude the possibility of future linkage with existing or proposed public roads*". GHMC 17.90.040 (A) 1. For instance, if the site had access to 54th Avenue NW at the south end of the site traffic could access this development from Hunt Street NW. The site's access point to 54th Avenue NW is undeveloped and **has no physical limitations.**
Clearly, this street design does not meet the objectives of the Public Works Standards.
The internal streets have a sidewalk on one side only. Other streets within the development called alleys are of substandard width. They are 15-feet wide and have no sidewalks. **Gig Harbor has no public works standards for alleys**. These streets are clearly an **inferior design** and do not meet the objectives of the public works standards GHMC 17.90.040 (A) 2.
While it is true that a tangible public benefit could accrue from the fact that private streets are maintained by private parties, a direct benefit to the public cannot be proven. Particularly when you consider that 1500 vehicle trips per day will be forced to ingress and egress via the north end of the site. This traffic impact on the neighborhoods to the north is significant. During the busy hour of the day it is anticipated that with the present design the intersection of 76th Street NW and 46th Avenue NW (North Creek estates) will experience a 265% increase in traffic. The intersection of Schoolhouse Avenue NW and Rosedale Street NW will experience a 203% increase in traffic. City maintenance budget savings cannot offset the traffic impact on the north end neighborhoods. GHMC 17.90.040 (A) 3. (See exhibit # 96 and oral presentation of Peter Dale)

The internal streets do not meet the requirements of GHMC 17.90.040 (A) 1, 2 and 3 therefore private streets within the development cannot be approved.

4. Hearing Examiner Error – Inadequate Pedestrian Ways.

Unsafe conditions for children walking to school and or school buses. The Hearing Examiner has concluded that the existing sidewalk system through Gig Harbor Heights will provide **adequate** pedestrian ways between the proposed development and the schools on Rosedale Street NW.

Fact.

Children residing in the Rosewood Development walking to meet their school buses, both private and public, travel north on 54th Avenue NW and board the buses at the intersection of Rosedale Street NW. Children residing in Gig Harbor Heights and Newport Ridge board their buses at the intersection of 76th Street NW and 46th Avenue NW. Additionally, children residing in North Creek Estates also board buses at the intersection of 76th Street NW and 46th Avenue NW. Both 54th Avenue NW and 76th Street NW **have no sidewalks**. See exhibits #65, #67 and #96 and oral testimony of Peter Dale.

Construction of a sidewalk was required of the applicant on 76th street as part of mitigation condition # 4, page 12, of exhibit # 58 but was eliminated in exhibit # 188, page 19, item 1 when the City decided to illogically **pretend** that the development's vehicular traffic won't use 76th Street NW (See Hearing Examiner error # 9 on page 7 of this document). Unfortunately, the Hearing Examiner, presumably in his eagerness to accommodate the City Staff's pretense that the development won't use 76th Street NW for access, overlooked the school aged pedestrian traffic (and others). This is in spite of the fact that he acknowledged the responsibility on page # 13 item 38 of the HED. To contradict this decision and confuse everybody, the Hearing Examiner shows 76th Street NW as an access route for this development. (See HED page #9, c3).

To conclude that the sidewalk system that bisects Gig Harbor Heights will provide adequate pedestrian ways for students in the face of all the testimony from appellants and others, both orally and in writing, demonstrates a complete lack of understanding of the testimony. See HED page 5. Item i.

GHMC 16.05.004 *Findings and conclusions: The Hearing Examiner shall not approve the preliminary plat unless written findings are made that: (B) Appropriate provisions are made for .... Sidewalks and other planning features that assure safe walking conditions for students who only walk to school* (buses). See HED page 13 item #8. The Hearing Examiner erred by failing to protect the children of our neighborhoods.

5. Hearing Examiner Error – Buffer Zone.

The Hearing Examiner states on HED page #15, item 10 a. that there will be a 50-foot buffer around the perimeter of the development.

Fact.

The proposed site drawings (exhibit # 4) don't show this buffer. HED page #15, item 10, d. and page 24, item #38, contradict the statement on page #15, item 10a.

6. Hearing Examiner Error - Public Streets.

The Hearing Examiner on HED page #15 item b. makes the following incorrect and misleading statement: "In addition, many of the proposed lots in the development will have legal access over 76th Street NW to 46th Avenue NW". Presumably, his conclusion was inspired by applicant's assertions outlined in Exhibit #111.

Fact.

Louis Willis and Peter Dale testified that in fact the proposed development would **not** have any legal access rights over 76th Street NW to 46th Avenue NW. This was done in oral and written testimony. (See exhibit # 96). Steve Brown, attorney for North Creek Homeowner's Association also testified to this. (See oral testimony of Steve Brown.)

The basis for this is case law that supports the position that the non-exclusive easement cannot be used for the benefit of lands outside of the east 26 acres (which have the easement rights). In other words, for the benefit of the other 16 acres of the development. (See exhibit # 96 section "wetlands traffic" for copy of Brown v. Voss, 105 Wn. 2d 366, 1986) It states: "an easement that is expressly limited to serving a specifically identified dominant estate (26 acres), is unlawfully enlarged if it is used to gain access to a combined use of the dominant estate and an adjoining parcel(s)(the 16 acres), even though the use does not increase the burden of the servient estate (North Creek Estates)".
Merely requiring the applicant to restrict his development to the original 26 acres, by phasing or any other means, does not satisfy the requirement under the law. This is because the applicant has shown that the intended goal of the development is to join the 26 acres with another 16 acres to create an entity (the development). As a result, the development cannot legally use **any** of the easement.
The Hearing Examiner does not have legal authority to decide this issue.

7. Hearing Examiner Error – Turn Around.

Hearing Examiner condition #4. Page 17 requires **a** turn around on the public street side of the gate, etc.

Fact.

A (singular) turn around does not satisfy the Fire Marshals requirements. There are two roads accessing the development from 76th Street NW. Both roads should require a turn around. (See Exhibit # 96)

8. Hearing Examiner Error – Curve Radius.

Hearing Examiner condition #7. Page 17 requires that **all** roadways inside curve radius must be a minimum of 20-feet and an outside radius of 45-feet.

Fact.

The proposed site plans do not depict this (See exhibit # 4). Proposed "alleys" on the plan depict hard 90-degree turns and intersections. The "T" shaped intersection in the south end of the project on one of the "alleys" requires a much larger intersection area in order to allow a fire engine or other service vehicle sufficient space to make a turn. The "first response" emergency vehicle for the fire department is 33-feet 3-inches long and 8-feet wide. This vehicle cannot make the turn at all, even when "jockeying". (See oral presentation of Peter Dale)
Since the Hearing Examiner made a distinction between roadways and alleys in condition # 6 page 17 we must assume that condition #7 on page #17 does not extend to alleys.

9. Hearing Examiner Error – Traffic Impact.

The Hearing Examiner has ignored the testimony of the Applicant's traffic expert, Mr. Gregory Heath, who testified that 80% of all traffic in and out of Harbor West will use 76th Street NW through to 46th Ave NW (Skansie).

Fact.

From the beginning of this project it has been clear that North Creek Lane would be the primary route for ingress and egress to the Harbor west site. This was confirmed at the May hearings when the applicant's traffic engineer Mr. Heath testified: **" 80% of the traffic in and out of this project will use North Creek Lane (76th Street NW)".** When the residents of North Creek Estates voiced their concerns over the increased volumes of traffic that they would be experiencing during construction and at project completion, pointing out that North Creek lane

was a private street over which Harbor West **does not have legal rights to use**, the City responded by requiring a new traffic study showing all project traffic on Beardsley Avenue NW and 54th Ave NW. In essence **pretending** that the development wouldn't use North Creek Lane. Mr. Heath did complete a new study and manipulated the numbers to show no project traffic on North Creek Lane. **However, he failed to show how this would be accomplished. How are the 1550 vehicle trips per day going to be kept off of North Creek Lane?** Perhaps the City was going to close North Creek Lane at the west-end? This of course would not be a viable solution since all 30 other property owners who have legal easement rights to use this street that reside west of the location of intended closure would undoubtedly resist such a solution.

By trying to avoid the problem the City has wasted the developer and appelants resources and the citizens time. **Simply stating that the traffic will use Beardsley and 54th Ave. and not use North Creek Lane will not satisfy the requirements of Gig Harbor Municipal Code 17.90.040 (A) "all roads shall be public roads..." and or SEPA. The applicant and or the City must show how this will be accomplished.** All this activity inspired North Creek to do more research on what exactly had transpired on previous projects that were constructed west of North Creek Estates.

By digging deep into the City's files they learned some very alarming facts. These facts are:

On April 3, 1991 the City's Hearing Examiner, **Mr. Ron McConnell**, approved the preliminary plat for Gig Harbor Heights that is located adjacent to and northwest of North Creek Estates. **One of the conditions of approval was for the developer of Gig Harbor Heights to improve North Creek lane to City of Gig Harbor standards and dedicate the improved street to the City.** The planning department in their report of May 12, 1991 confirmed this decision.

The City Council passed resolution #317 on June 29, 1991 approving the preliminary plat of Gig Harbor Heights with the requirement to improve North Creek Lane to City standards and dedicate it to the City.

Subsequently Gig Harbor Heights was merged with another development known as Pepperwood and their names were changed respectively to Gig Harbor Heights I and II. However, **none of the preliminary plat requirements were changed**. On May 10, 1993 the City Council passed resolution # 382 approving final plat for Gig Harbor Heights *I and II* **certifying that all requirements of preliminary plat have been met.**

Additionally, Newport ridge (formally Berrywood), a development to the west of North Creek Estates, received preliminary plat approval on 7-21-1992 from Pierce County with a requirement to upgrade 76th Street NW to County 1A standards to 48th court NW. This preliminary plat was annexed into the City of Gig Harbor on 7-27-1992 and "grandfathered". The condition of improving the road was never changed, except for requiring City Standards, and on 4-28-1997 the City Council passed resolution #494 certifying that the final plat conforms to **all terms of preliminary plat approval**. Of course this is incorrect. **No work was accomplished on the section of road from North Creek's west property line to 48th court NW. (See exhibit # 199)**

As a result of this activity North Creek Lane, is in fact, already a City Street, available for public use and, since the City failed to require the Harbor Heights Developer to follow through with the street improvement and dedication, it is now becomes the City's responsibility to do so.

10. Hearing Examiner Error – Wetland Classification.

The Hearing Examiner erred when he concluded that the site's western wetlands were properly classified by the City and the applicant's experts as class II wetlands in Gig Harbor. The staff did not address the " forested wetlands issue" and incorrectly dismissed the "fish" issue.

(a) Fact.

(1) Forested Wetlands

The wetlands in question meet the definition of Category I wetlands per GHMC 18.08.040 (1) (ii) Forested wetlands that have three canopy layers, excluding monotypic stands of red alder averaging eight inches diameter or less at breast height. (See exhibit # 96, # 136, #159 and #176. The following summarizes the reasons, other than the fish issue, used to determine that the west

wetlands meet and/or exceed requirements for category I designation per GHMC 18.08.040 (1) (ii):

- The City's wetland inventory map identifies the area as PFOC (Palustrine, [i.e. marshy, swampy] Forested seasonally flooded),
- The study produced by IES Associates on April 30, 1992, which the City used to inventory their wetlands, shows on page 9 par. 8.1.1.2 where these wetlands are identified as "The only true forested wetlands on the project". Additionally, other areas of this study identify this wetland as having characteristics of category I wetlands in Gig Harbor. (See pages 8, 10, and 11 of the attached copy of this study in exhibit # 176)(See also exhibit # 136).
- Tom Deming's wetland analysis identifies this area as palustrine, forested, seasonally flooded. See page # 8 of his June 1997 report (attached to exhibit # 176). Mr. Deming identifies the plant community within the west wetlands on page # 6 of this study (attached to exhibit # 176). His analysis includes the plants located within the three canopy layers and identifies plants that are hydrophytic (i.e. typical of wetland areas). Mr. Deming, in his written testimony stated that "IES had followed the present City wetland criteria". (See exhibit # 105 and referenced in # 176) This is incorrect. Apparently Mr. Deming didn't check his facts because IES did not use the present criteria. The City changed category II definitions to be the definition for new category I, category III to category II and so on in 1996. The IES study was completed in 1992. Mr. Deming's reliance on the work IES did and his assumption that the wetland criteria was the same back in 1992 nullifies his conclusions on the Forested aspects of his "study".
- Sue Burgemeister of B-twelve Associates concurs with Mr. Deming's analysis but uses the wrong criteria to classify these wetlands. See page # 4 of 10 in her report (attached to exhibit # 176) in which she uses DOE's category I wetland criteria to conclude that the forested wetland does not meet Gig Harbor's category I criteria. The DOE's category I criteria is <u>not</u> applicable in the City of Gig Harbor. All DOE category I types were shown by the IES Associates study not to exist within the boundaries of Gig Harbor. Therefore, The City removed all references of DOE category I types from their Municipal codes and made what would be DOE category II types into Gig Harbor category I. (See Gig Harbor Municipal Ordinance 726 attached to exhibit # 136)).(See also Peter Dale's oral cross examination of Sue Burgemeister on May 26, 1999 where Ms. Burgemeister acknowledges not knowing that Gig Harbor's wetland categories do not agree with other areas in this State).
- Diane Ryba, Wetland Specialist testified that the wetlands contained three canopy layers and met the requirements of category I wetlands within Gig Harbor. (See her letter dated June 5, 1999 attached to exhibit # 176)
- Peter Dale provided photographic evidence of tree types, Sizes and the three canopy layers. He also provided photographic evidence that the stream exceeds 24 inches in width. (See exhibit # 136)

The studies produced by the applicant's "experts" are flawed in their analysis on the forested wetland on the site. The appellant's expert and other evidence, including the IES study, supports the present category I criteria. These forested wetlands are, unquestionably, category I wetlands in Gig Harbor.

(2) Salmonid Fish-Bearing Waters

The Hearing Examiner relies upon and adopts the Staff report (exhibit # 188, page 5) where the Staff states: "While Ms. Ryba is correct in stating that the wetland is "associated" with a fish bearing stream, she is incorrect in her determination that such association results in a category I wetland. The fifth criteria states clearly that the wetland must be *contiguous* to a fish bearing stream. Webster defined *contiguous* as being in contact: **touching**; also: **next, adjoining**. In this case, the wetland is contiguous to a documented type 5 stream, which is not a fish bearing stream."

The City is reduced to "splitting hairs" on the definition of every word in the codes to try to find a reason to perpetuate the misidentification of these wetlands.

(b) Fact

Tom Deming the applicant's wetland specialist states: "The lower end of this wetland onsite appeared to exhibit features more associated with a stream (i.e. Type 3 Water) rather than a wetland. As a special note, following the Washington Department of Natural Resources emergency enactment, all streams wider than 2 feet are at least a Type 3 water unless proven otherwise by the Washington Department of Fish and Wildlife. However, based on the lack of fish use during a time period when such use, if existing, would be present this stream would appear better defined as a type 4 water."(See exhibit # 105 and # 136).
There has been no evidence presented in this case that Washington State Fish and Wildlife has proven that the onsite stream is not a type 3 stream. To the contrary, Mr. Deming testified at the May 26, 1999 hearing that Washington Department of Fish and Wildlife was pursuing enforcement action against a downstream landowner who is responsible for creating a downstream migrational barrier. It is obvious that removal of the barrier is to allow Salmonids to migrate upstream. Mr. Deming testified under cross examination that it is possible that salmon will use the onsite wetland as a rearing habitat when the migrational barrier is removed.

Mr. Adam Couto, fisheries biologist, testified that: In his expert opinion it was a certainty and more than just a possibility that the salmon will return to the on site wetland, because the wetland is perfect rearing habitat for juvenile COHO SALMON. (See exhibit # 136).
Furthermore. the stream onsite must be considered a type 3 stream because the State does not consider man made barriers a reason to change the Type of stream. Ergo, it is a fish bearing stream. (See exhibit # 136)
Mr. Couto provided an extensive, comprehensive analysis of the fish habitat onsite. The following summarizes his findings: (See exhibit # 136)

1. The presence of lamprey in Wetland A meets the definition of a category I wetland under GHMC.
2. The lack of salmon present in wetland A does not mean the site is inhospitable to salmon – it only confirms the presence of a complete migrational barrier downstream.
3. Wetland A will likely be used as salmon rearing habitat when the migrational blockage is repaired.
4. Industry norms require protection of Wetland as if no illegal barrier existed downstream, which means that Wetland A meets the fifth criteria for a category I wetland under GHMC.

The Staff states in (exhibit # 188 page 7) that they have been unable to find any documentation to validate the presence of fish. Apparently the documentation submitted by the applicant and the appellant doesn't count. However two State government documents were referred to in this material. (exhibit # 96, wetlands traffic tab, exhibit A1) State of Washington Priority Habitats and Species mapping noted that the onsite portion of this drainage provides habitat for anadromous salmonids. This was probably factual before the downstream barrier was put in place. This document was referred to in Mr. Demings first report on the wetlands. It confirms that when the migrational barriers are removed the onsite location will again be visited by salmon. The second document referred to is the Emergency Forest Practices rules. It states that any stream wider than 2 feet (at the high water time of the year) must be considered a type 3 steam. All Type 3 streams are considered habitat for salmonids. Only the Washington State Department of Fish and Wildlife can change the Type rating. **The wetlands onsite are category I wetlands because they meet GHMC 18.08.040(c) ii, (f) and (e). Only one of these categories is required to qualify these wetlands for Category I protection**.
In addition access roads and utilities can only be placed in category II wetlands when there is no reasonable alternative location for providing access and/or utilities to a site. {See GHMC 18.08.120 (d)}. The private portion of 76th St. NW was required to have been dedicated as a public road to the City in 1993. Predicated on this fact, the Harbor West project is required to use this street as a public access, thus negating any and all requirement to cross the wetlands (See exhibit # 176).

e. Expected relief.

Reverse the Hearing Examiner's decision.

f. A statement that the appellant has read the appeal and believes the contents to be true, followed by the appellant's signature.

I, the undersigned, Louis A. Willis, President of North Creek Homeowner's Association, have read this appeal and believe that the contents are true.

Louis A. Willis
President
North Creek Homeowners Association

rcpt # 41088
ck # 1303
2/14/2000
#120.00

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FEB 14 2000

PLANNING AND BUILDING SERVICES

NORTH CREEK HOMEOWNERS ASSOCIATION
BOARD OF TRUSTEES
POST OFFICE BOX 2041
GIG HARBOR, WASHINGTON 98335

Notice of Appeal

Dated: February 14, 2000

a. Appellant's name, address and phone number.

North Creek Homeowners Association
Board of Trustees
Post Office Box 2041
Gig Harbor, Washington 98335
253-858-6294

b. Statement describing appellant's standing to appeal.

North Creek Homeowners Association (NCHA) and Peter Dale Appellants, tax paying citizens and residents of Gig Harbor, submit for consideration of the Gig Harbor City Council a consolidated appeal. NCHA and Peter Dale are appellants and parties of record on this project. (See exhibit #65 and #66.)

c. Identification of the application which is the subject of the appeal.

Hearing Examiner decision of 1-31-2000 on Harbor West PUD 98-01. (See exhibit #3)

d. Appellant's statement of grounds for appeal and the facts upon which the appeal is based with specific references to the facts in the record.

We asseverate that significant errors in the findings of fact and conclusions, lack of convincing proof that the project conforms to the applicable elements of the City's development regulations as well as exclusions of pertinent facts have occurred in the Hearing Examiner's decision on the Harbor West PUD 98-01 dated 1-31-2000. See Gig Harbor Municipal Code (GHMC) 16.05.004 where it states " The Hearing Examiner shall not approve the preliminary plat unless written findings are made that: (A) The preliminary plat conforms to Chapter 16.08 of the GHMC, general requirements for subdivision approval 16.08.001 *"All subdivisions must meet the following general requirements in order to be approved" A. Zoning. "No subdivisions may be approved unless written findings of fact are made that the proposed subdivision is in conformity with any applicable zoning ordinance, comprehensive plan, or other existing land use controls".*
Summarized below is a listing of the of Hearing examiner errors, facts in the record (referenced in parenthesis), the decision of the Hearing Examiner, a statement from the appellants with specific reference to the Gig Harbor Municipal Code, the Gig Harbor Comprehensive Plan and / or Washington State Law. Excerpts from these references will be italicized.

1. Hearing Examiner Error – Density.

The density of the proposed development is too high and does not fit the character of surrounding neighborhoods. The project should be limited to 3 dwelling units per net acre (gross acreage less roads, parking lots, road easements and submerged lands) for a total of 105 dwelling units. (See exhibit #96 and oral presentation of Peter Dale).
See Hearing Examiner Decision (HED) page 3, item 2. (a).

HED page 12, item 4 states: "The density of the proposed preliminary plat and PUD is 3.51 dwelling units per acre and the adopted Comprehensive Plan anticipated a density for the subject property as 3 to 4 dwelling units per acre. Therefore, the proposed density of the project is consistent with the density anticipated in the adopted City of Gig Harbor Comprehensive Plan.

Fact.

The Comprehensive Plan is very specific about its role. It states under the section *PLAN IMPLEMENTATION AND INTERPRETATION. "The plan does not purport to be the legal instrument to carry out the objectives of the plan". This is the role of the .... Zoning Code, etc.* Additionally, GHMC 19.04.001 (B) specifically states: "*Consistency. During project permit application review, the director shall determine whether the development regulations applicable to the project, or in the absence of applicable development regulations, the City's Comprehensive Plan, etc.*" In this case there is no absence of applicable development standards.
Referring to the Comprehensive Plan to justify exceeding the 3 dwelling units per acre maximum allowed under the R1 zone is a deliberate attempt to circumvent GHMC 17.16.060 *Development Standards*. Those standards are very specific; ***Maximum density is 3 dwelling units per acre.***
There is only **one** exception to this and that is for a Planned Residential Development (PRD).
A PRD has more beneficial and stringent development requirements than a PUD. In a PRD a developer must **earn the right** to exceed the 3 dwelling units per acre maximum allowed in an R1 zone by meeting these stringent requirements (see GHMC 17.89.100).
This explains why the Comprehensive Plan designates properties such as this as RL (urban residential low density). Because, the plan anticipates the possibility that some developer could build a quality project (PRD). An RL zone allows for a PUD (3 dwelling units per acre maximum) or a PRD (up to 4 dwelling units per acre). GHMC (PRD) 17.89.090 has a clear, easy to understand, statement on how one should interpret overlying zone density adjustments. It states: *"(B) Building and development coverage of individual parcels may exceed the percentage permitted by the underlying zone; provided, that overall coverage of the project does not exceed the percentage permitted by the underlying zone".*
The City, long ago, decided this issue. That is why they made a specific exception in the codes to accommodate PRD's. This exception is in most of the residential codes (GHMC (R1)17.16.060(H), (R2) 17.20.040(G) and (R3)17.24.050(G).) **There is no exception for PUD's.**
The City staff argues that the difference between the 3.51 dwelling units per acre requested by the applicant and the underlining zone maximum of 3 dwelling units per acre is "**only one-half unit per acre**" and that "**visually this would hardly be noticeable**". (Adopted by the Hearing Examiner on page # 12, item 1).
This ignores the fact that this is a 16% increase in density with corresponding increases in impervious surfaces and in vehicular traffic. This amounts to 248 vehicle trips per day. A significant increase by any standards.
The Staff goes on to state that: "increased density in any zone, including the R-1 zone, can be considered through the PUD process. As stated in Chapter 17.90.010, which defines the PUD intent, ... underlying district regulations... may be varied; provided, however, such variances shall not compromise the overall intent of the Comprehensive Plan..." The Staff should have continued the excerpt because it goes on to state "*nor significantly impact existing uses or create adverse environmental effects.*" As I have already pointed out increased impervious coverage and vehicular traffic are, unquestionably, **adverse environmental effects**.
GHMC 17.90.040 (PUD) states: *"(C) Uses at variance with the underlying district shall be compatible with, and no more detrimental than, those uses specifically listed for a district.* **Increased impervious coverage and vehicular traffic is a detriment to the district.**
Inexplicably, the Staff has misled the Hearing Examiner into believing that PUD's can have up to 4 dwelling units in an R1 zone. This is particularly difficult to understand since The Planning Director (Correctly) wrote a letter to the applicant on 5-12-1998 suggesting that they resubmit their application as a Planned Residential Development (PRD).
The Director stated as a reason Washington case law respective to planned unit developments (Citizens v. Mount Vernon, 133 Wn.2d 861, 1997) (SEE exhibit #99 and #188 page 16). In exhibit

#188 the City Attorney explains that the Supreme Court stated: "the legal effect of approving a Planned Unit Development is an act of rezoning." She goes on to outline the required criteria, developed by the Court, that the applicant needs to submit in order to demonstrate the need for a rezone. There is no evidence that the applicant has submitted the required justification for a rezone or has formally requested such action. Furthermore, the Hearing Examiner is **specifically excluded** from making any decisions that would amount to a rezone or authorize any use not allowed in the district. GHMC 17.66.030 (See exhibit #96, #99 and oral presentation of Peter Dale.)

GHMC 17.90.050 states: *In approving the preliminary development plans, conditionally or otherwise, the hearing examiner shall first find that all of the following conditions exist: (A) That the site of the proposed use is adequate in size and shape to accommodate such use and all yards ...and other features necessary to insure compatibility with and not inconsistent with the underlying district.* This development is proposing 5000 square-foot lots. Adjacent to the west side of the site is the Rosewood development in Pierce County and Newport Ridge, Gig Harbor Heights and North Creek Estates developments are in the City on the north and east side of the proposed site and all have 12000+ square-foot lots. (See HED page 8, item 4.)

One of the arguments for allowing increased density in this subdivision is repeatedly presented by the City Staff and adopted by the Hearing Examiner throughout this process. This argument is that this project is unique and beneficial to the public because of the large amount of common open space proposed. The Staff states on page 10 of exhibit 188: "This PUD assures preservation of more common open space than would otherwise be preserved with a "normal" subdivision. This is a significant benefit that the Staff has not ignored". **This statement is categorically incorrect!** Ninety three percent of the proposed open spaces in this development would be required in a "normal" development. The following is a list of the "open spaces" for the proposed plat and their designated uses:

Table 1.

DESCRIPTION	SIZE	PUD OR DEVELOPMENT
Wetlands (On Site)	127,000 ft^2	Required in any development
Primary wetland buffer	161,500 ft^2	Required in any development
Open space for Storm Water retention pond	60,000 ft^2	Required in any development
Perimeter buffer	90,000 ft^2	Required in any development
Additional open space required for third Storm Water retention pond not shown on plan called storm basin # 2" on the conceptual plan	60,000 ft^2	Required in any development
Addition mitigation (page 21 of Exhibit # 188 35,000 to 70,000 S.F.) Average	52,500 ft^2	Required in any development
Fire Dept. Mitigation (page #17, Item 3, of HED). Estimated	18,000 ft^2	Required in any development
Open spaces lying on Private easement that Applicant cannot warrant will remain as such. Estimated	18,000 ft^2	Required in any development
Sub-total	**598,850 ft^2**	**Required in any development**
Total open spaces proposed by developer	**648,000 ft^2**	
Total difference	**49,150 ft^2**	**PUD enhancement**

This proposed development has 29 "pocket parks" that average 1694 square feet (S.F.) and 7 pocket parks that lie on the north to south easement. In the majority of cases these are land "remnants" unsuitable for open spaces. See exhibit #188, page 18 where the Staff suggests that portions of the north to south easement could be dedicated to open spaces if the developer

doesn't improve the easement area. Until the easement is properly extinguished it cannot be dedicated to open spaces. The Staff should be aware of this. {See GHMC 17.90.040 (D)}.
Keeping the preceding in mind refer to exhibit #136 which contains an exhibit of it's own entitled exhibit #12. This document is very illuminating. In this memorandum addressed to Phil Canter of McCormick and Canter Northwest the City Planning Department discusses the criteria for qualifying for a PUD. To summarize this memorandum it states: "In effect it appears that the creek area does not preclude achieving maximum density on the site and that more open space could be achieved by limiting the density to the R1 allowance of 12 lots. It is therefore difficult to see any increased benefits to the public as a result of this proposal.
The Staff states on page 8 of exhibit #188: "The proposed development's density is only ½ unit per acre greater than other subdivision development within the area. This is not a significant increase and the visual differences will hardly be noticeable. A difference that will be noticeable is the small lot sizes and the resultant large areas of open space. Because subdivisions are not subject to minimum lot sizes, 5000 square foot lots could be approved even under normal subdivision standards (apart from the PUD process). If a developer chooses small lots in order to preserve open space, then this is the developer prerogative. In fact smaller lots to preserve usable, common open space is preferred."
As shown above in Table 1., only 49,150 square feet of open space pocket parks is the actual PUD enhancement.
Keeping the lots the same size (5000 S.F.), roads the same (364,000 S.F.) all open spaces required for **any** subdivision (598,850 S.F.), the RV parking area (44,500 S.F.) and staying within the R1 subdivision code of 3 dwelling units per acre (128) will provide an additional 204,000 square feet of open spaces. **This is a 239 percent increase in open spaces over the PUD proposal.**
One more exercise to prove our point:
Assume, if you will, that the lot sizes were increased to meet minimum standards for setbacks required under the R1 code, which the PUD proposal does not. Also increase the lot width to 70-feet. Assume also a 1620 S.F. foot- print for the structures on the lot with a 550 S.F. driveway for a side-loaded garage. This would allow a 3,240 S.F. house (including garage) to be built on the lot. Additionally, it would result in 36% imperious lot coverage. This is 4% under the code's maximum. The PUD proposed is estimated to exceed the maximum impermeable coverage allowed in the zone by 5.5% to 12.3% depending on house design.
This would result in 5950 square foot lots and 8-foot side yard setbacks instead of 0 to 5 feet, 25-foot front yard setbacks instead of 12-feet and 30-foot rear yard setbacks instead of 10-feet. Keeping all the same parameters as the non-PUD example above but substituting the larger lots would result in an additional 82,350 square feet of open space. **This is a 60 percent increase over the PUD proposal.**

It is therefore difficult, if not impossible, to see any increased benefits to the public as a result of this proposal for a PUD.

The proposed project is incompatible and inconsistent with the underlying district.
The Staff also incorrectly calculates the density because they failed to subtract lands that should not be included in the gross acreage. I.e.: Streets, submerged lands, etc. The actual coverage is closer to 4.25 dwelling units per acre.
After subtracting roads, Parking lots, road easements and submerged lands our computer analysis determined that there was 35 net acres. 35 net acres times 3 dwelling units equals 105. (See exhibit #96 and oral presentation of Peter Dale.)

2. Hearing Examiner Error – Impervious surface.

The impervious coverage of lots on the site exceeds the maximum allowed in the zone.

Fact.

We testified that our computer analysis showed a low of 45.5% and a high of 52.3% of planned impermeable surfaces (roofs, driveways, sidewalks, etc) for each lot. The applicant stated on the environmental worksheet that impervious coverage was "about 18%".
The City Staff and the Hearing Examiner failed to address this issue. **Impervious surfaces cannot exceed 40% under any condition** (see GHMC 17.16.060 and 17.90.040 (c)). (SEE exhibit #96 and oral presentation of Peter Dale.)

3. Hearing Examiner Error – Private Internal Streets.

The planned private roads within the development do not meet the stringent criteria required shown under GHMC 17.90.040 (A) 1, 2 and 3. In order to meet these requirements the internal roads must preclude the possibility of future linkage with existing public roads which are part of the City's adopted road or transportation plan. The street design, pedestrian access and layout must represent a superior design which meets the objectives of the public works standards and a direct and tangible public benefit will accrue from the proposed street design.
The Hearing Examiner found the streets to be **adequate** (see HED page 14 item c. and 15 item b.).

Fact.

Two Pierce County roads dead end at or near the site. These roads are 54th avenue NW and Forest Lane NW. (See exhibit #97 map) Mr. Wes Hill in his memorandum of January 15, 1999 to Mr. Gilmore (See exhibit # 58) clearly and correctly points out that the design is deficient because there is no ingress and egress at the south end of the development and that the **only issue that keeps that from happening is the developer's failure to obtain the necessary right-of-way.**
The over-all goal of Chapter 2 of the Public Works Standards is to "integrate fully accessible public transportation systems that will facilitate present and future travel demand with minimal environmental impact to the community as a whole". In order for private roads within the PUD to be approved "*the **physical** limitations of the site* (must) *preclude the possibility of future linkage with existing or proposed public roads*". GHMC 17.90.040 (A) 1. For instance, if the site had access to 54th Avenue NW at the south end of the site traffic could access this development from Hunt Street NW. The site's access point to 54th Avenue NW is undeveloped and **has no physical limitations.**
Clearly, this street design does not meet the objectives of the Public Works Standards.
The internal streets have a sidewalk on one side only. Other streets within the development called alleys are of substandard width. They are 15-feet wide and have no sidewalks. **Gig Harbor has no public works standards for alleys.** These streets are clearly an **inferior design** and do not meet the objectives of the public works standards GHMC 17.90.040 (A) 2.
While it is true that a tangible public benefit could accrue from the fact that private streets are maintained by private parties, a direct benefit to the public cannot be proven. Particularly when you consider that 1500 vehicle trips per day will be forced to ingress and egress via the north end of the site. This traffic impact on the neighborhoods to the north is significant. During the busy hour of the day it is anticipated that with the present design the intersection of 76th Street NW and 46th Avenue NW (North Creek estates) will experience a 265% increase in traffic. The intersection of Schoolhouse Avenue NW and Rosedale Street NW will experience a 203% increase in traffic. City maintenance budget savings cannot offset the traffic impact on the north end neighborhoods. GHMC 17.90.040 (A) 3. (See exhibit # 96 and oral presentation of Peter Dale)

The internal streets do not meet the requirements of GHMC 17.90.040 (A) 1, 2 and 3 therefore private streets within the development cannot be approved.

4. Hearing Examiner Error – Inadequate Pedestrian Ways.

Unsafe conditions for children walking to school and or school buses. The Hearing Examiner has concluded that the existing sidewalk system through Gig Harbor Heights will provide **adequate** pedestrian ways between the proposed development and the schools on Rosedale Street NW.

Fact.

Children residing in the Rosewood Development walking to meet their school buses, both private and public, travel north on 54th Avenue NW and board the buses at the intersection of Rosedale Street NW. Children residing in Gig Harbor Heights and Newport Ridge board their buses at the intersection of 76th Street NW and 46th Avenue NW. Additionally, children residing in North Creek Estates also board buses at the intersection of 76th Street NW and 46th Avenue NW. Both 54th Avenue NW and 76th Street NW **have no sidewalks**. See exhibits #65, #67 and #96 and oral testimony of Peter Dale.
Construction of a sidewalk was required of the applicant on 76th street as part of mitigation condition # 4, page 12, of exhibit # 58 but was eliminated in exhibit # 188, page 19, item 1 when the City decided to illogically **pretend** that the development's vehicular traffic won't use 76th Street NW (See Hearing Examiner error # 9 on page 7 of this document). Unfortunately, the Hearing Examiner, presumably in his eagerness to accommodate the City Staff's pretense that the development won't use 76th Street NW for access, overlooked the school aged pedestrian traffic (and others). This is in spite of the fact that he acknowledged the responsibility on page # 13 item 38 of the HED. To contradict this decision and confuse everybody, the Hearing Examiner shows 76th Street NW as an access route for this development. (See HED page #9, c3).
To conclude that the sidewalk system that bisects Gig Harbor Heights will provide adequate pedestrian ways for students in the face of all the testimony from appellants and others, both orally and in writing, demonstrates a complete lack of understanding of the testimony. See HED page 5. Item i.
GHMC 16.05.004 *Findings and conclusions: The Hearing Examiner shall not approve the preliminary plat unless written findings are made that: (B) Appropriate provisions are made for .... Sidewalks and other planning features that assure safe walking conditions for students who only walk to school* (buses). See HED page 13 item #8. The Hearing Examiner erred by failing to protect the children of our neighborhoods.

5. Hearing Examiner Error – Buffer Zone.

The Hearing Examiner states on HED page #15, item 10 a. that there will be a 50-foot buffer around the perimeter of the development.

Fact.

The proposed site drawings (exhibit # 4) don't show this buffer. HED page #15, item 10, d. and page 24, item #38, contradict the statement on page #15, item 10a.

6. Hearing Examiner Error - Public Streets.

The Hearing Examiner on HED page #15 item b. makes the following incorrect and misleading statement: "In addition, many of the proposed lots in the development will have legal access over 76th Street NW to 46th Avenue NW". Presumably, his conclusion was inspired by applicant's assertions outlined in Exhibit #111.

Fact.

Louis Willis and Peter Dale testified that in fact the proposed development would **not** have any legal access rights over 76th Street NW to 46th Avenue NW. This was done in oral and written testimony. (See exhibit # 96). Steve Brown, attorney for North Creek Homeowner's Association also testified to this. (See oral testimony of Steve Brown.)

The basis for this is case law that supports the position that the non-exclusive easement cannot be used for the benefit of lands outside of the east 26 acres (which have the easement rights). In other words, for the benefit of the other 16 acres of the development. (See exhibit # 96 section "wetlands traffic" for copy of Brown v. Voss, 105 Wn. 2d 366, 1986) It states: "an easement that is expressly limited to serving a specifically identified dominant estate (26 acres), is unlawfully enlarged if it is used to gain access to a combined use of the dominant estate and an adjoining parcel(s)(the 16 acres), even though the use does not increase the burden of the servient estate (North Creek Estates)".
Merely requiring the applicant to restrict his development to the original 26 acres, by phasing or any other means, does not satisfy the requirement under the law. This is because the applicant has shown that the intended goal of the development is to join the 26 acres with another 16 acres to create an entity (the development). As a result, the development cannot legally use **any** of the easement.
The Hearing Examiner does not have legal authority to decide this issue.

7. Hearing Examiner Error – Turn Around.

Hearing Examiner condition #4. Page 17 requires a turn around on the public street side of the gate, etc.

Fact.

A (singular) turn around does not satisfy the Fire Marshals requirements. There are two roads accessing the development from 76th Street NW. Both roads should require a turn around. (See Exhibit # 96)

8. Hearing Examiner Error – Curve Radius.

Hearing Examiner condition #7. Page 17 requires that **all** roadways inside curve radius must be a minimum of 20-feet and an outside radius of 45-feet.

Fact.

The proposed site plans do not depict this (See exhibit # 4). Proposed "alleys" on the plan depict hard 90-degree turns and intersections. The "T" shaped intersection in the south end of the project on one of the "alleys" requires a much larger intersection area in order to allow a fire engine or other service vehicle sufficient space to make a turn. The "first response" emergency vehicle for the fire department is 33-feet 3-inches long and 8-feet wide. This vehicle cannot make the turn at all, even when "jockeying". (See oral presentation of Peter Dale)
Since the Hearing Examiner made a distinction between roadways and alleys in condition # 6 page 17 we must assume that condition #7 on page #17 does not extend to alleys.

9. Hearing Examiner Error – Traffic Impact.

The Hearing Examiner has ignored the testimony of the Applicant's traffic expert, Mr. Gregory Heath, who testified that 80% of all traffic in and out of Harbor West will use 76th Street NW through to 46th Ave NW (Skansie).

Fact.

From the beginning of this project it has been clear that North Creek Lane would be the primary route for ingress and egress to the Harbor west site. This was confirmed at the May hearings when the applicant's traffic engineer Mr. Heath testified: **" 80% of the traffic in and out of this project will use North Creek Lane (76th Street NW)".** When the residents of North Creek Estates voiced their concerns over the increased volumes of traffic that they would be experiencing during construction and at project completion, pointing out that North Creek lane

was a private street over which Harbor West **does not have legal rights to use**, the City responded by requiring a new traffic study showing all project traffic on Beardsley Avenue NW and 54th Ave NW. In essence **pretending** that the development wouldn't use North Creek Lane. Mr. Heath did complete a new study and manipulated the numbers to show no project traffic on North Creek Lane. **However, he failed to show how this would be accomplished. How are the 1550 vehicle trips per day going to be kept off of North Creek Lane?** Perhaps the City was going to close North Creek Lane at the west-end? This of course would not be a viable solution since all 30 other property owners who have legal easement rights to use this street that reside west of the location of intended closure would undoubtedly resist such a solution.

By trying to avoid the problem the City has wasted the developer and appelants resources and the citizens time. **Simply stating that the traffic will use Beardsley and 54th Ave. and not use North Creek Lane will not satisfy the requirements of Gig Harbor Municipal Code 17.90.040 (A) "all roads shall be public roads..." and or SEPA. The applicant and or the City must show how this will be accomplished.** All this activity inspired North Creek to do more research on what exactly had transpired on previous projects that were constructed west of North Creek Estates.

By digging deep into the City's files they learned some very alarming facts. These facts are:

On April 3, 1991 the City's Hearing Examiner, **Mr. Ron McConnell**, approved the preliminary plat for Gig Harbor Heights that is located adjacent to and northwest of North Creek Estates. **One of the conditions of approval was for the developer of Gig Harbor Heights to improve North Creek lane to City of Gig Harbor standards and dedicate the improved street to the City.** The planning department in their report of May 12, 1991 confirmed this decision.

The City Council passed resolution #317 on June 29, 1991 approving the preliminary plat of Gig Harbor Heights with the requirement to improve North Creek Lane to City standards and dedicate it to the City.

Subsequently Gig Harbor Heights was merged with another development known as Pepperwood and their names were changed respectively to Gig Harbor Heights I and II. However, **none of the preliminary plat requirements were changed.** On May 10, 1993 the City Council passed resolution # 382 approving final plat for Gig Harbor Heights I and II **certifying that all requirements of preliminary plat have been met.**

Additionally, Newport ridge (formally Berrywood), a development to the west of North Creek Estates, received preliminary plat approval on 7-21-1992 from Pierce County with a requirement to upgrade 76th Street NW to County 1A standards to 48th court NW. This preliminary plat was annexed into the City of Gig Harbor on 7-27-1992 and "grandfathered". The condition of improving the road was never changed, except for requiring City Standards, and on 4-28-1997 the City Council passed resolution #494 certifying that the final plat conforms to **all terms of preliminary plat approval.** Of course this is incorrect. **No work was accomplished on the section of road from North Creek's west property line to 48th court NW. (See exhibit # 199)** As a result of this activity North Creek Lane, is in fact, already a City Street, available for public use and, since the City failed to require the Harbor Heights Developer to follow through with the street improvement and dedication, it is now becomes the City's responsibility to do so.

10. Hearing Examiner Error – Wetland Classification.

The Hearing Examiner erred when he concluded that the site's western wetlands were properly classified by the City and the applicant's experts as class II wetlands in Gig Harbor. The staff did not address the " forested wetlands issue" and incorrectly dismissed the "fish" issue.

(a) Fact.

(1) Forested Wetlands

The wetlands in question meet the definition of Category I wetlands per GHMC 18.08.040 (1) (ii) Forested wetlands that have three canopy layers, excluding monotypic stands of red alder averaging eight inches diameter or less at breast height. (See exhibit # 96, # 136, #159 and #176. The following summarizes the reasons, other than the fish issue, used to determine that the west

wetlands meet and/or exceed requirements for category I designation per GHMC 18.08.040 (1) (ii):

- The City's wetland inventory map identifies the area as PFOC (Palustrine, [i.e. marshy, swampy] Forested seasonally flooded),
- The study produced by IES Associates on April 30, 1992, which the City used to inventory their wetlands, shows on page 9 par. 8.1.1.2 where these wetlands are identified as "The only true forested wetlands on the project". Additionally, other areas of this study identify this wetland as having characteristics of category I wetlands in Gig Harbor. (See pages 8, 10, and 11 of the attached copy of this study in exhibit # 176)(See also exhibit # 136).
- Tom Deming's wetland analysis identifies this area as palustrine, forested, seasonally flooded. See page # 8 of his June 1997 report (attached to exhibit # 176). Mr. Deming identifies the plant community within the west wetlands on page # 6 of this study (attached to exhibit # 176). His analysis includes the plants located within the three canopy layers and identifies plants that are hydrophytic (i.e. typical of wetland areas). Mr. Deming, in his written testimony stated that "IES had followed the present City wetland criteria". (See exhibit # 105 and referenced in # 176) This is incorrect. Apparently Mr. Deming didn't check his facts because IES did not use the present criteria. The City changed category II definitions to be the definition for new category I, category III to category II and so on in 1996. The IES study was completed in 1992. Mr. Deming's reliance on the work IES did and his assumption that the wetland criteria was the same back in 1992 nullifies his conclusions on the Forested aspects of his "study".
- Sue Burgemeister of B-twelve Associates concurs with Mr. Deming's analysis but uses the wrong criteria to classify these wetlands. See page # 4 of 10 in her report (attached to exhibit # 176) in which she uses DOE's category I wetland criteria to conclude that the forested wetland does not meet Gig Harbor's category I criteria. The DOE's category I criteria is <u>not</u> applicable in the City of Gig Harbor. All DOE category I types were shown by the IES Associates study not to exist within the boundaries of Gig Harbor. Therefore, The City removed all references of DOE category I types from their Municipal codes and made what would be DOE category II types into Gig Harbor category I. (See Gig Harbor Municipal Ordinance 726 attached to exhibit # 136)).(See also Peter Dale's oral cross examination of Sue Burgemeister on May 26, 1999 where Ms. Burgemeister acknowledges not knowing that Gig Harbor's wetland categories do not agree with other areas in this State).
- Diane Ryba, Wetland Specialist testified that the wetlands contained three canopy layers and met the requirements of category I wetlands within Gig Harbor. (See her letter dated June 5, 1999 attached to exhibit # 176)
- Peter Dale provided photographic evidence of tree types, Sizes and the three canopy layers. He also provided photographic evidence that the stream exceeds 24 inches in width. (See exhibit # 136)

The studies produced by the applicant's "experts" are flawed in their analysis on the forested wetland on the site. The appellant's expert and other evidence, including the IES study, supports the present category I criteria. These forested wetlands are, unquestionably, category I wetlands in Gig Harbor.

(2) Salmonid Fish-Bearing Waters

The Hearing Examiner relies upon and adopts the Staff report (exhibit # 188, page 5) where the Staff states: "While Ms. Ryba is correct in stating that the wetland is "associated" with a fish bearing stream, she is incorrect in her determination that such association results in a category I wetland. The fifth criteria states clearly that the wetland must be *contiguous* to a fish bearing stream. Webster defined *contiguous* as being in contact: **touching**; also: **next, adjoining**. In this case, the wetland is contiguous to a documented type 5 stream, which is not a fish bearing stream."

The City is reduced to "splitting hairs" on the definition of every word in the codes to try to find a reason to perpetuate the misidentification of these wetlands.

(b) Fact

Tom Deming the applicant's wetland specialist states: "The lower end of this wetland onsite appeared to exhibit features more associated with a stream (i.e. Type 3 Water) rather than a wetland. As a special note, following the Washington Department of Natural Resources emergency enactment, all streams wider than 2 feet are at least a Type 3 water unless proven otherwise by the Washington Department of Fish and Wildlife. However, based on the lack of fish use during a time period when such use, if existing, would be present this stream would appear better defined as a type 4 water."(See exhibit # 105 and # 136).
There has been no evidence presented in this case that Washington State Fish and Wildlife has proven that the onsite stream is not a type 3 stream. To the contrary, Mr. Deming testified at the May 26, 1999 hearing that Washington Department of Fish and Wildlife was pursuing enforcement action against a downstream landowner who is responsible for creating a downstream migrational barrier. It is obvious that removal of the barrier is to allow Salmonids to migrate upstream. Mr. Deming testified under cross examination that it is possible that salmon will use the onsite wetland as a rearing habitat when the migrational barrier is removed.

Mr. Adam Couto, fisheries biologist, testified that: In his expert opinion it was a certainty and more than just a possibility that the salmon will return to the on site wetland, because the wetland is perfect rearing habitat for juvenile COHO SALMON. (See exhibit # 136).
Furthermore. the stream onsite must be considered a type 3 stream because the State does not consider man made barriers a reason to change the Type of stream. Ergo, it is a fish bearing stream. (See exhibit # 136)
Mr. Couto provided an extensive, comprehensive analysis of the fish habitat onsite. The following summarizes his findings: (See exhibit # 136)

1. The presence of lamprey in Wetland A meets the definition of a category I wetland under GHMC.
2. The lack of salmon present in wetland A does not mean the site is inhospitable to salmon – it only confirms the presence of a complete migrational barrier downstream.
3. Wetland A will likely be used as salmon rearing habitat when the migrational blockage is repaired.
4. Industry norms require protection of Wetland as if no illegal barrier existed downstream, which means that Wetland A meets the fifth criteria for a category I wetland under GHMC.

The Staff states in (exhibit # 188 page 7) that they have been unable to find any documentation to validate the presence of fish. Apparently the documentation submitted by the applicant and the appellant doesn't count. However two State government documents were referred to in this material. (exhibit # 96, wetlands traffic tab, exhibit A1) State of Washington Priority Habitats and Species mapping noted that the onsite portion of this drainage provides habitat for anadromous salmonids. This was probably factual before the downstream barrier was put in place. This document was referred to in Mr. Demings first report on the wetlands. It confirms that when the migrational barriers are removed the onsite location will again be visited by salmon. The second document referred to is the Emergency Forest Practices rules. It states that any stream wider than 2 feet (at the high water time of the year) must be considered a type 3 steam. All Type 3 streams are considered habitat for salmonids. Only the Washington State Department of Fish and Wildlife can change the Type rating. **The wetlands onsite are category I wetlands because they meet GHMC 18.08.040(c) ii, (f) and (e). Only one of these categories is required to qualify these wetlands for Category I protection.**
In addition access roads and utilities can only be placed in category II wetlands when there is no reasonable alternative location for providing access and/or utilities to a site. {See GHMC 18.08.120 (d)}. The private portion of 76th St. NW was required to have been dedicated as a public road to the City in 1993. Predicated on this fact, the Harbor West project is required to use this street as a public access, thus negating any and all requirement to cross the wetlands (See exhibit # 176).

e. Expected relief.

Reverse the Hearing Examiner's decision.

f. A statement that the appellant has read the appeal and believes the contents to be true, followed by the appellant's signature.

I, the undersigned, Louis A. Willis, President of North Creek Homeowner's Association, have read this appeal and believe that the contents are true.

Louis A. Willis
President
North Creek Homeowners Association

March 15, 2000

To: ALL CITY COUNCIL MEMBERS.
From: NICHOLAS NATIELLO, Ph.D. (253) 851-7778
RE: ANNOTATED VERSION OF MY APPEAL FILED AND DATED FEBRUARY 14, 2000

Dear Council Member,

In memos dated February 29, and March 7, Ray Gilmore, Director, asked each appellant to review the transcript of the Harbor West hearings and submit an annotated version of the appeal to the City Council. I have reviewed the 669 pages of the Harbor West transcript and respectfully submit these annotations to my Appeal.

However, first I wish to point out that my Appeal contends that the City Hearing Examiner made at least 14 errors in his Harbor West decision. I request that the City Council allow me to add to my Appeal an additional error made by the Examiner. I discussed this matter with Ray and he appears to agree that it would be appropriate to present this issue to the Council in this manner because, until I found the issue in the transcript, I had no evidence the Examiner had resolved the issue in my favor.

Please understand that this is NOT new information. When I filed my appeal on February 14, the transcript was not available. On March 9th, I received Ray's March 7th memo advising me that the transcript was available. I purchased an electronic disc of the four hearings on March 10th.

Note: For the Hearing Examiner's errors 1 through 14, please see my appeal dated February 14.

(15) The Examiner erred when he failed to include in his decision as a condition of approval that citizens would have an opportunity to look at the storm water design and construction plans submitted by Harbor West to the City, as described on page 18, §16 of Examiner's SUB decision.

To support my position, I submit the transcript of the tape recorded hearing of May 26, 1999, known as "Volume III". At page 208, lines 4 through 10, the transcript reads as follows:

MR. NATIELLO: "One more question. The last time around, you said that when they (Harbor West) developed the storm drainage plan, we (will) have an opportunity to look at it when it was submitted (to the City). Could you put that as a condition?"

HEARING EXAMINER: "Yeah."

MR. NATIELLO: "Thank you very much."

Although the above rendition of the transcript is sufficient to validate my position, I urge the Council to read Volume III, pages 200 through 208, to fully understand this issue. For your convenience, I have reproduced and attached pages 200 to 208 of the transcription. It's on pages 2 and 3. Please note that Grant Middleton is presented as a Harbor West storm water expert, yet his answers reveal that he is not an expert. Also, please read page 207, lines 5 through 13, which demonstrates how difficult it was to conduct the hearings without the presence of Ray Gilmore.

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collect or infiltrate back under a home in some of these upper lots and soils would be the penetration, that is true. But that becomes impervious, some of the lawns may still infiltrate down. But when you get down into the pond, where it's all collected, the release rate off-site is matched -- is to match the existing conditions.
Q So you -- so you go downstream and test flows. How long did you test the --
A You don't test any flows.
Q Oh.
A The modeling is -- the Santa Barbara Unit Hydrograph Methodology or Urban Hydrograph Methodology has been basically -- I mean, this is a program that's been -- that's been put together from tons and tons of data through research, rainfall data --
Q Doing some assumptions?
A Exactly. And it's -- it's probably one of the better -- you know, of course the better design parameters for our storm water modeling and -- and compared to the older methodologies.
Q Earlier there was some talk about the Pierce County -- the specifications for a storm water plan.
A Uh-huh. (Witness answers affirmatively.)
Q Is it -- is your client going to use that system in

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their designs?
A For the Pierce County we're stating that we can utilize --
Q Can utilize. Does that mean you're going to?
A It doesn't mean we're going to.
Q I want to make it clear what we're talking about.
HEARING EXAMINER: So let me ask which -- which model are you going to use or do you propose to use?
MR. MIDDLETON: We need to meet the City of Gig Harbor's standards. But we can propose to use the Pierce County -- we have. So if that's a condition, then we could use it.
MR. LYNN: Just to shortcut this -- this is Bill Lynn on behalf of the applicant -- we are willing to commit to a condition that will say we'll apply the Pierce County manual to the storm design.
HEARING EXAMINER: Okay.
(Discussion off the record.)

Q (By Mr. Dale) This conceptual -- what did they call it? -- not program, but it wasn't even called a plan, it was called a report, I believe, that was produced in --
A Report.
Q Was it called that because it was not a plan?

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A That -- that is a -- that is a plan there. That's not my conceptual storm plan, but that is a conceptual report, right. And that goes along with the conceptual plan.
Q Are you -- are you -- are you familiar with what Gig Harbor municipal code calls for as far as storm water on a preliminary plat?
A Yeah, I am familiar with that.
Q They use that word "plan"?
A Right.
Q Do you think that what you've prepared is a plan?
A Correct.
Q For the --
A For a conceptual storm.
Q Well, get me through that word "conceptual."
A Sure.
Q When you get ready to put together a plan, it's not going to have the word "conceptual" in there, is it?
A Not at the final engineering stage, that's correct.
Q That would be a plan.
A You would have a site plan.
Q Something that you could really make it work?
A An engineering plan -- the engineering plan would probably consist of 17 to 18 pages, a plan profile --
Q Yes, right.

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A -- where you can be exact and show every elevation.
Q Okay. Do you -- are you familiar with the site?
A Yes.
Q Up in the northwest corner there is an underground detention facility.
A Correct.
Q And I -- and I looked at -- at the report --
A That report may be called out -- the document --
Q Yeah, up there and it goes back.
A Yeah, I believe -- I believe there is a detention and a retention facility called out in that area.
Q It has a 200-foot swale and a --
A Correct.
Q -- as a manhole that goes down into it with -- right into it. How far down would that be? How deep?
A It depends on --
Q Typically?
A Typically, four or five feet deep.
Q Did you notice that the -- in the topographical map that that mud area was about five feet above the creek bed?
A Correct.
Q Would that make it awful wet down there on that --
A Not necessarily. In fact, we just -- we just got done working on a site where we're actually infiltrating water below the creek bed. The elevation of the creek

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site up here and it's not exactly -- the elevation of that isn't conducive -- again, you get into the geotechnical.
Q So you can make water flow uphill?
A I'm not saying that.
Q Oh.
A I'm saying you can get below the creek bed that's dry. The creek bed could be resting on a -- as you suggested down here, on a --
Q Hardimentus?
A -- and still flowing, but under that it would be --
Q I looked at the wetland specialist's report. He said he hit water at 19 inches.
A Okay.
Q That might be something that you would want to look at. I notice if it wasn't --
A Well, we're going to definitely look at water elevations.
Q I noticed if it was not in that location, you wouldn't be able to drain the water from the -- from a lot of those lots up in there in that corner.
A That's true, but then there are all sorts of techniques that you can use.
Q Pumps?
A You can use pumps, sure.

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MR. DALE: Okay. Thank you. That's all I have.
HEARING EXAMINER: Mr. Lynn?
MR. LYNN: No questions.
HEARING EXAMINER: Mr. Natiello?
MR. NATIELLO: I have a quick one.

EXAMINATION
BY MR. NATIELLO:
Q You are the one that's going to design the whole plan once --
A That's not true.
Q Oh, you're not going to?
A I won't be the one designing it.
Q Phil Pinard?
A Jim Schweikert will most likely be the one to design it. Or I will aid in the -- in that design and he will approve whatever I design prior to submitting it.
Q I'm from the old school. Being 73, I'm probably older than anybody else in the room. I'm always of the impression, without getting involved in all of the details of storm water, that the post development velocity and the quality of the water has to be equal to predevelopment, no more or no less. And because I'm

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downstream on 32 acres, everything is in harmony. If you give me more water, you'll flood me; if you impound the water, you'll cause me problems. What guarantee do you have that you'll be able to comply with that post development, that it should be the same?

A I -- I personally cannot guarantee anything other than I can guarantee you that we're going to use the best -- we're going to use the Pierce County storm water management that has the requirements in there to utilize the most up-to-date unit hydrograph methodology for modeling the storm water and try to match the existing conditions to the predevelopment conditions the best that we know how, to the best knowledge that we have available.

Q Good answer. So in other words, if we're not -- if we run into a problem, we look to our own resources, because if you follow the book, I can't quarrel with that. And Mr. Huber says he's going to follow the Pierce County storm water management plan?

A Right.

MR. NATIELLO: One quick question, Mr. Examiner.

HEARING EXAMINER: Sure.

MR. NATIELLO: When I met Mr. Huber he said, Mr. Natiello, I want to show you that I'm going

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to use the most stringent standards of DOE. Now he is also incorporating Pierce County. And when I read Mr. Gilmore's document, he says, Oh, no, you're going to use the Gig Harbor standards.

HEARING EXAMINER: But Mr. Gilmore -- but, again, Mr. Gilmore -- I think since he's not here, my guess is that he's saying, I can't require anything more than the Gig Harbor standards. Mr. Huber has just volunteered to meet the Pierce County standards and so I've made that -- I've noted that and so I will say, Okay, they've volunteered a condition to meet the Pierce County standards.

So there you have it.

MR. NATIELLO: That's exactly my point. So if Mr. Huber says he's going to --

HEARING EXAMINER: Yeah.

MR. NATIELLO: -- volunteer that --

HEARING EXAMINER: That means -- that means --

MR. NATIELLO: -- you should put that as a condition --

HEARING EXAMINER: You should see all of the little stars that I have here with that.

MR. NATIELLO: Mr. McGowan would say, Well, that was what Mr. Huber said, but that's not

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Mr. McGowan talking. In other words, if you condition it, that will be the case.

HEARING EXAMINER: That's right.

MR. NATIELLO: One more question. The last time around, you said that when they developed the storm drainage plan, we have an opportunity to look at it when it was submitted. Could you put that as a condition?

HEARING EXAMINER: Yeah.

MR. NATIELLO: Thank you very much.

HEARING EXAMINER: Now we're out of consultants. Now, any questions of -- you have a question of Mr. --

MR. BROWN: Mr. Halsan.

HEARING EXAMINER: -- Halsan. That's right. That's right. We got the project manager here.

MR. HALSAN: Carl Halsan, for the record.

EXAMINATION

BY MR. BROWN:

Q Carl, I'm interested in roads, okay? First let's talk about 76th Street, also known as Northcreek Lane. And

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that -- what is the developer's position? Is that one of the access points to this -- to this development? Is that one of the planned accesses?

A Which one? 76th or Northcreek Lane?

Q You make a distinction, so tell me what the distinction is.

A From this point to this point, it's a city street called 76th Street, public. From this point to here, it's a private road called Northcreek, private road

Q I'm talking about the private portion which goes through the Northcreek development.

A And the question, again, was do we anticipate using that for this development, yes?

Q That is one of the roads leading to this development, but it's -- I take it, it's not a public road.

A Yes.

Q Is that correct?

A That is correct.

Q And do you know whether that's required under the Gig Harbor municipal code, that roads leading to the development be public?

A Do I know that's in the Gig Harbor municipal code? Not off the top of my head, but if you say so I'll believe you that it's in the code. And --

Q Well done. Do you have a -- you being the

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representative of the developer -- have any -- are you going to present any evidence or have you presented any evidence with respect to the structural damage that will occur to 76th Street, if it's used to the degree that Mr. -- Pete has testified to?

A The question is do we have any evidence? No, we do not. And we do not anticipate going out and getting that data

Q Are you planning to identify any roads?

A That one I can't answer.

Q Have you reviewed his study, not the Willis study, but the study that Mr. Willis presented?

A I have not personally.

Q With regard to the easement that comes through the Harborwest development, north to south, south to north, you've testified as to that, that -- in essence, you're saying it leads nowhere?

A Correct.

Q All right. It leads really to some raw land, does it?

A You're talking about --

Q Yeah.

A -- Tarver property?

Q Yes. And you don't know standing here what's going to occur with that land? Do you know?

A I can assume it will be developed consistent with the

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comp plan and zoned for the area.

HEARING EXAMINER: Mr. Halsan, does that property have access to that easement?

MR. HALSAN: No, it does not.

MR. BROWN: I'm sorry, does Harborwest --

HEARING EXAMINER: No. I mean, I asked if the land that you pointed to, does it have any -- does the land to the south, does it have any rights to the easement running through the property. He said, No, it does not. He provided a title report. I'm assuming -- I'm assuming -- I haven't read the title report, I just got it tonight, but I'm assuming it will say that, but I don't know that. I'll find that out.

Q (By Mr. Brown) All right. Going the other direction, the landowners in Northcreek have access to the land to the south, right, through that easement?

A Yes, they have the right to be on that road, correct

Q Right. And they could access that land to the south, if that became feasible or practical at some point?

HEARING EXAMINER: So you could have a one-way road down there?

MR. BROWN: A person could go both directions.

HEARING EXAMINER: I suppose that a

ANNOTATIONS TO ISSUE (1).

On May 5, 1999 Ray made his presentation. In closing, Ray quite properly stated, "I think that sums up my report, and **I'll answer any questions if anybody has any.**" [Volume I, page 33 starting on line 15]. When I raised my hand and advised the Examiner that I wished to question Ray, the Examiner angrily refused to allow me to do so. [Volume I, page 33 lines 20 through 25 and page 34 lines 1 through 4]. The main purpose of the open public hearing was to explain the Harbor West project to the people, to answer their questions and obtain the comments of the people. On page 38, at line 2, an identified person said to Ray, "I don't understand what your saying." The Examiner gruffly stated, "I understand what he is saying." The person wanted Ray to respond. All this had a chilling affect on the people. Later, I again cautiously raised the issue of when would the people have the opportunity to ask Ray a question? The Examiner stated, "When its your turn to speak." [See page 38 starting at line 23]. The problem is that, unlike me, most of the people at the hearing did not plan to speak, but many had questions. In fact, many people, including grown men, told me they were extremely uncomfortable making a public presentation but would have no hesitation to ask questions. A person who had a question but did not come up to the podium and make a formal presentation was barred from asking Ray a legitimate question. Some of the people felt intimidated by the process and did not attend the other three hearings. So, by the time Ray made himself available, many people had already given up and did not attend the other meetings. The Examiner erred. This is not the way to conduct an open pubic hearing. It intimidates the people, violates the peoples' due process, freedom of speech and RCW 42.30, *The Open Public Meetings Act.*

RCW 42.30.010. states:

> "The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the public to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

I spent much time preparing my 25 page document that also contained 84 pages of exhibits pertaining to the Harbor West subdivision and its planned unit development (PUD). I orally presented my document at the May 19, 1999 open public hearing. At the end of my presentation, I presented the 109 page written document to the Examiner. He entered it as Exhibit 99 with attachments. [See Volume I, page 291, line starting at 22]. I was extremely disappointed Ray did not attend the May 19, 1999 open public hearing and did not hear my presentation. On May 19, 1999 I was unable to question Ray. Yet, the Examiner had promised I could question Ray "when I made my presentation."

The City received a copy of my document [Exh.99]. It was Ray's responsibility to carefully read it, give it serious consideration, modify his position where he agreed with me and to respond to it in writing in his staff report. I was distressed when Ray said, "I have to admit I'm not familiar with that document ..." [Volume IV, page 68, line 23].

ANNOTATIONS TO ISSUE (6) FIRE ACCESS ROADS

In my Appeal, I stated that some appellants, including Tom Morfee, PNA Director, told the Examiner that he would defer to me on the fire issue to avoid redundancy. In Volume I, page 142 starting at line 19, He stated: "In terms of fire protection, there has been concern about access. One of our members, Mr. Natiello, has done an enormous amount of research on this issue, and I'm going to defer to him tonight or the next time we meet to discuss that with you. It is an issue. It's important."

In Volume I, page 190, starting at line 15, Peter Dale, speaking about fire protection, stated: "Mr. Natiello, who will be speaking later, has worked extensively on this subject, and so I will minimize my comments on this subject to defer to his more extensive knowledge and to save time."

When I was orally presenting the vital fire safety issue, Carol Morris without provocation or explanation simply walked out of the meeting. [Volume I, page 282, line 17 and 18]. I offered to wait until she returned but the Examiner told me to continue with my oral presentation. [Volume I, page 282, at line 19]. Carol never returned to the hearing. I wanted Carol to hear what I had to say.

Then, when I was presenting the fire protection and road access issue the Examiner kept interrupting me and then ordered me "to wrap it up because other people wanted to speak." [Volume I, page 288 and 289]. I'll admit that he got me angry when he treated me like a school boy and ordered me to stop making my presentation "because other people wanted to speak." I reminded the Examiner that both Tom Morfee of PNA and Peter Dale had asked me to present the fire safety issue. At that point, I had taken less time than Peter Dale who read into the record his entire presentation and he was not cut off by the Examiner. Why was I discriminated against?

The peoples' fire issue suffered badly because Ray was not present when I orally presented it. At the December 8, 1999 Hearing, Ray admitted that he was not familiar with my document that addressed the fire issue. Carol walked out without provocation when I was calmly presenting it. She left way before the time I got angry when the Examiner cut me off. Then, the Examiner refused to let our fire safety engineer expert witness testify at the December 8, 1999 hearing. Again, this is not the proper way to conduct an **open public hearing.** I have spent over two years researching all the issues. I have a Ph.D. and I know how to do research. I have been a world wide corporate vice president in private industry and, in the public sector, I have been a management consultant for numerous cities throughout the State. I am knowledgeable about land use planning and how to conduct open public hearings. I needed more time to present my substantive research and findings than, for example, the person who spoke after me who talked in an anecdotal, romanticized manner about how the Harbor West PUD would adversely change his "life style". Of course, his type presentation would take less time then my comprehensive and substantive presentation. The Examiner was extremely uncomfortable in dealing with the fire protection and access road issues and, since his mind was made up, he did not want to listen to me, or listen to the fire safety licensed engineer who was our expert witness, who was more knowledgeable than the City's Fire Marshal.

City Fire Marshall Steve Brown has never made an oral or written presentation at a Harbor West open public hearing nor has he made himself available at a Harbor West open public hearing to be cross examined. These facts are supported by simply reviewing the transcription of the four Harbor West hearings. Steve never appeared at any of the meetings.

The Examiner lists the following exhibits as Steve Bowman's:

(1) July 22, 1998. Harbor West Exhibit # 41. (2) Nov. 6, 1998. Harbor West Exhibit # 52.

(3) Mar. 17, 1999 Harbor West Exhibit # 113.

Note: Steve also wrote and circulated a memo dated October 20, 1998. The Examiner does not list it as an exhibit but I had included it in my 109 page document [Exhibit 99, page 54].

For your convenience, I have reproduced the four memos that Steve has written on the access road issue. They follow this page. Please note that Steve uses a check list that only shows what Steve has asked for and what he has received from the Harbor West applicant. Steve points out in his memo dated November 6, 1999 that, **"Without review and approval of these items the Fire Marshal cannot recommend approval of the proposed PUD."** The operative words are "approval of these items." It is not enough to simply show that Steve has received what he has asked for but Steve must also make a finding and explanation as to whether or not he has **approved the material submitted.** So, please keep that in mind when you review Steve's memos, which follow on the next four pages.

One other important point to note is that Steve's memos state that: **"Note: The applicant may submit alternate methods of materials for consideration ... (which) include such improvements as increased fire flow, auto-fire sprinkler and alarm systems, fire resistive wall construction, building separation and the use of fire resistive roofing materials."** The operative words are "for consideration". In other words Steve is stating that he would consider using the above "alternate methods" in place of a south-end fire access road.

Another important point to remember is that since day one the Harbor West preliminary plats always had two access roads from the north. Nevertheless, Glen Stenbak and Steve, early on, insisted on having a south-end fire access road, in addition to the two roads from the north.

Frankly, trying to understand what Steve was saying was like chasing ghosts. Exhibit 158, attached, shows my frustration. It is a memo dated August 13, 1999 that I wrote to Carol Morris with a copy to City Fire Marshal Steve Bowman (and others) stating that in the unlikely event Fire Marshal Bowman has surrendered to Harbor West's attorney Lynn, we demand a written statement clearly articulating why Bowman has reneged on the south-end fire access road, since Lynn's position is frivolous, impudent, absurd and makes a farce of the potential loss of life fire issue. I did not receive a response from Carol, Steve or anyone else. I then sent a memo to Carol dated October 6, 1999 (Exhibit 170], attached, reminding her that her contract with the City required her to: **" (8) Respond to citizens inquiries in person, in writing or by telephone involving City business."** I was disappointed when I did not get a response from Carol on my August 13th and October 6th memos.

City of Gig Harbor. The "Maritime City"

DEPARTMENT OF PLANNING & BUILDING SERVICES
3125 JUDSON STREET
GIG HARBOR, WASHINGTON 98335
(253) 851-4278

TO: Ray Gilmore, Planning Director
FROM: Steve Bowman, Building Official/Fire Marshal
DATE: July 22, 1998
RE: **Harbor West P.U.D.**

Please consider the following comments:

1. A fire lane from the southern end of Harbor West P.U.D. must be extended to Hoover Road to provide emergency equipment access to Harbor West P.U.D. Hoover Road must be made traversable for fire and emergency equipment. If Hoover Road was vacated, an alternate secondary access roadway must be provided in accordance with Section 902.2.1, 1997 Uniform Fire Code.

   "... More than one fire apparatus road shall be provided when it is determined by the chief that access by a single road might be impaired by vehicle congestion, condition of terrain, climatic conditions or other factors that could limit access. ..."

   Note: The applicant may submit alternate methods of materials for consideration. Documentation must be submitted to verify claims that the roadway separation as shown on the PUD conforms to the UFC as interpreted by other jurisdictions. Alternate methods of materials may include such improvements as increased fire flow, auto-fire sprinkler and alarm systems, fire resistive wall construction, building separation and the use of fire resistive roofing materials.

2. Each roadway must be improved to the minimum width of 25 ft. and all cul-de-sacs must be improved to the minimum outside radius of 45 ft. Alleys must have an exit on each end or an approved hammer head turn around where over 150 feet in length.

3. All roadway inside curve radius must be a minimum of 20 ft. and an outside radius of 45 ft.

4. If gates are proposed at the ends of roadways or the entrances to subdivisions plans must be submitted to the City of Gig Harbor Fire Marshal for approval and conform to the latest Fire District No. 5 requirements.

5. Fire Hydrants must be located at roadway intersections, every 600 ft along

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DEPARTMENT OF PLANNING & BUILDING SERVICES
3125 JUDSON STREET
GIG HARBOR, WASHINGTON 98335
(253) 851-4278

TO: Ray Gilmore, Planning Director
FROM: Steve Bowman, Building Official/Fire Marshal
DATE: October 20, 1998
RE: **Harbor West P.U.D. Plans dated 10-19-98 / Memo dated 7-22-98**

The items listed ☒ have been submitted for review. The items identified as ☐ have not been submitted for review as of this date.

Please consider the following comments:

☐ 1. A fire lane from the southern end of Harbor West P.U.D. must be extended to Hoover Road to provide emergency equipment access to Harbor West P.U.D. Hoover Road must be made traversable for fire and emergency equipment. If Hoover Road was vacated, an alternate secondary access roadway must be provided in accordance with Section 902.2.1, 1997 Uniform Fire Code.

> ". . . More than one fire apparatus road shall be provided when it is determined by the chief that access by a single road might be impaired by vehicle congestion, condition of terrain, climatic conditions or other factors that could limit access. . . ."

Note: The applicant may submit alternate methods of materials for consideration. **Documentation must be submitted to verify claims that the roadway separation as shown on the PUD conforms to the UFC as interpreted by other jurisdictions. Alternate methods of materials may include such improvements as increased fire flow, auto-fire sprinkler and alarm systems, fire resistive wall construction, building separation and the use of fire resistive roofing materials. Documentation has not been submitted as of this date. The proposed phasing of this plat without the installation of secondary access is not approved.**

☒ 2. Each roadway must be improved to the minimum width of 25 ft. and all cul-de-sacs must be improved to the minimum outside radius of 45 ft. Alleys must have an exit on each end or an approved hammer head turn around where over 150 feet in length.

☒ 3. All roadway inside curve radius must be a minimum of 20 ft. and an outside radius of 45 ft.

☐ 4. If gates are proposed at the ends of roadways or the entrances to subdivisions, plans must be submitted to the City of Gig Harbor Fire Marshal for approval and conform to

City of Gig Harbor. The "Maritime City"

DEPARTMENT OF PLANNING & BUILDING SERVICES
3125 JUDSON STREET
GIG HARBOR, WASHINGTON 98335
(253) 851-4278

TO: Ray Gilmore, Planning Director / Steve O.
FROM: Steve Bowman, Building Official/Fire Marshal
DATE: November 6, 1998
RE: **Harbor West P.U.D. Plans dated 10-19-98 / Letter dated 10-30-98**

The items listed ☒ have been submitted for review. The items identified as ☐ have not been submitted for review as of this date. **Without review and approval of these items the Fire Marshal cannot recommend approval of the proposed PUD.**

Please consider the following comments:

☒ 1. A fire lane from the southern end of Harbor West P.U.D. must be extended to Hoover Road to provide emergency equipment access to Harbor West P.U.D. Hoover Road must be made traversable for fire and emergency equipment. If Hoover Road was vacated, an alternate secondary access roadway must be provided in accordance with Section 902.2.1, 1997 Uniform Fire Code.

> ". . . More than one fire apparatus road shall be provided when it is determined by the chief that access by a single road might be impaired by vehicle congestion, condition of terrain, climatic conditions or other factors that could limit access. . . ."

Note: The applicant has submitted an alternate method of materials for consideration. **Documentation was submitted which shows that the roadway separation as shown on the PUD conforms to the Pierce County Development Standards. PC Ord. 96-46S2 § 2 (part), 1997 adopts the STORM DRAINAGE AND SITE DEVELOPMENT REGULATIONS and the PIERCE COUNTY STORMWATER MANAGEMENT and SITE DEVELOPMENT MANUAL (PCSMSDM). Three paragraphs of Section 10.1.2.4 of the PCSMSDM state:**

> **. . ."When multiple major driveways to one parcel or development are permitted, they shall not be less than 125 feet apart, measured from centerline to centerline.**
>
> **A minimum of two major driveways will be required for developments that will generate 500 ADT or more unless other mitigating measures are approved by the County."**
>
> **Not withstanding the requirements of this Manual, the number and location**

City of Gig Harbor. The "Maritime City"

DEPARTMENT OF PLANNING & BUILDING SERVICES
3125 JUDSON STREET
GIG HARBOR, WASHINGTON 98335
(253) 851-4278

TO: Ray Gilmore, Planning Director
FROM: Steve Bowman, Building Official/Fire Marshal
DATE: March 17, 1999
RE: **Harbor West P.U.D. Plans dated 10-19-98 / Letter dated 10-30-98**

The items listed ☒ have been submitted for review. The items identified as ☐ have not been submitted for review as of this date. **Without review and approval of these items the Fire Marshal cannot recommend approval of the proposed PUD.**

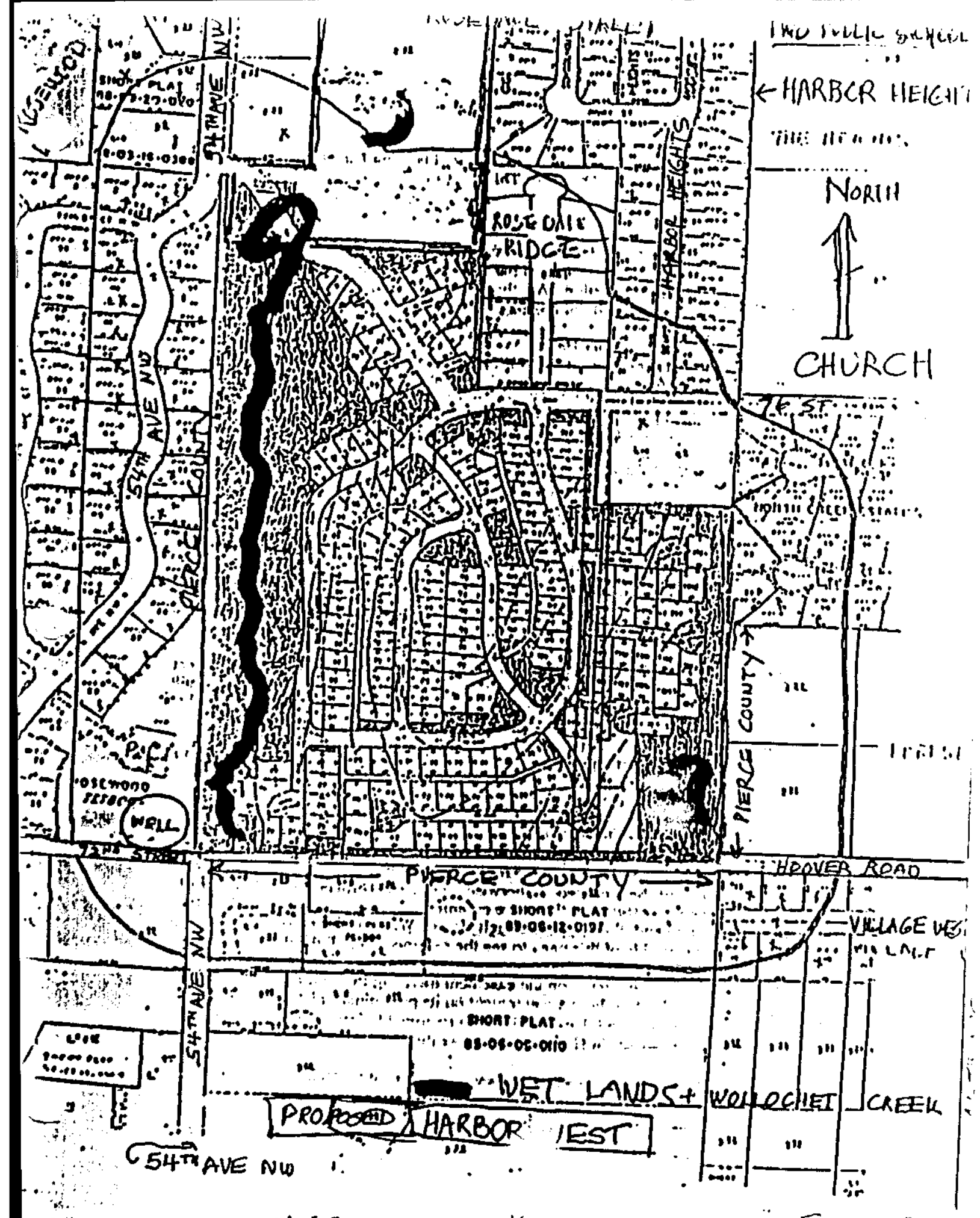
Please consider the following comments:

☒ 1. A fire lane from the southern end of Harbor West P.U.D. must be extended to Hoover Road to provide emergency equipment access to Harbor West P.U.D. Hoover Road must be made traversable for fire and emergency equipment. If Hoover Road was vacated, an alternate secondary access roadway must be provided in accordance with Section 902.2.1, 1997 Uniform Fire Code.

> ". . . More than one fire apparatus road shall be provided when it is determined by the chief that access by a single road might be impaired by vehicle congestion, condition of terrain, climatic conditions or other factors that could limit access. . . ."

Note: The applicant has submitted an alternate method of materials for consideration. **Documentation was submitted which shows that the roadway separation as shown on the PUD conforms to the Pierce County Development Standards. PC Ord. 96-46S2 § 2 (part), 1997 adopts the STORM DRAINAGE AND SITE DEVELOPMENT REGULATIONS and the PIERCE COUNTY STORMWATER MANAGEMENT and SITE DEVELOPMENT MANUAL (PCSMSDM). Three paragraphs of Section 10.1.2.4 of the PCSMSDM state:**

> **. . ."When multiple major driveways to one parcel or development are permitted, they shall not be less than 125 feet apart, measured from centerline to centerline.**
>
> **A minimum of two major driveways will be required for developments that will generate 500 ADT or more unless other mitigating measures are approved by the County."**
>
> **Not withstanding the requirements of this Manual, the number and location**


HARBOR HEIGHT
NORTH
CHURCH
ROSE OAK RIDGE
HARBOR HEIGHTS
54TH AVE NW
PIERCE COUNTY
HOOVER ROAD
WELL
WET LANDS + WOLFCHET CREEK
PROPOSED HARBOR WEST
54TH AVE NW

[EXH 99]

AUGUST 13, 1999 NOTE: FOR THOSE WHO RECEIVED MY AUGUST 11TH MEMO, THIS REPLACES IT.

To Carol Morris, Gig Harbor City Attorney

Fr: Nicholas Natiello, Ph.D [253] 851-7778

cc: Mayor Wilbert, Hoppen, Gilmore, Bowman, Hill, McConnell, City Council, Morfee, Davis, Brown, WISHA, Gateway, TNT, Senator Oke, Rep. Huff, State Fire Marshal Corso, Gov. Locke.

RE: THE PROPOSED HARBOR WEST DOES NOT COMPLY WITH THE UNIFORM FIRE CODE

The proposed Harbor West PUD plat does not comply with GHMC, Chapter 15 - Uniform Fire Code. The Revised Code of Washington 58.17.110 codified what has been settled Washington law since 1905, i.e., property rights of the Harbor West developers must yield to public health, safety and welfare issues. An absolute right of the people in the Gig Harbor community is to be protected against impairment, imperilment, personal injury, death and property damage. The City of Gig Harbor has the sole authority and has the full responsibility to provide for fire protection to its citizens within and adjacent to the proposed Harbor West PUD in the exercise of its police powers.

While the Pierce County Fire District 5 Asst. Fire Chief may make fire safety suggestions regarding fire protection and prevention in the proposed subdivision, Steve Bowman, the Gig Harbor City Fire Marshal, has the full responsible and authority to make certain that the proposed Harbor West subdivision complies with State law and the GHMC Uniform Fire Code.

When City Fire Marshal Steve Bowman first independently reviewed the proposed Harbor West preliminary plat. He stated: **"A fire access road is needed from the south because the two fire access points from the north side of the subject site converge into what is a single access point for the bulk of the subdivision. If Hoover Road was vacated, an alternate secondary access roadway must be provided in accordance with Section 902.2.1, 1997 Uniform Fire Code. I cannot approve the Harbor West PUD without it."** (Exhibit 1)

In his Fire Determination Letter dated May 4, 1998, Glen Stenbak, the Asst. Chief of Fire District 5 stated: **"The project needs to have at least two access roads for emergency vehicles that serve the project from the North and South end, not two roads from the North end."** (Exhibit 2).

Ray Gilmore stated in a letter dated May 12, 1998 to Carl Halsan, the developers' agent: **"Staff has extensively discussed this Harbor West Subdivision with the City's legal advisor and several issues need to be resolved before we can proceed with this application: Of utmost critical concern is the need for a second access by the City Fire Marshal. Preference has been voiced for a second access road from the South. The plans submitted have not shown any secondary access to this plat. This needs to be included. No further action will be taken on this application until this issue is addressed. "** (Exhibit 3).

Attorney Bill Lynn responded on May 22, 1998 to Gilmore's May 12 letter and stated: **"The PC Fire District 5 letter dated May 4, 1998, was apparently issued in response to pressure from neighbors. The two northern access roads are 230 feet apart. Hoover Road was vacated."** (Exhibit 4).

Fire Marshal Bowman reviewed attorney Lynn's May 22nd letter and stated in his July 22, 1998 memo: **"If Hoover Road was vacated, an alternate secondary access roadway must be provided in accordance with Section 902.2.1. of the Uniform Fire Code." Fire Marshal Bowman also said: "(A) Documentation must be submitted to verify claims that the roadway separation as shown is 230 feet apart; AND, (B) I would consider alternate methods of material, such as, auto-fire sprinkler and alarm systems, fire resistive wall construction, building separation, the use of fire resistive roofing materials and increased fire flow. Unless I receive the documentation and a south end fire access**

road is shown on the plat the Harbor West PUD cannot be approved." (Exhibit 5)

Fire Marshal Bowman wrote an October 20, 1998 memo to Gilmore and reiterated that: **"If Hoover Road was vacated, an alternate secondary access roadway must be provided in accordance with the Uniform Fire Code." He would consider alternate materials for fire protection as stated in his July 22 memo, above, but without the access road or alternate fire protection, he stated that he could not approve the Harbor West subdivision PUD. (Exhibit 6).**

Not getting a response from Mr. Gilmore, Fire Marshal Bowman decided to send his October 20, 1998 memo directly to the developer's agent, Carl Halsan. He did so with cover letter dated November 6, 1998. (Exhibit 7). Attorney Lynn responded and simply stated that the two northern access roads were 230 feet apart but Lynn did NOT provide for a south end access road, or in lieu of a south end access road, Lynn completely ignored the alternate method of construction, which included, at a minimum, automatic-fire sprinkler and alarm systems, fire resistive wall construction, building separation and the use of fire resistive roofing materials.(Exhibit 7).

I first wrote a memo on this fire issue over a year ago. Attorney Lynn had a year to research the fire issue. He should have used the Uniform Fire Code of the GH Municipal Code to deal with the fire safety issue. **(Exhibit 8).** Instead he cited a Pierce County Road Ordinance which has nothing to do with a south end secondary fire access road. The PC ordinance he used simply regulated how the north end major driveways of the proposed subdivision would connect to the proposed extension of North Creek Lane. The P.C. Road Ordinance dealt only with issues such as the road approach permit, distances in feet between road approaches, vehicle sight distances, vehicle sight and stopping distances, where stops signs would be placed, the removal of obstructions such as electric utility posts, etc.

If attorney Lynn wanted to cite the appropriate P.C. Ordinance, pertaining to fire access roads, he should have used P.C. 12,52, Part II - Emergency Vehicle Access (EV Access), Sections 12.52.210-230. **(Exhibit 9).** Not only did Lynn use the wrong ordinance and or code, but he indulged himself in the crime of omission because the P.C. Road Ordinance states: "New driveways that would create a four-legged intersection are undesirable." **(Exhibit 10).** Yet, this is how the subdivision's road system is designed. It creates a four legged intersection. Harbor West's major driveway is directly across the street from Newport Ridge's entrance. But no one has complained because the developer's agent, Carl Halsan, lives there.

As late as March 17, 1999 Fire Marshal Bowman again stated: **"A fire lane from the southern end of Harbor West P.U.D. must be extended to Hoover Road to provide emergency equipment access to Harbor West P.U.D. Hoover Road must be made traversable for fire and emergency equipment. If Hoover Road was vacated, an alternate secondary access roadway must be provided in accordance with Section 902.2.1, 1997 Uniform Fire Code." Fire Marshal Bowman also stated that the two north end roads were 218 feet apart, not 230 as alleged by attorney Lynn. Bowman's March 17, 1999 memo still requires a secondary access roadway. He states "Without review and APPROVAL of these items the Fire Marshal cannot recommend approval of the proposed PUD." (Exhibit 11).**

How difficult is it to build a south end fire access road? The gross profit of this development is over thirty million dollars. Purchasing and building a South end fire access road is a cost of doing business. The developers purchased a north end access road for about $100,000, which amounts to about $671 per house. Prorated over 20 years it amounts to $33 per house. [Small price to pay to protect human life.] Huber has stated that he passes on all increases in costs to the house purchaser. However, a south fire access road will only have to be a single road, only 20 feet wide, not a two lane 60 foot wide road that it proposes to build in the north end. Unlike the north fire access road, a south access road would not even have to go through wetlands and a stream. It would be very inexpensive to acquire the land and build the road in the south end. Citizens would not object

because a south fire access road would be dedicated to being used exclusively for emergency fire apparatus. The road would have a gate and a lock. Only the fire department would be able to unlock the gate. Yet, Gilmore has dropped his demand for a south fire access road. Why?

When Mark Hoppen told Roy Sell he wanted to find out how District 16 would evaluate the Harbor West plat, I contacted the Fire Chief of Dist. 16, Gary Franz, who stated: **"I have reviewed the Harbor West preliminary plat. If the proposed Harbor West subdivision was in my District 16, at a minimum, my official position would be that there be a south end fire access road."** I contacted Wayne Wenholdt, Pierce County Fire Marshal; William Spenser, Fire Control Protection Bureau; Les Townzen, Chief Deputy State Fire Marshal; Roger Woodside and Asst. State Fire Marshal. After lengthy discussions, they all shared my concern but indicated they had no authority to get involved.

I communicated with Mary Corso, State Fire Marshal, and asked her to review and comment on the issue. The State Fire Marshal's letter dated June 1, states, "After a review of the documents we find three items that appear to be the main focus of the fire code issues: 1. Fire Department Access Requirements. 2. Access Road Turn Around Requirements. 3. Multiple Access Requirements. Fire apparatus access roads shall be provided and maintained. **The course of action that Mr. Natiello is following is the proper action in regards to code compliance issues. He should appeal the issue to the City Council, if necessary." (Exhibit 12).**

Mayor Wilbert assured Senator Oke that the City would comply with the fire access road requirements. Mark Hoppen, City Administrator, echoed the Mayor's position. State Senator Oke and Representative Huff stated: **"They will be required to have adequate fire access. This is of great concern and needs to be resolved before approval of the plan." (Exhibit 13).**

Since attorney Lynn has used Pierce County (P.C.) Ordinances, let's examine the following: Prior to Harbor West's proposed subdivision, at the exact same location, proponents for a subdivision called "Silverwood" proposed to build 55 single family dwelling units. At that time, the tract was in Pierce County. Attorney Steve K. Causseaux, the Pierce County Hearing Examiner, approved the proposed Silverwood subdivision provided that **"A fire access road shall be installed and maintained to enable fire fighting equipment to reach any portion of any build/area on the site." (Exhibit 14).** Silverwood did not go forward. Harbor West took over the property and propose to build 149 lots instead of the 55 lots proposed by Silverwood. More importantly, Harbor West does NOT provide for a fire access road from the south end, but Silverwood did.

As a former corporate officer in charge of safety on a world wide basis in private industry, I was concerned about the fire safety issue and was of the opinion that even a secondary south end fire access road would not correct all the fire safety problems because of the inadequate fire safety design of the subdivision. So I filed a referral with the Washington State Industrial Safety and Health Administration, (WISHA), asking them to review the Harbor West plat. I spent hours in their office and discussed the Harbor West project with them. **(Exhibit 15).** WISHA investigated and communicated with the District 5 Fire Commissioners. On April 20, 1999 WISHA stated: **"In assessing your concerns for the fire protection of this planned community I can understand that it is possible upon completion of this housing development a fire could come about. Further, if that fire were to be of such a volume that it would cause a hazard to fire fighters over and above that normal hazard, the fire fighters would still have the right not to enter the area. Therefore, if the hazard existed but the employees were not exposed to that hazard WISHA could not cite the fire department." (Exhibit 16). <u>WISHA MAY PROTECT THE FIREFIGHTERS, BUT WHO WILL SAFEGUARD THE LIVES OF THE RESIDENTS OF THE PROPOSED HARBOR WEST. IF THE FIREFIGHTERS DO NOT HAVE TO FIGHT A HARBOR WEST FIRE IF THEY FEEL IT IS TOO HAZARDOUS?</u>**

Even if firefighters agreed to fight a fire in Harbor West, the record shows that the proficiency of firefighters can never make up for the deficiency of an appropriate Harbor West subdivision Fire Protection Plan developed in strict compliance with all codes and regulations.

So, where are we on this issue? Gilmore's has ceased to address the south end fire access road. It just disappeared from the processing of Harbor West and therefore is not mitigated. Gilmore allowed attorney Lynn to adopt the Pierce County's Stormwater Management and Site Development Manual [PCSMSDM] in a futile attempt to erroneously claim he has proven a south fire access road is unnecessary. There is nothing in the PCSMSDM that addresses fire access roads. **(Exh. 17)**. This is like Lynn giving an aspirin to a person who is dying of cancer and Lynn then claiming he has found a cure. Yet, when I legitimately asked Gilmore to use PCSMSDM because the City does not have an up-to-date professional Stormwater Drainage Plan, Gilmore refused and stated, **"We do not understand your apparent assertion that the City may impose another jurisdiction's requirements on applications submitted to the city. You should review the City's codes." (Exhibit 18).**

It is unclear if City Fire Marshal Bowman will have the professional courage to follow through on his position that Harbor West needs a south fire access road, as written in all his fire memos because he states **he can only make fire safety recommendations and Gilmore has the final word.** When Bowman was specifically asked what he planned to do, he was evasive and stated, **"My official position is on record. Go to the Planning Dept and read it!"** The question is will Bowman follow through or be vanquished by Gilmore and Lynn? Adding to the confusion, Penny Hulse, Dist. 5 Fire Dept. stated, "Don (Huber) has convinced me Hoover Road is abandoned. He can't use it to build the south fire access road." **(Exh.19)**. Gilmore and Lynn have latched on to Penny's convoluted inference that since Hoover Road is abandoned a south fire access road may not be needed after all. This erroneous position is without merit. It's like the insurance agent who stole the insurance premium money for the first Narrows Bridge because he was sure it would never collapse. If Huber can't use Hoover Road, he must simply select one of the numerous other alternative road connections, as so stated by Marshal Bowman in his numerous memos over a period of a year.

We need to have a definitive written statement from you and City Fire Marshal Steve Bowman on this issue. What do you and Bowman plan to do to make certain Harbor West fully complies? Again, remember Gilmore has completely dropped the fire access road issue and has given Lynn the understanding that a south fire access road is not required and is no longer an issue. In the unlikely event Fire Marshal Bowman has surrendered to attorney Lynn and Gilmore, we demand a written statement clearly articulating why Bowman has reneged since Lynn's and Gilmore's position is frivolous, impudent, absurd and makes a farce of the potential loss of life fire issue.

The courts will not consider this issue unless we show we have exhausted all remedies with the City. We demand you and Marshal Bowman furnish us with an official comprehensive written statement on this issue. If we still continue to be ignored, this memo will serve as a court exhibit.

The City of Seattle and the Seattle Fire Dept. were both found negligent and responsible for the four deaths in the Pang Warehouse Fire. If a death unnecessarily occurs in Harbor West who will accept the responsibility? Marshal Bowman alleges he only makes recommendations. The Fire Dept. contends only Marshal Bowman has the authority and responsibility to ensure the Harbor West **plat design, configuration and roads comply with fire prevention and safety.** Gilmore will take a vacation or go on sick leave and Harbor West's attorney William Lynn will weep all the way to the bank!

You must stop City employees from abdicating their professional responsibilities. The City must not ignore its statutory and moral obligations to protect the pubic health, safety and welfare. As City Attorney, you must ensure that the City has provided for public safety in dealing with the potential loss of life, property and the squandering of millions of taxpayers' dollars in wrongful death lawsuits. We're disappointed that it's necessary to send you memos to have City public servants perform their ministerial duties. If the City does its job there would be no need for our entanglement. **In brief, the potential loss of life has become lost in the scuffle, the shuffle and the sidestepping.**

Nicholas Natiello

Nicholas Natiello, Ph.D. 5812 Hunt St. NW, Gig Harbor, WA 98335 [253[851-7778

October 6, 1999

To: Carol Morris, Gig Harbor City Attorney

Fr: Nicholas Natiello, PH.D.

cc: Mayor Wilbert, Mark Hoppen, Ray Gilmore, Steve Brown, Clark Davis, Lou Willis, Peter Dale, PNA, Tom Morfee

Dear Carol,

Paragraph 3 A (8) of the *Legal Services Agreement*, dated August 27, 1998, between you and the City, signed by you, as City Attorney and by Mayor Wilbert, in part, states:

> **"The following list of duties are illustrative of the services to be performed by the City Attorney, but is not necessarily inclusive of all duties: ... (8) Be available on an as-needed basis to discuss legal matters with citizens which affect the City and respond to citizen inquiries in person, in writing or by telephone involving City business;"**

While the language of LSA 3A(8) is clear and unambiguous, its application and past practice by the City leaves much to be desired. In fact, it appears that 3A(8) has been abandoned by the City in that citizens' memos asking to discuss legal issues with the City Attorney that involve City business are not even acknowledged.

Yet, your billing records for legal services reveal that, at taxpayers' expense, you drove to Gig Harbor and have spent countless hours meeting with developers discussing legal matters with them. I am not suggesting that it is illegal to meet with developers but citizens have rights under LSA 3A(8), RCWs and WACs that are being unfairly disregarded.

The record shows that Ray Gilmore needlessly spent taxpayer money when he asked you, **in writing**, to discuss legal matters with Harbor West attorney Bill Lynn to urge the developers to refile the Harbor West PUD as a PRD. In addition, Ray Gilmore has personally told me that citizens have no right to contact the City Attorney who only represents the City and its personnel.

Carol, as you know, I have personally written to you asking for the City's legal position concerning numerous issues. It appears from your writing that only if you receive a memo from an attorney, on an issue which a citizen has raised, will you respond. Refusing to deal with a citizen unless represented by an attorney is wrong and cost prohibitive. Remember LSA 3A(8)!

State law requires that Cities retain a City Attorney. Certainly it was not the legislators' intent to use taxpayers money to pay for the services of the City Attorney and have the City Attorney only represent the City and its personnel on a risk management basis at the expense of citizens or in total disregard of citizens' rights.

Nothing in this memo is meant to be offensive but we would be less than honest if we did not clearly speak out to you on this issue. Citizens want the City to conform with LSA3A(8). What comments and suggestions do you have to resolve and expedite this issue?

Nicholas Natiello

Nicholas Natiello, Ph.D.
5812 Hunt St NW
Gig Harbor, WA 98335
(253) 851-7778

EXH 170

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

April 20, 1999

Dear Mr. Natiello:

Thank you for the opportunity of addressing your concerns fro the safety of fire fighters of Pierce County Fire District 5 in regard to the proposed Harbors West sub-division in Gig Harbor, Washington.

In doing an exhaustive review of the laws involved with this matter I find that no safety codes have been violated and that the jurisdiction still lies with the City of Gig Harbor & Pierce County. An inquiry was made to Pierce County in this matter. The county stated the authority lies with the City of Gig Harbor.

In accessing your concerns for the fire protection of this planned community I can understand that it is possible upon completion of this housing development a fire could come about. Further, if that fire were to be of such a volumn that it would cause a hazard to fire fighters over and above that normal hazard, the fire fighters would still have the right not to enter the area. Therefore, if the hazard existed but the employees were not exposed to that hazard WISHA could not cite the fire department.

Please understand that we are concerned for the fire fighters safety in all cases and we do access issues with fire departments as they arise where we do have jurisdiction.

There are four things WISHA must prove for a citation to be issued.
We must ascertain that:

1. a hazard is present;
2. employees are exposure to that hazard;
3. there is a safety code in place to cite; and
4. the employer has knowledge of the hazardous condition.

Unless all four parts of this are in place WISHA can not cite.

Again I thank you for the opportunity of addressing the safety of workers. If I can be of further service to you please call (253) 596-3891.

Sincerely

Dennis A. Smith
Safety Compliance Supervisor
Region 3, Tacoma, Washington

(EXH 99, page 6 of 11)

June 8, 1998

To: Fire Marshal S. Bowman, R. Gilmore, S. Osguthorpe, W. Hill, Fire Chief Claiborne

From: Nicholas Natiello, Ph.D. 5812 Hunt St. NW Gig Harbor, WA 98335 [253] 851-7778

Copy: M. Hoppen, Mayor Wilbert, Senator Oke, Representative Huff, Gateway, TNT, PNA.

FIRE APPARATUS ACCESS ROADS IN THE PROPOSED HARBOR WEST SUBDIVSION.

The State Fire Marshal affirms the responsiblility of the local jurisdiction to require north and south fire apparatus access roads per 902.1. Exhibit is reduced in size and reproduced below:

JUN - 4 1998

COPY

STATE OF WASHINGTON

WASHINGTON STATE PATROL

General Administration Building, PO Box 42600 • Olympia, Washington 98504-2600 • (360) 753-6540

June 1, 1998

Dear Senator Oke:

Captain Eric Robertson has asked that I reply to your constituent's inquiry regarding a code compliance issue. After review of the documents we find three items that appear to be the main focus of the fire code issues.

1. Fire Department Access Requirements
2. Access Road Turn Around Requirements
3. Multiple Access Requirements.

902.1 General. "Fire apparatus access roads shall be provided and maintained in accordance with locally adopted street, road and access standards."

The course of action that Mr. Natiello is following is the proper action in regards to code compliance issues. The local city council and/or board of appeals is the proper forum for his appeal in this issue.

Mary L. Corso
State Fire Marshal

[EXH 99, PAGE 62]

Pierce County Fire District Five

May 4, 1998

Steve Bowman
3105 Judson St.
Gig Harbor, WA 98335

Dear Steve:

The fire prevention division of Pierce County Fire District No. 5 recently conducted a review of the Harbor West Subdivision plot plan.

This project needs to have at least two access roads for emergency vehicles that serve the project from the North and South end, not two roads from the North end.

All roads in this project shall have a minimum clear width of at least twenty-four feet. It appears from the plot plan that there would be no parking allowed on the roadways as they are shown.

The parking issue is not enforceable; therefore the roadways either must accommodate parking or off street parking must be provided.

The cul-de-sacs appear to be sub standard, that is, not ninety feet in diameter.

Any further questions, please call me at 851-3111.

Sincerely,

Glen Stenbak
AC/SS

[EXH 99]

10222 Bujacich Road N.W. ▲ Gig Harbor, Washington 98332 ▲ Tel: [253] 851-3111 Fax: 851-9600

BEFORE THE HEARING EXAMINER CITY OF GIG HARBOR

In re: HARBOR WEST PUD | BRIEF IN SUPPORT OF EXPERT WITNESS PRESENTATION OF EVALUATION REPORT AND TESTIMONY.

This memorandum is in support of Mr. Thomas Kraft, Certified Fire Protection Safety Engineer, presenting his *Evaluation Report*, dated December 7, 1999, and testifying at the December 8, 1999 Public Hearing as an Expert Witness on the adequacy of the Revised TIA and the need for an emergency access road to the proposed Harbor West PUD subdivision. He has made himself available for cross examination at the December 8, 1999 Public Hearing

LEGAL AUTHORITY

Mr. McConnell, City Hearing Examiner, in his Harbor West Decision dated January 15, 1998, in his "findings and conclusions", stated on page 8, paragraph 9:

> "9. Plats may be approved only after the consideration of the public use and interest proposed to be served by the subdivision. Conditions may be imposed before a plat is approved to ensure that the public interest is served. The Examiner must review the proposal to determine if it makes provisions (or can be conditioned to make provisions) for the public health, safety, and general welfare; and for streets or roads, alleys;"

The language used above by the Examiner is identical to what the Court ruled in *Lechelt v. Seattle*, 32 Wn. App 831 (1982). The Court stated:

> "Plats may be approved only after consideration of the public use and interest proposed to be served by the subdivision. Conditions may be imposed before a plat is approved to ensure that the public interest is served. Agencies reviewing plat applications must consider and may condition approval of the plat upon the provision of adequate access."

In *Miller v. Port Angeles*, 38 Wn. App. 904 (1984) the Court quoted *Lechelt* and stated: "It must consider the adequacy of access to AND WITHIN the proposed subdivision and it is empowered to condition approval of the plat upon adequate access, *Lechelt v. Seattle*, supra." Furthermore in *Miller*, the Court also stated that safety and regulatory measures are within the proper exercise of the City's police power and it can require that the cost of these measures be borne by those who created the need, *Miller*, supra, at 910.

Mr. Thomas, CFPS, in his *Evaluation Report* clearly demonstrates that there is a geometric deficiency within the south end of the proposed Harbor West road system which represents a serious safety concern, which if not mitigated, will create a substantial impact. The geometric deficiencies of the Harbor West road configuration CAN and MUST be corrected within the scope of the Harbor West project. RCW 58.17.110 prohibits the Examiner from approving the Harbor West subdivision until appropriate provisions are made for streets, alleys and emergency access roads.

The City Attorney in the Staff Report dated November 1, 1999 stated: "If Mr. Natiello believes that the preliminary plat, and its recommended conditions, violated the Uniform Fire Code, he must identify the section of the Code purportedly violated, and state how the recommended condition or preliminary plat violates the Code.// We have engaged Mr. Kraft, CFPS, as an Expert Witness. His Evaluation Report is attached.

Respectfully submitted, Nicholas Natiello, Ph.D. Dated December 8, 1999.

[EXH. 196]

A PLANNED UNIT DEVELOPMENT IS NOT A DEVELOPER'S BIRTHRIGHT.

In various places throughout my Appeal I have cited the court case of Johnson v. Mount Vernon, 37 Wn. App. 679 P. 2d 405 and stated that it was proper and within the sole discretion of the City Council to determine to what degree of density variation they will permit, if any. Even if a PUD proposal meets the maximum density per acre set forth in the City PUD ordinance, (which Harbor West does not) the City Council has the right and duty to consider whether the proposal is harmonious with the surrounding area, whether it is consistent with the Comprehensive Plan and whether there has been a showing made that granting this "exception" to the zoning ordinance is necessary due to a change of circumstances in the area.

The City Council has the right and duty to consider the views of the community in making their decision, whether favorable or unfavorable, and to give substantial weight to those views as expressed in public hearings.

Although there is a lawyer who is an elected official that serves on the Gig Harbor City Council, you don't have to be a lawyer to understand or apply Johnson to the Harbor West planned unit development evaluation. I have made a copy of the appropriate pages of Johnson v. Mount Vernon for you to review. In reading the case, you will immediately find that the language I used above was taken directly from the Johnson court case. Please review page 217 of Johnson, attached, especially the third paragraph, entitled paragraph " III."

However, before you read the case, page 217 to and including page 221, please be aware that the Appeals Court "remanded the matter back to the Mount Vernon City Council for the entry of appropriate findings of fact and conclusions stating the reasons as mandated in Parkridge." In other words the Court of Appeals did not quarrel with the Superior Courts assertions that a city council had sole discretion to approve or disapprove a planned unit development, provided the Council entered proper findings and conclusions and reasons for the denial, such as density, whatever.

It must be noted that the error made by the City Council in Johnson was that it did not tell the applicant why it denied the planned unit development which would haven given the applicant proper guidance to prepare another application. Perhaps the best thing to do is to read page 221 to understand what I am saying.

Yet another point for you to consider is that Johnson cites the Supreme Court in Lutz v. Longview. Please see page 218 of Johnson. The Supreme Court in Lutz stated: "What is the legal nature and effect of the act of imposing a PUD upon a specific parcel of land? We hold that it is an act of rezoning which must be done by the city council because the council's zoning power comes from the statute and this is what the statute requires."

XII.

Under a traditional subdivision (as opposed to a P.U.D.), the Plaintiff's development would not be permitted, absent a rezone, as it would fail to comply with the Comprehensive Plan and the minimum lot size under the zoning code. The lot size of the proposal would approximate 8,000 square feet.

XIII.

Under the P.U.D. provisions of the City of Mount Vernon, the Plaintiff is permitted to deviate from the strict zoning requirements of density if the project is harmonious with the surrounding area and consistent with the Comprehensive Plan. The P.U.D. provisions permit a maximum net density of four (4) dwelling units per acre, or when factoring out roads and required open space, equates to a minimum lot size of 8,168 square feet per lot.

The trial court reached the following pertinent conclusions of law:

III.

Although a P.U.D. necessarily permits a higher density development than would normally be permitted in an area under traditional zoning, it is still a proper consideration and within the sole discretion of the City Council to determine to what degree of density variation they will permit, if any. Even if a P.U.D. proposal meets the maximum density per acre set forth in the City P.U.D. ordinance, the City Council has the right and duty to consider whether the proposal is harmonious with the surrounding area, whether it is consistent with the Comprehensive Plan and whether there has been a showing made that granting this "exception" to the zoning ordinance is necessary due to a change of circumstances in the area.

IV.

The Mount Vernon City Council had the right and duty to consider the views of the community in making their decision, whether favorable or unfavorable, and to give substantial weight to those views as expressed in the public hearings.

V.

The motion to deny the preliminary development plan was sufficient to state the reasons for denial, and the City

Council's action was not motivated solely by the neighborhood opposition but included reasons based on sound land use concerns.

VI.

The Mount Vernon City Council's determination that the Timberline P.U.D. proposal was inconsistent with the Comprehensive Plan in terms of location and density was made after much deliberation and consideration of all the facts, and the Court concludes that there does exist room for two opinions on this matter.

Based on these findings of fact and conclusions of law the court dismissed Johnson's petition and in effect affirmed the City Council's denial. This appeal followed.

On appeal Johnson raises two issues: (1) whether the Council's action was arbitrary and capricious because the Council failed to either approve the plan or state the conditions that precluded approval, (2) whether the density of a PUD is determined on a per lot basis or a per acre basis.

We must initially determine the proper standard of review for a denial of a PUD proposal. To determine that standard, it is necessary to ascertain the nature of the proceeding. The City emphasizes in its brief that Johnson's proposed plat is not a standard preliminary plat proposal but a specialized type authorized by the Mount Vernon Municipal Code and points out that a PUD subdivision proposal is in effect a request by the developer for a rezone. In other words, the City argues that if Johnson desires to develop lots under 13,500 square feet on his 69 acres that are presently zoned for single family residences with minimum 13,500-square-foot lots, he in essence desires a rezone, even if proceeding under the city code's PUD provisions which permit smaller lots.

[1] We agree. A request for a PUD is treated as a request for a rezone. As our Supreme Court stated in *Lutz v. Longview*, 83 Wn.2d 566, 568-69, 520 P.2d 1374 (1974):

> What is the legal nature and effect of the act of imposing a PUD upon a specific parcel of land? We hold that it is an act of rezoning which must be done by the city council because the council's zoning power comes

> from the statute and that is what the statute requires. It is inescapable that application of the PUD to this tract constituted an act of rezoning. Before the PUD was authorized, the tract here was limited to low density single family residences primarily. . . .
>
> The authorities are clear that such a change in permitted uses is a rezone or amendment of the zoning ordinance.

We therefore review the City Council's denial of Johnson's PUD proposal as a denial of a rezone.

An appellate court will overturn a governmental body's decision on a rezone only if that decision is arbitrary or capricious. *See Hayden v. Port Townsend*, 93 Wn.2d 870, 879, 613 P.2d 1164 (1980).[1] Accordingly, because this is an appeal from a denial of a proposed PUD, and a proposed PUD is in the nature of a rezone application, we will only overturn the City Council's decision if it can be characterized as arbitrary or capricious.

[2] A governmental body's failure to enter written findings of fact and conclusions of law in a rezone action constitutes arbitrary or capricious action. Requirements for written findings of fact and conclusions were imposed on city councils and county commissioners by our Supreme Court in *Parkridge v. Seattle*, 89 Wn.2d 454, 573 P.2d 359 (1978). *Parkridge* involved a rezone of certain property by the Seattle City Council. The court noted the well recognized distinction between the legislative function of enacting the initial comprehensive plan and zoning ordinance and the adjudicatory function of a subsequent rezone, and emphasized the special necessity of an adequate record when a court is required to review adjudicatory proceedings. *See Barrie v. Kitsap Cy.*, 84 Wn.2d 579, 527 P.2d 1377 (1974). In addition to the adequate record required by *Barrie*, the *Parkridge* court mandated the entry of specific

[1] We note that our Supreme Court recently overruled *Hayden v. Port Townsend*, 93 Wn.2d 870, 613 P.2d 1164 (1980) in part. *Save a Neighborhood Env't v. Seattle*, 101 Wn.2d 280, 676 P.2d 1006 (1984). That decision, however, did not affect the authority of *Hayden* for the proposition cited here.

findings of fact and conclusions or reasons. The court in *Parkridge* stated at page 464:

> Henceforth, we also require, founded upon and supported by the record, that findings of fact be made and conclusions or reasons based thereon be given for the action taken by the deciding entity (in this case, the city council).

The *Parkridge* requirement established in January 1978 predated the hearing before the Mount Vernon City Council in the instant case which took place on September 10, 1980 and is therefore binding herein.[2]

We hold that in the instant case the City Council's decision was arbitrary or capricious because it entered no written findings indicating its reasons for denial of Johnson's application. While the Superior Court found adequate reasons from a review of the discussion by council members, the trial court in its oral opinion had to rely for its conclusion upon an evaluation of the comments made. The court said in its oral opinion:

> The petitioner maintains this action was faulty in that the action taken by the Council failed to indicate why the petition was being denied. The motion itself fails to set forth reasons. An explanation given following the motion, I believe, sets forth the basis upon which the motion was made, pinpointing density. I don't think it is a secret that some people vote for a motion even though it may be based on reasons and specific reasons other than those in the mind of the voter. I mean by saying that *probably* the basis here was density. Some of these people who voted for it *may have voted* because of traffic problems and other reasons.

(Italics ours.) A review of the same record considered by the trial court reveals various reasons for the Council's decision. While some of the reasons expressed may justify the denial of Johnson's proposal, we do not know which

---

[2]We note that the Skagit County Board of Commissioners in considering a rezone in 1979 (prior to the City Council's action herein) adopted resolutions which detailed the reasons for the denial permitting proper appellate review. *See Burkseb/Danard, Inc. v. Skagit Cy.*, 31 Wn. App. 489, 643 P.2d 460 (1982).

reasons the Council relied upon for disapproval.

There are two important reasons in this type of case for entering proper findings and conclusions. First, written findings and conclusions provide guidance to the developer. If the council does not provide reasons for the denial, the developer is unable to satisfy the council's objections or prepare another application. If, for example, the majority of the Council believe the mobile home subdivision designed pursuant to the PUD ordinance should never be placed on Johnson's tract merely because it involves mobile homes, that reason should be made clear. Second, the absence of written findings including a statement of reasons for the Council's action makes appellate review difficult if not impossible.

We therefore vacate the trial court's order and direct that the matter be remanded to the Mount Vernon City Council for the entry of appropriate findings of fact and conclusions stating reasons as mandated in *Parkridge*.

CORBETT, A.C.J., and WILLIAMS, J., concur.

Respectfully submitted

Nicholas Natiello PH D.

rcpt # 41089 $ 120.00
ck# 29724

Smith Alling Lane

A Professional Services Corporation

Attorneys at Law

1102 Broadway Plaza, #403
Tacoma, Washington 98402
Tacoma: (253) 627-1091
Seattle: (425) 251-5938
Facsimile: (253) 627-0123

Douglas V. Alling
Grant B. Anderson
Joseph R. Cicero
Barbara A. Henderson
Edward G. Hudson
Edward M. Lane
Linda Nelson Lysne, CPA
Robert E. Mack
Timothy M. Schellberg
Daniel C. Smith (Ret.)

Michael E. McAleenan

February 14, 2000

NOTICE OF APPEAL
OF HEARING EXAMINER'S DECISION
RE HARBOR WEST PUD SUB NO. 98-01

City of Gig Harbor, Clerk
3105/3125 Judson Street
Gig Harbor, WA 98335

Re: Harbor West PUD SUB No. 98-01

Dear Sir or Madam:

Pursuant to Gig Harbor Municipal Code ("GHMC") 19.06, the Peninsula Neighborhood Association ("PNA") hereby appeals the Hearing Examiner's Decision to approve a Planned Unit Development ("PUD") for Harbor West SUB 98-01 issued on January 31, 2000. The PNA has standing to file this appeal due to testimony on its behalf at open record public hearings and through PNA's submission of materials. In addition to, or in the alternative, Marian Berejikian, acting as agent for the PNA, has standing to file this appeal as a party of record because of her testimony given at the hearings.

The following are grounds for appeal. They may be supplemented and expanded upon at a later date.

1. The proposal does not meet requirements of the Gig Harbor Comprehensive Plan and Development Regulations regarding densities for residential development.

2. The Decision is erroneous as to the amount of transportation impact fees that should be charged the development.

3. The mitigation amount for open space, parks and recreation is incorrect and too low.

4. The development, as approved, does not meet the requirements of RCW 58.17.110.

ORIGINAL

5. The Hearing Examiner's Decision fails to adequately meet public health and safety, and public interest issues regarding, among other things, fire safety, traffic and storm water drainage.

6. The Decision is inadequate to protect the wetlands on and near the site.

7. The Decision inadequately protects surface waters of the State of Washington, and may allow improper uses of, and damages to, such waters.

8. The Hearing Examiner relied on the Gig Harbor Comprehensive Plan's designation of the area as "urban residential low density"; 3-4 du/ac. However, the parcel is zoned R-1 (three dwelling units per acre), and when a conflict exists between the Comprehensive Plan and GHMC, the regulations control the zoning. So it is the R-1, not the Comprehensive Plan that is the basis of comparison for the PUD density.

9. The Hearing Examiner states that the open space, parks and recreation mitigation fee should be reduced from $761.07 per dwelling unit, to $353.14 per dwelling unit. The Hearing Examiner does not offer evidence as to why he reduced the mitigation fee by this amount. The reduction is an arbitrary and capricious decision on the part of the Hearing Examiner. Gig Harbor City Ordinance No. 828 requires a $1,500.00 per dwelling unit fee for park impacts.

10. The Hearing Examiner states that density of the proposed preliminary plat and PUD is 3.51 dwelling units per acre, and the adopted Comprehensive Plan anticipated a density for the subject property as 3-4 dwelling units per acre. The proposal exceeds the maximum dwelling units per acre under a PUD. GHMC 17.16.060(H) states that a maximum density of up to four dwelling units per acre may be permitted within a Planned Residential Development ("PRD"). The PRD would be the correct means to increase residential density above basic zoning, not a PUD.

11. The Hearing Examiner states that the plat may be approved only after consideration of the public use and interest proposed to be served by the subdivision. RCW 58.17.110(1) states that the city, town, or county legislative body, shall inquire into the public use and interest proposed to be served by the establishment of the subdivision. It shall determine (a) if appropriate provisions are made for the public health, safety and general welfare, and for such open spaces and drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolyards, and shall consider all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) whether the public interest will be served by the subdivision and dedication.

a. The Hearing Examiner ignored the potential fire/public safety issue by not requiring a southern access road into the development. PNA provided a fire safety report, written by Thomas Kraft (Exhibit 201), that addressed the fire safety issues as the development is currently designed. Ignoring such an obvious public safety concern will put the public at risk and expose the city to civil liability.

b. The Hearing Examiner did not address the street and road concerns that were raised by PNA's traffic expert (Exhibit 193). Among his concerns were additional traffic congestion generated by this project and the safety of pedestrians and bicyclists.

c. The Hearing Examiner erred in his calculation of transportation fee impacts. He required $51,360.00 for project related traffic impacts. Gig Harbor City Ordinance No. 828 requires $517.30 per dwelling unit (Single Family House) for transportation impact fees. Harbor West as planned, proposes 149 dwelling units. The correct fee total is $77,077.70.

d. The drainage way, also known as Wollochet Creek, which flows through the development site, was incorrectly identified as a "Type 5" water by the developer's consultant. PNA's fish habitat expert provided evidence to prove that Wollochet Creek is a "Type 3" water (Exhibit 189). According to GHMC 18.08.090, this creek requires a 35 foot buffer. The associated wetland to Wollochet Creek (near the northern property boundary) was incorrectly identified as a "Category 3" wetland by the developer's consultant. PNA's wetland experts identified this wetland as a "Category 1" (Exhibit 94), which requires a 100 foot buffer around the entire wetland -- not just the partial buffer as proposed by the developer. In addition, the developer is counting the wetland and stream buffers as open space that will provide recreational opportunities. Utilizing buffers as open space, and allowing recreational activities, would provide less protection to stream and wetland from resident "traffic" and associated activities.

12. The Hearing Examiner outlines his findings under which the proposed residential development would be approved under GHMC 17.90.050. This section of the regulations state that development will not be detrimental to the public welfare, injurious to the environment, inconsistent with, or injurious to the character of the neighborhood. The proposal does not meet the intent of the PUD. Specifically, this plat does not encourage the conservation of natural topographical features. The wetlands and streams are required to be preserved. Virtually all the rest of the parcel is proposed for intense development. The record is replete with public testimony concerning the potential inconsistency with and/or injury to the surrounding neighborhoods and the environment.

13. As approved, the development would not meet the intent or requirements of the Gig Harbor Comprehensive Plan and Gig Harbor's Development Regulations, nor would it meet the requirements of the Pierce County-wide planning policies, or the Growth Management Act.

14. Pursuant to GHMC 19.06, the PNA respectfully requests the council reverse the hearing Examiner's decision.

15. I have read this Notice of Appeal and believe its contents to be true.

Sincerely,

SMITH ALLING LANE, P.S.

Robert E. Mack for by Michael E. McAleenan
Robert E. Mack

Michael E. McAleenan

Marian Berejikian, Technical Director, PNA

REM:sl

cc: Peninsula Neighborhood Association

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Sincerely,

SMITH ALLING LANE, P.S.

_____
Robert E. Mack

_____
Michael E. McAleenan

Marian Berejikian
Marian Berejikian, Technical Director, PNA

REM:sl

cc: Peninsula Neighborhood Association

Smith Alling Lane

A Professional Services Corporation

Attorneys at Law

1102 Broadway Plaza, #403
Tacoma, Washington 98402
Tacoma: (253) 627-1091
Seattle: (425) 251-5938
Facsimile: (253) 627-0123

FAXED

Douglas V. Alling
Grant B. Andersen
Joseph R. Cleere
Barbara A. Henderson
Edward G. Hudson
Edward M. Lane
Linda Nelson Lyons, CPA
Robert E. Mack
Timothy M. Schellberg
Daniel C. Smith (Ret.)
Michael E. McAleenan

FACSIMILE TRANSMITTAL

TO: Ms. Marian Berejikian
Peninsula Neighborhood Association
Fax No. 858-3586

City of Gig Harbor, Clerk
Fax No. 851-8563

Mr. Clark Davis
Brown, Davis & Roberts
Fax No. 858-8646

Mr. William Lynn
Gordon Thomas Honeywell
Fax No. 620-6565

Ms. Carol Morris
Attorney at Law
Fax No. 206-780-3507

Mr. Nick Natiello
Fax No. 851-7778

FROM: Robert E. Mack

DATE: March 23, 2000

TIME: 12:00 noon

RE: Harbor West PUD

FILE NUMBER: 1365-05

NUMBER OF PAGES (including this cover sheet): 3

DOCUMENTS TRANSMITTED: 3/23/00 letter to Gig Harbor Clerk (supp. appeal document)

SPECIAL INSTRUCTIONS: fyi

ORIGINAL BEING MAILED: Yes

TO VERIFY RECEIPT ASK FOR: Carla, Ext. 115

Smith
Alling
Lane

A Professional Services Corporation

Attorneys at Law

1102 Broadway Plaza, #403
Tacoma, Washington 98402
Tacoma: (253) 627-1091
Seattle: (425) 251-5938
Facsimile: (253) 627-0123

Douglas V. Alling
Grant B. Anderson
Joseph R. Cicero
Barbara A. Henderson
Edward G. Hudson
Edward M. Lane
Linda Nelson Lyons, CPA
Robert E. Mack
Timothy M. Schollberg
Daniel C. Smith (Ret.)

Michael E. McAleenan

March 23, 2000

VIA FACSIMILE: 253-851-8563

City of Gig Harbor, Clerk
3105/3125 Judson Street
Gig Harbor, WA 98335

Re: Harbor West PUD SUB No. 98-01

Dear Sir or Madam:

The following is a supplemental appeal document filed on behalf of the Peninsula Neighborhood Association. You requested references to the hearing examiner's record regarding issues raised in our appeal. This document provides such references to the transcribed record before the hearing examiner.

A. Wildlife Habitat/Wetlands Issues Testimony.

1. Mr. Couto: I Tr., 130-136.
2. Mr. Morfee: I Tr., 147-149.
3. Mr. Dale: I Tr., 161-163, 166-169.
4. Ms. Ryba: I Tr., 163-165.
5. Mr. Deming: III Tr., 80-81, 160, 165-166.
6. Ms. Berejikian: IV Tr., 16-22.
7. Mr. Brown: IV Tr., 26-27.

B. Stormwater Testimony.

1. Mr. Fox: I Tr., 111-116.

2. Mr. Morfee: I Tr., 137-139, 143-144.

3. Mr. Dale: I Tr., 184-192.

4. Mr. Willis: I Tr., 212-213.

C. Traffic Impact Testimony.

1. Mr. Wessels: I Tr., 117-125; IV Tr., 55-66.

2. Mr. Dale: I Tr., 174-184.

3. Mr. Brown: IV Tr., 28-34.

D. Parks Impact Testimony.

1. Mr. Gilmore: I Tr., 55.

E. GMA/Comprehensive Plan Consistency Testimony.

1. Mr. Morfee: I Tr., 149 et seq.

Sincerely,

SMITH ALLING LANE, P.S.

Robert E. Mack

REM:cjs
cc: Carol Morris (via fax)
cc: Bill Lynn (via fax)
cc: Nick Natiello (via fax)
cc: North Creek Homeowners Ass'n
Attn: Clark Davis, Attorney (via fax)
cc: Peninsula Neighborhood Association (via fax)

rcpt # 41091 $ 120.00
ck # 1232

RECEIVED
CITY OF GIG HARBOR
FEB 14 2000
PLANNING AND BUILDING SERVICES

BEFORE THE CITY COUNCIL OF THE CITY OF GIG HARBOR

NICHOLAS NATIELLO, Appellant CITY OF GIG HARBOR, Respondent	NO. HARBOR WEST PUD SUB 98-01. APPEAL OF THE CITY OF GIG HARBOR HEARING EXAMINER'S DECISION

I, NICHOLAS NATIELLO, Ph.D., 5812 Hunt St. NW, Gig Harbor, WA., file this appeal of the Examiner's decision. I testified , submitted written statements and cross-examined the applicant's expert witnesses and the City's Planning Director. I respectfully submit the following for your review.

(1) . The Examiner erred when he adopted Ray Gilmore's Staff report when under my cross examination Gilmore admitted to the Examiner that he had not read my material.

(2) The Examiner erred when he failed to consider the fact that Gilmore had written to the applicant that it should resubmit its applicant as a PRD in light of recent Washington case law.

(3) The Examiner erred when he allowed Harbor West to utilize an illegally built connecting road to 54th Ave since the US Army Corps of Engineers ordered it removed.

(4) The Examiner erred since he lacks the authority to approve Harbor West as a rezone.

(5) The Examiner erred since he lacks the authority to approve Harbor West's variances.

(6). The Examiner erred when he ignored the fire safety expert's report and disallowed testimony.

(7). The Examiner erred in approving lots having more than 40% of impervious coverage.

(8) The Examiner erred since he did not require the improvement of the unsafe North Creek Lane which Harbor West's engineer admitted it will use as an ingress and egress road to its PUD.

(9). The Examiner erred in failing to consider Harbor West's community incompatibility.

(10). The Examiner erred since Harbor West's $53,360 road fund is insufficient and will not correct unsafe roads because additional public funds are not available to improve the unsafe roads. .

(11) The Examiner erred since not all of the property owners in the proposed Harbor West have signed an affidavit approving the building of the proposed Harbor West PUD.

(12). The Examiner erred since Pierce County not Gig Harbor should process Harbor West.

(13). The Examiner erred since the GHMCs and/or Comprehensive Plan does not allow 10 single family homes to built on an acre of land in R-1 residential zoning.

(14). The Examiner erred since he did not take into consideration that the City allowed headwaters of Wollochet Creek to be impounded to construct an expansive lake which destroyed fish habitat and cut off the flow of water in that section of Wollochet Creek located on the Harbor West site.

RELIEF SOUGHT

(1) Pursuant to GHMC 19.06.005(A), I respectfully request the Council reverse the Examiner's decision. (2) Based on *Johnson vs.City of Mount Vernon*, 37Wn. App.214 [1984], the City Council has the discretion to deny a PUD even though the PUD complies with the GHMCs and the G.H. Comprehensive Plan, if it believes the PUD is inappropriate and does not provide any benefit to the community and the environment. I respectfully request the Council disapprove the Harbor West PUD.

What follows is a discussion of the above issues with references to the facts in the record.

ISSUE 1 --- INVALID STAFF REPORT

At the May 26, 1999 Hearing, I orally testified and presented a 109 page document to the Examiner and the City. [EXH 99]. At the May 5, 1999 Hearing, the Examiner had angrily refused to allow me to question Planning Director, Ray Gilmore, about the material he had presented to the public. The Examiner promised me that I would be able to cross examiner Ray Gilmore when I made my presentation. However, on May 26, 1999, Gilmore did not attend the Hearing and I was unable to question him.

Carol Morris, City Attorney, supported Gilmore's absence and in writing (EXH 142) alleged that Gilmore was not required to attend any of the Hearings even though we were appealing a determination that Gilmore himself had authored. Morris stated (EXH 142) the fact that Gilmore attended any of the Hearings was pure generosity on Gilmore's part. She told the Examiner (EXH 142) that nothing in the GHMCs required that Gilmore had to attend an Appeal Hearing. I told the Examiner (EXH 141) that nothing in the GHMCs allowed Gilmore to not attend an Appeal Hearing, appealing a determination that he, and he alone, had authored. I can't cross examine a piece of paper. All other attorneys, including the applicant's attorney, wanted Gilmore to attend the hearings.

At the May 26, 1999 Hearing, the Examiner cut my presentation short "because there were other people who wanted to talk", even though PNA and other appellants had earlier told the Examiner that, since I would be presenting similar issues, they would defer to me on some issues to avoid redundancy. At that point, I had taken less time than the prior appellants.

Without provocation and explanation, Morris walked out of the May 26 meeting before I had concluded my presentation and never returned. A few days later she apologized in writing only to the Examiner. I was disappointed that she did not hear my presentation to hear my position.

Finally, a meeting was set for December 8, 1999 wherein I would be able to cross examine Gilmore. Under my cross examination, the taped record will show that Gilmore stated, **"I did not read your material known as exhibit 99 because I was too busy with other things."** The Examiner erred when he adopted Gilmore's staff report and ignored the fact that Gilmore admitted he had not read and considered my Exhibit 99 and he knew that Gilmore was not present at the May 26, 1999 Hearing when I orally delivered it.

Carol Morris, in the City's staff report, did not respond to all my issues but selected only what she wished to respond to in my Exhibit 99. In addition, she took the liberty of restating my issues, using her own language, after putting a spin on my language. The response she gave in the staff report was not an answer to my issue but an answer to her bogus restatements of my issues. Whether Morris did it intentional or unintentionally, the result is the same, i.e., it prejudiced my presentation of my issues and violated my due process.

To make matters even more convoluted, Gilmore in his staff report acts as if he has read my Exhibit 99 because he refers to it and signed the staff report. Perhaps Morris may have written Gilmore's staff report. Morris states in her writings that she regularly drafts memos which are signed by others. The point is that the Examiner erred when he adopted Gilmore's staff report when he knew Ray had admitted he had not read my Exhibit 99. I am a key participant in this process. Over a three year period, I researched and wrote 45 memos. Yet, my Exhibit 99 which contains some of the issues has been ignored by Gilmore. Morris is not the City's Planning Director, Ray is.

Unfortunately, most citizens do not possess the skills, time or interest in dealing with this subject matter, Consequently, if it were not for people like me and PNA, the Harbor West PUD would be a slam-dunk and Bill Lynn and Carol Morris would be looking for work. The land use permitting process should not be so citizen unfriendly.

ISSUE 2 --- GILMORE ASKS THAT THE PUD BE RESUBMITTED AS A PRD.

Please refer to page 51 & 52 of my Exhibit 99 and my Exhibit 21 as evidence that I have presented to the Examiner what I am now presenting to the Council. Exhibit 21 is a memo that I wrote requesting that the City not negotiate a PUD with Harbor West but ask them to build a normal subdivision. I pointed out that if the City Council looked at how the PUD would adversely impact the community, the Council had the right to simply refuse to approve the PUD. To support my legal position I cited Johnson v. City of Mount Vernon, (1984) which held that the City had the discretion to deny a PUD even though the PUD density was authorized by the City's PUD ordinances. I also

cited Citizens of Mount Vernon v. City of Mount Vernon (1997) and Lutz v. Longview (1974). Ray Gilmore wrote to agent Carl Halsan concerning the unsoundness of Harbor West as a PUD.

Gilmore wrote agent Halsan and stated: **"Staff has extensively discussed this application with the City's legal adviser and issues need to be resolved before we can proceed with this application."** (EXH 99, page 51, Gilmore's letter dated 5/12/99). **"In light of the recent Washington case law respective to Planned Unit Developments (PUDs) (Citizens v. Mount Vernon, 133 Wn. 2d 861 1997), you should consider resubmitting this application as a Planned Residential Development (PRD), per Chapter 17.89. If your legal advisor has any questions, he may contact the City's Legal Counsel, Carol Morris, at Ogden-Murphy-Wallace.**

It is obvious that Gilmore was concerned about the veracity of the Harbor West PUD and advised its proponents to resubmit Harbor West as a PRD, but he did not send a copy to any of the opponents. Since Harbor West's attorney Lynn was getting everything his proponents wanted, he did not change to a PRD. It is unfair that Gilmore, for reasons known only to him, feels an obligation to provide legal advice, provide legal counsel and land planning advice to a proponent building a PUD with a gross profit of thirty million dollars, who has its own attorney, agent and substantial resource personnel. Gilmore's actions are suspect and violate the Fairness Doctrine.

As I stated in my Exhibit 21 and Exhibit 99, if the City Council feels that the Harbor West PUD is inappropriate it can not approve it as a PUD. In *Johnson v. City of Mount Vernon*, the Mt. Veron Council had the discretion to deny a proposed PUD even though the PUD density was authorized by the City's PUD ordinance. Later in this document [Issue 4- Rezone], I state that the PUD is a rezone and it does not comply with the R-1 residential zoning. [Issue 13 - Density]. But, even if it did conform, each Council member can cast their vote to not approved the PUD and ask the developer to file a new application to build a normal subdivision.

ISSUE 3 --- ILLEGALLY BUILT CONNECTING ROAD TO BE REMOVED.

To build a connecting road to 54th Ave. NW, the Harbor West wetlands were illegally filled, Wollochet Creek illegally channelized and a culvert illegally installed. I alerted the US Army Corps of Engineers (USACE) and Washington Fish & Wildlife (WDFW). Both Agencies investigated, issued a Stop Work Order and required that the Harbor West wetlands and stream be restored to its original state and the culvert removed. (EXH 39 & 99). To date, the restoration has not been accomplished.

In reckless disregard of the USACE, WDFW, and ignoring my testimony, the Examiner approved Harbor West's connecting road through the wetlands and Wollochet Creek and stated in his Decision [paragraph 8(g), page 9], that **"the proposed connection to 54th Avenue will be located in a corridor that has been previously channelized and culverted by prior land use actions."** He distinguishes "prior land use actions" from "new instream work" and states, **"(Any new instream work will be required to comply with all federal, state and city standards)."**

The Examiner completely ignored the fact that the existing corridor that has been previously channelized and culverted must be restored and the illegal fill material and culvert removed.

I testified before the Examiner and submitted documents from USACE and WDFW (documents which the City already possessed) and repeatedly informed the Examiner, orally and in writing, that the "existing corridor" would have to be totally removed as ordered by the USACE and WDFW (EXH 99); The Examiner erred because he admittedly based his decision on misinformation that Harbor West's **proposed** connecting road could simply use the "existing corridor", when the Examiner knew the "existing corridor" would be eliminated. (EXH 99. page 42)

ISSUE 4 - - - EXAMINER CANNOT APPROVE A REZONE

GHMC §17.66 prohibits the Planning Director and/or the City Hearing Examiner from approving a REZONE, but the Director and the Examiner have illegally done so. The court decisions in *Citizens of Mount Vernon vs. City of Mount Vernon* (1997); *Lutz v. Longview* (1974); *Johnson v. City of Mount Vernon* (1984) clearly consider Harbor West to be a Rezone. The Hearing Examiner ignored my oral and written testimony which I presented at the May 26, 1999 Open Record Public Hearing (EXH 99). He also ignored all the pertinent and appropriate court rulings that I presented, as stated above. (EXH 99) He exceeded his authority when he illegally approved Harbor West's Rezone. GHMC §17.66 states that only the City Council may approve a rezone which is a

complicated process, involving, but not limited to, public hearings. After reviewing Carol Morris' legal remarks concerning the rezone issue (EXH 188) I am more convinced of my position.

ISSUE 5. - - - EXAMINER CANNOT APRROVE VARIANCES

GHMC §17.16.060 provides that the minimum front yard be 25 feet, Harbor West is 15 feet; the minimum rear yard be 30 feet, Harbor West is 10 feet; the minimum side yard be 8 feet, Harbor West is 0 to 5 feet. The Hearing Examiner has exceeded his authority by approving any and/or all the above variances and violated GHMC §17.66.020(A)(1), §17.01.060 and §17.16.060. In accordance with GHMC §17.66, only the City Council may approve variances. When Carl Halsan, agent for Harbor West and former Chairman of the Planning Commission, filed Harbor West's application, he asked for variances. Halsan has never gone on record in his application or at any time, at any of the numerous hearings, that Harbor West was entitled to the variances simply because it was a PUD. Halsan knew that the Council can only approve the requested variances.

ISSUE 6 - - - FIRE SAFETY EXPERT WITNESS.

Thomas V. Kraft, CFPS, an Expert Fire Safety Engineer, determined that Harbor West must have a south access road to enable emergency apparatus to be able to access all the homes in the south end of Harbor West.(EXH 201). Although Mr. Kraft was present at the December 8, 1999 Hearing, the Hearing Examiner wrongfully did not allow the Expert Witness Kraft to make an oral presentation and submit himself to cross examiner. The Examiner erred when he completely ignored the Fire Safety Expert Witness and his document and approved, without fully addressing the issue, Harbor West without an emergency access road from the south, violating GHMC §15.12 and RCW 58.17.170. The Examiner asked North Creek Homeowners attorney Brown, city attorney Morris and Harbor West's attorney Lynn to file legal briefs in support of, or in opposition to, my submitting Kraft's expert witness fire safety report. (EXH 201). Attorney Morris (EXH 198) and attorney Brown (EXH 199) filed a legal brief in support of accepting the Kraft Report as evidence. Attorney Lynn who objected at the December 8, 1999 Hearing to admitting Kraft's report into evidence and allowing Kraft to testify and be crossed examined, was unable to produce legal authority or case law to support his objection. (EXH 200). The Examiner should have scheduled another open public hearing to allow our expert witness to make an oral presentation and submit himself to cross examination but this was not done. Clearly the Examiner erred and the fire safety issue was never fully addressed.

ISSUE 7 - - - BUILDING LOTS EXCEED REQUIRED MAXIMUM OF IMPERVIOUS SURFACE.

GHMC §17.16,060(F) states no more than 40% of each building lot can be covered by an impervious surface, (building, driveway, sidewalks, patio, courtyard, etc.), but the Hearing Examiner wrongly approved Harbor West after he was advised orally and in writing the impervious surfaces exceeded 40%. (EXH 96). The Examiner erred when he approved Harbor West knowing that some of the building lot had an impervious surface covering over 50%.

ISSUE 8 - - - NORTH CREEK LANE UNSAFE INGRESS AND EGRESS FOR THE PUD.

Harbor West's traffic engineer admitted at the May 26, 1999 Open Public Hearing under cross examination that 80% of the traffic from Harbor West will travel on North Creek Lane, a primitive, unsafe, narrow private road presently maintained by North Creek Estates. The North Creek Homeowners' attorney Steve Brown filed a legal brief concerning this matter, (EXH 135) pointing out that 80% of Harbor West's traffic would use North Creek Lane and not all the lots in Harbor West had a legal right to use North Creek Lane. Thereafter, the City stated let's pretend that Harbor West traffic would not use North Creek Lane when everyone knew better. Examiner erred when he approved Harbor West without requiring road improvements of the unsafe street.

ISSUE 9 - - - PUD NOT COMPATIBLE WITH SURROUNDING SUBDIVISIONS.

GHMC §17.16 and §17.90 require that Harbor West, even as a PUD, be compatible with the existing single family residential area. The average lot size of subdivisions bordering Harbor West is 15,000 square feet. The Harbor West average lot size is only 5,000 square feet. (EXH 94, 96 & 99).

ISSUE 10 - - - THE PUD'S TRAFFIC IMPACTS NOT MITIGATED.

The Examiner calculated road improvements involving Harbor West amounted to $893,478 but asked Harbor West for only $51,360. Since no public money is available, needed road improvements will not be done and Harbor West will get its $51,360 returned with interest. This makes the traffic mitigation a mockery of public safety! I made an oral and written presentation on May 26, 1999 at the Hearing that Pierce County required nearby Chelsea Park to **pay in full** to bring Hunt Street to Pierce County road standards because public funds were not available. Lexington Home Park (1/2 mile away) **to fully pay** for the improvement of an unsafe intersection because public funds were not available. Cost to Chelsea, $1,500,000; Lexington, $350,000; **Harbor West $0**. (EXH 99).

ISSUE 11 NOT ALL THE HARBOR WEST PROPERTY OWNERS HAVE APPROVE THE PUD.

GHMC §16.08.002, the Examiner is required to have approval from every person with ownership interest in the proposed Harbor West. There is a dispute as to who owns a six acre parcel in Harbor West. (EXH 99). Yet, the Examiner authorized Harbor West without resolving this issue.

ISSUE 12 - - - ILLEGAL ANNEXATION.

The Harbor West annexation was illegal since it failed to notify neighboring landowners who were to be given a chance to appear at a public hearing and be heard to support or oppose the annexation. The Supreme Court in *Tukwila v. King County* required annexation notification and in *Davis v. Gibbs*, the Court invalidated an annexation because there was inadequate public notice. Such is the case with Harbor West. Pierce County not Gig Harbor should process the Harbor West application. Pierce County and the City of Gig Harbor entered into an illegal annexation. (EXH 99).

ISSUE 13--- TEN HOMES ON AN ACRE

GHMC §17.16.060 allows Harbor West to build a maximum of three homes per acre, but, in reality, Harbor West proposes to build ten (10) homes per acre on each **buildable acre**. An acre of land contains 43, 560 square feet. Harbor West's lots are 4316 square feet which results in ten homes per acre. Harbor West is prohibited by GHMC §18,08 from building homes in the wetlands or in Wollochet Creek. The Examiner has allowed ten homes to be crowded on each remaining acre that does not contain wetlands or the creek. However, GHMC §17.90 does not allow transferring homes elsewhere that can't be built in the stream or in wetlands. No where in the GHMCs or the Gig Harbor Comprehensive Plan does it state that there can be as many as 10 homes on an acre of land in R-1 residential zoning. I made an oral/written presentation about this at the May 26, 1999. (EXH 99).

ISSUE 14.- - - HEADWATERS OF WOLLOCHET CREEK IMPOUNDED BY DAM.

The City allowed the headwaters of Wollochet Creek, located at the northern boundary of Harbor West, to be impounded and illegally transformed into a large lake, used merely for landscaping and aesthetics, destroying the fish habitat and spawning grounds at the proposed Harbor West site and on my 32 acre property as well. I put my 32 acres into open space to protect the fish spawning grounds and habitat in Wollochet Creek which is downstream from Harbor West and flows through my property. When the US Army Corps of Engineers orders the dam to be removed and the impounded headwaters of Wollochet Creek released, it will have a substantial affect on Wollochet Creek and the wetlands at the Harbor West site and on other downstream property. (EXH 99) The Examiner has completely ignored this issue.

RELIEF SOUGHT

Pursuant to GHMC § 19.06.005(A) the City Council has the right to reverse the Examiner's decision. I respectfully request the Council exercise its authority, ensure and provide for the public health, safety and welfare, and based on the RCWs, WACs, Case law, which I have presented to the Examiner, the City Council should reverse the decision of the Examiner and disapprove the PUD.

I have personally prepared this appeal, dated Feb. 14, 2000, and believe its contents to be true.

Nicholas Natiello

Nicholas Natiello, Ph.D. (253) 851-7778 5812 Hunt St. NW, Gig Harbor, WA 98335

City of Gig Harbor. The "Maritime City"
DEPARTMENT OF PLANNING & BUILDING SERVICES
3125 JUDSON STREET
GIG HARBOR, WASHINGTON 98335
(253) 851-4278

May 12, 1998

Mr. Carl Halsan
Ray Frey and Associates
P.O. Box 1447
Gig Harbor, WA 98335

RE: Preliminary Plat Application - Harborwest Subdivision/PUD (SUB98-01)

Dear Mr. Halsan:

Staff has extensively discussed this application with the City's legal adviser and several issues need to be resolved before we can proceed with this application:

1. Of utmost critical concern is the need for a second access by FD No.5 and the City Fire Marshal. Preference has been voiced for a second access from the South. The plans submitted have not shown any secondary access to this plat as stated by FD No. 5. This needs to be included.

2. 72nd Street NW (Hoover Road) remains an issue, as we do not have any evidence to show that it has been vacated. Because the applicant desires to use Hoover Road as part of its open space perimeter buffer and density calculation, it must be vacated BEFORE we proceed with the application. The information we have is that Hoover Road is a platted road. Application for vacation of the northern half of Hoover Road must be submitted to the City Council for consideration and action. If Council does not vacate Hoover Road, the application must be revised accordingly.

3. The proposed construction of the road crossing (to 54th Street) of the wetland on Mrs. Zammarello's property was not included in the original wetland evaluation. Perhaps this was an oversight, but this portion of the Wollochet Creek tributary is a wetland and needs to be included as part of the evaluation. Evaluation must include a conceptual mitigation plan for any wetland alteration that will occur.

4. As discussed previously, you should delineate the primary (required) wetland buffer on the plat and differentiate between the required primary and any additional buffers which the developer plans to provide.

(page 6)

EXH 99 - 51

5. The Category III wetland on the southeast corner of the proposed plat needs to have a buffer delineated on the preliminary plat map. Per our previous discussion, this may be shown as the primary wetland buffer. Any additional buffers should be so noted.

6. Pierce County needs to approve the road approach onto 54th Street NW before we can proceed further with the application. Pierce County's approval must be in writing.

7. Phased development has been mentioned as a method of constructing the various improvements to the plat. Although we have discussed the phased approach, there has been no resolution as to what should be submitted to the City in order to adequately evaluate phasing. It is my determination that the phased approach must include a description of the number of lots proposed for each phase, location of necessary utilities such as sewer lines, water lines, storm water and detention facilities, and the timing for each phase. Be advised that the preliminary plat is only valid for a period of five (5) years. The phasing plan should contemplate that all development will be completed within this time period.

In light of the recent Washington case law respective to Planned Unit Developments (Citizens v. Mount Vernon, 133 Wn.2d 861, 1997), you should consider resubmitting this application as a Planned Residential Development (PRD), as per Chapter 17.89. A copy of this decision is enclosed. Please check with your legal advisor on this. If he has any questions, he may contact the City's Legal Counsel; Carol Morris, at Ogden-Murphy-Wallace, Seattle.

Because these issues are integral to the review of this preliminary plat, no further action will be taken on this application until these issues have been addressed. Staff will continue to work with the applicant in an effort to resolve these issues. Please call me if you have any questions on this matter.

Sincerely,

Ray Gilmore
Director, Planning and Building

C: Mark Hoppen, City Administrator
Wes Hill, Director, Public Works Department
Carol Morris, City Attorney
Steve Bowman, City Fire Marshal
Steve Osguthorpe, Associate Planner

enclosure

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(Page 7)

EXH 99 – 58

EXH 21

PLEASE PLACE THIS MEMORADUM IN THE PUBLIC RECORD

MAY 14, 1998

From: Nicholas Natiello, Ph.D.

To: Ray Gilmore, Director of Planning and Building Services Department, City of Gig Harbor.

Copy: Mark Hoppen, Gig Harbor City Administrator; Mayor Wilbert.

RE: HARBOR WEST - PLANNED UNIT DEVELOPMENT [PUD] SUB 98-01

You will recall that at the April 21, 1998. meeting we asked you for a written response concerning the material that we presented, and left with you, which included Harbor West as a Planned Unit Development. As we discussed, a PUD is a negotiated agreement between the applicant and the jurisdiction. You and Mark agreed that a PUD is not a matter of right of the applicant.

At the meeting, we urged you to not negotiate a PUD, with Harbor West but to ask them to build the subdivision in compliance with the underlying district zoning, R-1 Single Family low density. Harbor West would be treated like North Creek Estates and Harbor Heights. Obviously, this would make the processing straight forward and avoid the convoluted mess that exists now. Please explain why Harbor West needs to be a PUD when the underlying zoning, using gross acreage calculations, would allow its development up to 127 dwelling units?

In the proposed Harbor West 152 lot subdivision, you have waived all the single-family R-1, zoning requirements of the underlying district regulations. Minimum front yard: 25 feet (5 feet); minimum rear yard: 30 feet (five feet); Minimum side yard: Eight feet (0 to 5 feet); minimum lot width: 70 feet (52 feet max): Buffer zone:30 feet (25 feet). Harbor West is shown in the parenthesis following Single-family R-1 standard zoning. Please cite your authority to do this. GHMCs, WACs, RCWs, etc.

Washington court decisions involving PUDs, consider a request for approval of a PUD, that does not comply with the district's zoning, as a REZONE.. Gig Harbor Municipal Code 17.66.030(B)(1), states that before a PUD which does not comply with the underlying zoning code can be reviewed and evaluated, the Hearing Examiner shall make a finding of fact, setting forth and showing that the proposed PUD will NOT amount to a rezone.

Since Harbor West's PUD is a REZONE, [as shown by case law that follows below], neither you or the Hearing Examiner have the authority to approve it. Approval will violate GHMC 17.66.030(B)(1). A REZONE requires City Council action. Public hearings are required before approval of a PUD. RCW 36.70B.200. PUD agreements are not required, but when considered by a local government, they must first be subject to a public hearing. Laws of 1995, Ch. 347 § 505.

The Washington court cases cited herein show that the proposed Harbor West, as requested, is a REZONE. In Lutz v. City of Longview, 83 Wn.2d 566, [1974], the court held that the request for the approval of a PUD which would authorize the development of property not permitted by the underlying zoning is an act of rezoning and cannot be approved administratively.

In Johnson v. City of Mount Vernon, 37 Wn. App. 214, [1984], the court of appeals restated the rule that a request for PUD approval which does not comply with the underlying zoning is to be treated as a rezone. Johnson involved a proposed PUD that would have resulted in a single-family development at a density that was greater than that authorized by the underlying zoning. While the increase in density was authorized by the City of Mount Vernon's PUD ordinance, the City determined that the proposed increase in density was not appropriate and the City would not approve the PUD as requested by the developer. The developer filed a lawsuit against the City. The court held that the City had the discretion to deny the proposed

(Page 8)

EXH 21

PUD even though the PUD density was authorized in the City's PUD ordinance.

In Citizens of Mount Vernon v. City of Mount Vernon, 133 Wn.2d 861 [December 1997], a local citizens' group challenged the city's approval of a PUD on the grounds that, even though the PUD may have conformed to the City's Comprehensive Plan, the PUD did not comply with the underlying zoning. The court construed RCW 36.70B.030(1) to mean that although specific project decisions must conform to the City's Comprehensive Plan, "conflicts between the City's Comprehensive Plan and a specific zoning code must be resolved in the zoning code's favor." The court also reiterated that the legal effect of approving a PUD that did not comply with the district's zoning code, would be considered a rezoning.

Infrastructure-- If the city and an applicant enter into a negotiated PUD agreement, it must not violate the peoples' due process, prejudice the peoples' interests, violate zoning requirements. The PUD must comply with fire codes and regulations and fire fighting equipment must be able to access all dwellings. PUD approval requires demonstration of available water supply and wastewater treatments. In addition, GMA transportation concurrency will apply, RCW 36.70(6)(e).

Staff and Community support-- Community support and participation in the approval process is critical. The GH Comprehensive Plan, the Municipal Code, land use ordinances and resolutions require that all proposed projects protect the character and environment of surrounding neighborhoods. In the approval process, the ultimate test of whether this has been achieved is the degree of community opposition.

Another issue involving Harbor West's PUD is whether the applicant can include or must subtract critical acreage such as wetlands, Wollochet Creek and steep slopes when calculating the number of lots permitted in a subdivision. For example, Seattle's ordinance bases lot number on net acreage, explicitly excluding critical areas. The number of maximum lots permitted in Harbor West using standard zoning and gross acreage calculations is 127, while calculations using net acreage is 73 maximum lots because Harbor West contains three separate parcels of wetlands and Wollochet Creek upon which no lots may be built. We believe Harbor West should use the net acreage calculation. While Steve, the associate planner points to GHMC 17.90 010 PUD as authorization for Harbor West variances, the GHMC does not provide for density bonuses. Many counties that had bonus density provisions have abandoned bonus density programs as being ineffective and inconsistent. Harbor West should not be allowed to increase the basic density of developable acres when the only reason that it does not build on so called "open space" is because the acreage is undevelopable due to wetlands, creeks or slopes.

The county assessors will allocate the value of open space reserved for the use and benefit of lot owners within a development to the assessed value of the individual lots. Therefore, PUD housing will not confer a tax benefit over developing lots as provided by the underlying zoning.

Please explain your reasons for negotiating a PUD with Harbor West. Please cite all the specific GHMCs, RCWs, WACs, or what ever else you relied upon to exempt Harbor West from all the underlying zoning regulations. Why did you approve Harbor West preliminary plat when you were told by Fire Officials that fire fighting equipment would be unable to access all the dwellings in the subdivision? Why did you violate GHMC 17.90.040 when you were not authorized to allow private, narrow streets?

While there are numerous other questions that I could ask about this issue, if you, in good faith, answer these questions it would be a good start. I am hand delivering this memo to you while there is still time to consider these issues before you make a SEPA determination, etc., and set a date for a public hearing. In other words, this memo is not to be considered all we need to know about your processing Harbor West as a PUD and a REZONE.

Since we have been waiting for over three weeks to receive your written response to this material, which is the same material that was presented and left with you on April 21, 1998, it would be appreciated if you would give the matter priority and consider it as you process Harbor West. Thank you

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EXH 21

CERTIFIED MAIL

DEPARTMENT OF THE ARMY
SEATTLE DISTRICT, CORPS OF ENGINEERS
P.O. BOX 3755
SEATTLE, WASHINGTON 98124-2255

REPLY TO ATTENTION OF

MAR 29 '99

Regulatory Branch

Mr. Ray Gilmore
Department of Planning and Building Services
3125 Judson Street
Gig Harbor, Washington 98335

Reference: 1999-4-00369
Harborwest Development

Dear Mr. Gilmore:

Thank you for the opportunity to comment on the Harborwest subdivision project located in Gig Harbor, Washington. After reviewing the provided information, I have concluded a Department of the Army permit will be required.

A section of the property currently has an unresolved violation of Section 404 of the Clean Water Act. I have enclosed a copy of the Stop Work Order which was sent to the property owner. We are currently waiting for the unauthorized culvert to be removed. This was to have been accomplished last summer, but delays in acquiring local and State permits prevented meeting this deadline. Since there is an unresolved violation on this property, we would not accept an application for the proposed work until the violation is resolved.

If you have any questions, please contact Mr. John Pell, telephone (206) 764-6914.

Sincerely,

Stephen A. Wright
Chief, Enforcement Section

Enclosure

cc:

Nick Natiello
5812 Hunt Street NW
Gig Harbor, Washington 98335

(Page 10)

EXHIBIT 99

State of Washington
DEPARTMENT OF FISH AND WILDLIFE
Region 7 Mailing Address: 600 Capitol Way N - Olympia, Washington 98501-1091 - (360) 902-2808
Region 7 Office location: Natural Resources Building - 1111 Washington Street SE - Olympia, Washington

April 17, 1998

Huber & McGowan
315 39th Avenue SW, Suite 6
Puyallup, Washington 98373

RE: Violation of the Hydraulics Code of the State of Washington RCW 75.20.100, and 75.20.103 for culvert installation in Wollochet Creek, WRIA 15.0081 for access to the project known as Harbor West.

Dear Sir:

The Hydraulics Code of the State of Washington RCW 75.20.100 states that "In the event that any person or government agency desires to construct any form of hydraulics project or perform other work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state, such person or government agency shall, before commencing construction or work thereon and to ensure the proper protection of fish life, secure the written approval of the Department of Fish and Wildlife as to the adequacy of the means proposed for the protection of fish life."

Your construction of Installation of culvert and stream clean out on Wollochet Creek is subject to approval of the Department of Fish and Wildlife and required a Hydraulics Project Approval from this agency. As this project was constructed without a Hydraulics Project Approval, it is in violation of this law.

The following steps need to be taken to bring this project into compliance with the law.

1. A hydraulics Project Approval will be required before taking corrective action.

2. A set of plans showing stream channel restoration, bank protection, and installation of a culvert or other crossing structure with a diameter equal to or greater than the existing average stream channel width.

(Page 11)

EXH 99 4

3. The name, address, and phone number of the contractor who did the work.

4. A copy of the site plan and any mitigation approved by the City of Gig Harbor.

Please call me at your earliest convenience to discuss this matter and to schedule a meeting to develop a plan to correct this problem.

Sincerely,

Stephan A. Kalinowski
Habitat Biologist
Tel. No. (360) 895-3965

cc: Nicholas Natiello, Gig Harbor
Steve Keller, WDfW
Enforcement Division, WDFW

file: Huber.498

Fire Protection Engineering Services
Fire Protection, Safety, & Engineered Risk Management

Interoffice Correspondence

To: Nick Natiello, Ph.D. **At:** PNA – Gig Harbor, Washington
From: Thomas V. Kraft, CFPS **At:** FPE Services - Seattle
CC: file
Date: 12/08/99
Re: Harbor West PUD Subdivision Fire Apparatus Access Review

Scope

The following review is limited to the preliminary plat provided December 2, 1999 for Harbor West PUD Subdivision and the 1997 edition of the Uniform Fire Code, as adopted and amended by the City of Gig Harbor, Washington. Comments are restricted to the traffic pattern and arrangement of roads leading to and within this development with respect to fire department apparatus ingress and access to the proposed single family residences.

Background

The Uniform Fire Code (UFC) is applicable to the arrangement of roads and thoroughfares in that it deals with the most critical of all traffic; fire department apparatus. For the purposes of the UFC, "fire department apparatus" include both vehicles used for fire response and Emergency Medical Service (EMS).

Fire apparatus access over established roads is critical to timely arrival. It should be remembered that fire development within ordinary combustibles (typical wood framing, finish and carpets) will progress from ambient room temperature to over 1200 degrees F (the point at which softening and collapse of structural steel begins) at the ceiling in less than five minutes. Room flashover can occur in residential structures in as little as ten (10) minutes. Similar National Institute of Standards and Technology (NIST) tests have demonstrated that potentially deadly products of combustion (smoke) are produced well before flaming ignition. Many of these compounds have a debilitating effect on individuals, particularly the elderly and young children, that results in deep sleep, slowed breathing, impaired judgment, all of which may lead to death in as little as less than one half hour if escape or rescue is not effected and the fire continues to progress. Even with smoke detectors, a large number of the fire calls

324 SOUTH 309 TH. STREET * FEDERAL WAY, WASHINGTON 98003-4083
TELEPHONE (253) 941-3396 * FAX (253) 941-3398 * E-MAIL kraftfire@aol.com

(Page 13)

EXH 201

are made not by the occupants themselves, who may be sleeping or otherwise in a remote location in the residence from the fire, but from neighbors. Taking into account that the majority of residential fires occurs during the periods of darkness, it can readily be seen that most fire department responses are hampered from the beginning by a delay in identification. Therefore, clear, reliable access is critical to mounting an effective search and rescue of the premises, much less an aggressive fire attack with any expectation of early suppression and building or contents salvage.

Increasingly, the issue of conflagration or multiple residence fire involvement has again become an issue in the United States. As housing density within developments is increased, space separation needed to prevent the spread of fiery brands or windblown embers is reduced. The use of combustible wood shingles and shakes, even with fire retardant chemical additives, will over time make structures increasing vulnerable to these fire threats. Even more of an issue is one of defensible clearspace between housing developments and rural or wildland vegetation. While such threats of wildland/urban interface fires were thought to be confined to dryer climates, there has been an increase in such events in the Pacific Northwest over the past five years. The threat of conflagration or multiple fire spreading to adjoining structures places further demands on the fire department, by requiring an increased number of vehicles to physically be at the incident, as well as the need for their mobility at the scene to redeploy. Again, adequate, reliable access is a key ingredient to successful control of such fires.

As a development and a community mature, existing water supplies (underground mains and pump/storage tanks) may see increasing use. Available flow and pressure may be impacted by growth or seasonal demands. In residential areas the location and arrangement of fire hydrants may become impaired or obstructed, depending upon landscape growth or physical conditions. While every effort may be made to maintain these fixed resources, fire company tactics may still need to shift to an increased reliance, at least at the early stages, upon water carried on the pumper truck to initiate the attack. Once more, the question of how to get these resources to the fire scene will become an issue.

Sound community risk management calls for the Fire Marshal and Fire chief to examine these potential vulnerabilities to both the infrastructure and access. Without question, fire department access by reliable roads is the least adaptable feature within a community once they and the surrounding structures they serve have been built. Therefore, any new development must be closely examined from the standpoint of roads and traffic to clearly develop established avenues of attack (access) and a long-term strategy for managing neighborhood changes as the community develops. Roads, like water, are the life-blood of successful community fire management.

The International Fire Code Institute, who has authored and published the UFC, and the International Fire Marshals Association noted in a recent study that the role of the Fire Department as an EMS provider has increased over the past decade. Prompt EMS arrival and attention is now a standard throughout the majority of municipalities of the United States to improve the chances of survival of citizens during that critical "golden hour". In fact, there

has been a steady increase nationally in "911" calls for EMS services with a conservative estimate of twenty (20) such calls to every one fire call.

The principle challenges to road development from a fire department standpoint are:

- Access
- Width
- Ability to turn around
- Load bearing

Access must take into consideration not just the physical layout or routing to the subject area, but factors such as traffic congestion, slopes and grades, obstructions such as rail crossings or bridges, and seasonal conditions such as ice storms or snow and flooding. These conditions impact reliability or the capacity of the department to reach any structure in the community.

Width is not merely an issue of the design dimension of the road. It must also consider impacts form parking of vehicles or other encroachment. In terms of community risk management, the Fire Chief must consider the historical effectiveness of passive measures such as traffic control signs and enforcement to ensure the reliability of this corridor. Where the degree of encroachment or its frequency exceeds the level of risk from relying upon a single access, then alternative routes must considered. However, alternative routes may be needed even when the primary road is deemed reasonably protected from impairment. This occurs when the number of structures or citizens within an area served by the road is greater than the community accepted standard of risk.

The ability of the vehicle to turnaround, like width is concerned not only with the design lay-out, but community road use habits and the ability to preserve the right-of-way, as well. These experience factors must be included in the determination of the techniques and methods used; and a one-size –fits-all "cookbook approach is to be avoided. Therefore, while the code may list accepted minimum methods, the selection of any of these methods, singlely or in combination, must also meet the fire department's "experience and condition factors" for the project, as well.

Load bearing capability of regular roads, as well as emergency access ways, must be capable of supporting the movement and maneuvering of emergency vehicles. Fire apparatus, particularly pumpers and tenders, are every bit as heavy as commercial transport vehicles, and often feature commercial chassis, as well. As a result, the roadbed must be capable of sustaining this load to prevent collapse or sinking of the vehicle in transit or in position.

The final concept of fire department access deals with emergency ingress/egress. While the life safety provisions of the UFC, Uniform Building Code (UBC), and NFPA 101 Life Safety Code deal with personnel rather than vehicular movement, they do share some crucial common factors. First, both ingress of emergency responders and egress of occupants is considered to be a part of the "path of egress" (life safety) or access (fire department roads).

Second, the degree of obstruction or restriction versus traffic or "occupant load" is considered for the subject area (either development or building). Finally, the potential of common mode failure (i.e.: the ability to involve any portion of the access in a single point obstruction that would render it ineffective) is considered.

Section 902 – Fire Department Access of the UFC addresses the issue of required access (Section 902.2.1) by first stating such access to "any portion of the facility or portion of an exterior wall of the first story of the building is located more than 150 ft from fire apparatus access..." fire apparatus access roads shall be provided.

Exceptions are made for buildings completely protected by automatic sprinklers, because such active protection has been established as an effective method of controlling fires and protecting occupants from smoke and fire effects, as well as providing early warning to emergency responders when installed in accordance with approved methods. In essence, the automatic sprinkler protection then performs the role of the fire department for at least the early stages of a fire.

Where topography does not feasibly permit the construction of a fire department access road, the fire chief is authorized to require additional fire protection features, such as automatic sprinkler protection and/or increased building separation, and/or non-combustible construction. These alternatives are presented in an effort to make the subject structures perform in "self-defense" during the initial stages of a fire, allowing the fire department increased time for deployment. Presumably, the fire department would then prepare a formal pre-plan and tactics in advance of an emergency to address the accessibility issue.

A graded approach to lesser levels of access or alternatives is allowed for areas involving two or less residences. This is presented as a minimum level of "acceptable risk" to the community. However, alternative protection is to be considered in this case, even if it is an unspecified "modification" by the Fire Chief.

It should be noted however, that the alternatives presented to fire department access are for the fire event and do not address the need for timely and reliable access for EMS vehicles. The acceptable level of risk to the community served from delayed EMS access is presumed to be addressed by the individual community.

The UFC is less specific relative to the measures to be taken in determining how a second fire department access is to be constructed. It states, "More than one fire department access shall be provided when it is determined by the chief that access by a single road might be impaired by vehicular congestion, condition of terrain, climatic conditions, or other factors that would limit access."

However, both the UBC and NFPA 101 offer a rationale concerning second means of access that addresses the arrangement. Specifically, when required by the code the two means of access must be "... placed a distance apart equal to not less than one half the length of the maximum overall diagonal dimension..." This concept of "remoteness" between means of

access is used to ensure that at least one route will remain accessible. This element of reliability is further extended to the notion of "common travel distance", or that length of route shared by two access paths. The basic idea is to ensure that neither route nor the occupants served are impaired by an event or condition affecting the other. Therefore, these life safety tenets can be applied, at least conceptually with equivalent effectiveness for secondary fire department access route arrangement, as well.

While the concept of community risk management is not restricted to the prescriptive elements of code, the code does provide a forum for addressing real concerns for public safety. Consider that there are over 11,000 homes in Pierce County Fire Protection District #5. Over the last 5 years, there have been an average of 63.5 house fires per year in this District. Mathematically, there is an 83% chance that a fire will occur in any given year in the completed Harbor West development. The potential for fire is a credible risk that warrants both strategic and planning for the eventuality.

Evaluation

For the purposes of this evaluation, width requirements and dimensions for the subject development access roads are assumed to have been reviewed and can be clearly demonstrated to meet UFC 902.2.2 and the Gig Harbor amendments in the developer's design basis report. It is also assumed that the Fire Chief has undertaken or will undertake the formal development of both fire and medical emergency response pre-plans to address site specific conditions for the development and any exceptions or alternatives to the UFC taken for the project to ensure adequate tactical response with available resources and timely access can be achieved. Both the design basis report and the development specific pre-plan should be available to residents of the community for review.

A summary report by Mr. Nicholas Natiello, PhD was prepared on August 13, 1999 to the Gig Harbor City Attorney, which outlines the technical position of the Pierce County Fire District 5 Assistant Fire Chief, and Gig Harbor Fire Marshal. This report, along with copies of the complete original correspondence, listed as Exhibits 1 –11, were reviewed. In summary, the position of Fire District 5 and the Gig Harbor Fire Marshal for the subject development were in concurrence and on record as late as March, 1999 stating a "... secondary access roadway must be provided in conformance with Section 902.2.1 of the Uniform Fire Code." Further, "I would consider alternative methods of material, such as auto-fire sprinkler and alarm systems, fire resistive wall construction, building separation, the use of fire resistive roofing materials, and increased fire flow. Unless I receive the documentation and a south end fire access road is shown on the plat, Harbor West PUD cannot be approved."

Subsequent to these rulings, it does not appear either alternative means of protection or a south access road were provided by the developer, nor was there any report indicating the change in the Fire Marshal's opinion, which would provide a technical basis and rationale for such a reversal. Mr. Natiello proceeded to seek the technical opinion of other fire service officials, including Fire Chief Franz of Fire District 16, who in turn concurred with the original

determination that a secondary access to the south of the development was warranted and required by code. Finally, in a letter to Senator Oke, the Washington State Fire Marshal's Office responded to an inquiry and clearly stated its concurrence with the determination of the need for the secondary south access road to the development.

The subject development is to include approximately one hundred forty nine (149) single-family residences. Access to the development is presently proposed through a connector from 54Th Avenue Northwest (which connects to Rosedale Street NW) and Beardsley Ave. NW, which connects to North Creek Lane (76TH street) on the south end and to Rosedale street NW on the North end via Schoolhouse Ave. NW. North Creek Lane (as 76Th street NW) connects to the East at 46Th Avenue Northwest. Whether the Beardsley connector or the 76TH Street NW/46Th Avenue Northwest connector will serve as the primary eastern service to the development is currently in contention. However, the feasibility of maintaining both of these connections under at least restricted to fire department access appears to be assured. However, it should be noted that at the North end of each North to South Street that accesses 76th St. NW there will be 90-foot diameter turnarounds just North of electronically controlled gates. Advance planning and coordination will be needed between the developer and Fire District for effective access provisions and on-going communication with the eventual development association to ensure the reliability of these measures.

Both the 54Th Avenue Northwest connector and the North Creek Lane connector clearly provide two points of access service to the northern lobe of the Harbor West development. The access routes do not provide remote separation from each other of at least one half the longest diagonal length of the development from each other (e.g.: If the corner to corner length of the development diagonally is 1500 ft, the remote separation distance of the roads should be at least 750 ft). While Section 902 of the UFC does not specify this separation, further examination of the proposed roadway arrangement within the development certainly supports the risk management rationale. Namely, the serpentine street pattern of loops within the development, intended for a "closed community/reduced traffic accommodation", results in long distances from an alternate point of entry by emergency apparatus should one or the other primary feeder be obstructed.

While the two northern access feeders themselves do not appear to be subject to common mode failure or obstruction, the southern most cul de sac of this development does feature an extended dead-end arrangement. This segment is connected to the southwest lobe of the main access road. The dead-end proceeds to a circular turnaround and thence to an east-west section terminating in a "hammer head". This dead-end section serves seventeen (17) residences. Should weather or parking related obstructions occur at the junction to this portion of the road with the main development thoroughfare, these homes would effectively be isolated from emergency vehicles. This distance would clearly be greater than 150 ft and impact more than two structures. The "T" shaped alley intersection at the south end of the project in the same area requires a much larger intersection area in order to allow a fire engine or other service vehicle sufficient space to make a turn. The "first response" vehicle for Fire District #5 is 33 feet, 3 inches long and 8 feet wide. Therefore, a fire engine could not negotiate the turn, should the alley be considered an alternative route.

Conclusion

The original finding by the Gig Harbor Fire Marshal is both valid from a strict code standpoint, as supported by the concurring documentation of Fire District 5 and 6 Senior Fire Officers and the Washington State Fire Marshal's Office, and from a concern for community risk management. Given the proposed density of this development, lack of other active fire suppression or passive fire protection methods used in construction, and the intent of the code to preserve emergency access as a protection to the community; we conclude that the development should have at least a southern fire department access, as originally recommended by the Fire Marshal. At the minimum, the issue of the southern cul de sac dead-end should be addressed.

While individual circumstances must be weighed against the prescriptive requirements of the code in both the interests of the community and the individual citizen, there does not appear to be sufficient technical documentation to base the deviation from the code in this instance. Both design basis reports by competent and qualified professionals and technical documentation of alternative means and methods used by the fire department to address such differences are an important step in assuring that community interests are rationally addressed and further ensure the continued constructive involvement of interested members of the city in the issues of community protection and risk management.

rcpt # 41090
$ 120.00 ck#

R. Frey & Associates

PO Box 1447 Gig Harbor, WA 98335 **(253) 858-8820**

February 14, 2000

Mayor Wilbert and
Members of the City Council
CITYOF GIG HARBOR
3125 Judson Street
Gig Harbor, WA 98335

RE: HARBORWEST PUD (SUB 98-01)

Dear Mayor Wilbert and Members of the City Council:

This appeal is filed on behalf of the applicant, Harborwest Development with respect to the Hearing Examiner's decision dated January 31, 2000. We are appealing two of the conditions of approval, one included in the decision and one we asked be included in the decision, but it was not. Attached is a separate letter from our attorney, William Lynn, with respect to the school mitigation fees. The applicant intends to appeal this matter in Superior Court, but to the extent the City Council may have any jurisdiction, we are including it as part of our appeal.

Gig Harbor Municipal Code (GHMC) at 19.06.004(4) requires that appeals be in writing and include certain elements:

a. Appellant's name, address and phone number:
Harborwest Development, PO Box 64160, Tacoma, WA 98464, (253) 564-6069

b. Appellant's statement describing his or her standing to appeal:
Appellant is the applicant which gives them standing pursuant to GHMC 19.06.003(B)1.

c. Identification of the application which is the subject of the appeal:
The City identifies the case as SUB 98-01.

d. Appellant's statement of grounds for appeal and the facts upon which the appeal is based:
Detailed statements below.

e. The relief sought, including the specific nature and extent:
Detailed below.

f. A statement that the appellant has read the appeal and believes the contents to be true, following by the appellant's signature:
Included at the conclusion of this letter.

Appeal Issue #1 -- Model Homes

During the public hearing process, the applicant asked the Examiner to include a condition allowing up to four model homes to be built prior to final plat approval (Exhibit #89). The Examiner did not include such a condition. There is currently no provision in the GHMC prohibiting the construction of model homes. As a matter of comparison, Pierce and King County and many other local jurisdictions allow up to four model homes to be built within an approved preliminary subdivision prior to final plat approval.

The purpose of allowing model homes is to allow the builder to demonstrate a variety of housing designs together with all associated on-site improvements, e.g., landscaping, improved driveways, patios, etc. The other jurisdictions that allow model homes require that:

1. they are built to code,
2. only one may be used for a temporary real estate office,
3. they may be sold, but the sale is not considered final until a final plat is recorded, and
4. all public and private roads providing access to the model homes be improved and maintained in a dust free condition.

We would not object to such conditions.

Moreover, there is no risk in the City allowing the construction of model homes. By the time a builder is ready to begin construction of model homes, the preliminary plat will have been approved, road and storm design and construction will be completed, and the final plat process will have begun. The time it takes for a final plat to be recorded, including surveying and City and County review of the final documents, can take months. A builder can build a house in approximately 120 days and builders who build in subdivisions want to "hit-the-ground-running" as soon as a final plat is recorded. Building model homes provides the opportunity for marketing to begin in advance of lots being ready for sale. Potential buyers can actually see the product that will be offered in the subdivision and begin comparison shopping. If they do decide to build or buy in the subdivision, they can begin the process immediately after the final plat is recorded. If model homes are not allowed, there will be an unnecessary and expensive lag-time between the recordation of the final plat and the construction of the first homes. Finally, no one objected to our request at any time during the hearing process, nor are there any good substantive reasons to prohibit the construction of model homes.

Relief Sought -- Allow up to four model homes to be built within the project prior to final plat approval, subject to the following conditions:

a. Model Homes must be built to code and certified for occupancy,
b. Only one model home may be used for a temporary real estate office,
c. A model home may be sold, but the sale will not be considered final until a final plat is recorded, and
d. All public and private roads providing access to the model homes must be improved and maintained in a dust free condition.

Appeal Issue #2 – 25' Perimeter Buffer

Condition of Approval #38 of the Hearing Examiner's decision requires dedication of 25' wide buffer around the entire development. Moreover, the condition requires that lots 146-149 be revised to eliminate two lots so that a 25' wide buffer can be located on the **west** side of the access easement. We argued during the hearing process (Exhibit #89) that dedication of a buffer in this particular location is unnecessary.

An old 60' wide easement is centered on the property line at this location; 30' on the subject site and 30' on the neighboring parcel. The neighboring 2.5 acre parcel is already developed with an estate size home located in the middle of the parcel and has its access to 76th Street via a private driveway located in the center of the parcel. Harborwest proposes to build one of its primary access roads about 150' west of the common property line. The point is that neither Harborwest nor the adjacent property owner ever needs to construct an access road in the 60' wide easement area. However, no structures other than roads can ever be build in any of the 60' wide area because of the restriction of the easement. Therefore, the entire 60' wide area will effectively act as a buffer so long as neither party builds any roads in the 60' wide area.

The purpose of the perimeter buffer requirement of the zoning code is to buffer new residential development from established residential development, not new residential development from public or private roads. The City has never required new residential development to provide a 25' perimeter buffer along road frontages. The point here is that if Harborwest had opted to locate one of the access roads within the 60' easement area, then there would be no perimeter buffer area required or even possible in this location.

The Examiner's condition requiring a 25' wide buffer to be established west of the 60' wide easement will effectively be creating an 85' wide buffer between Harborwest and its neighbor to the east. Most of the 85' will be on Harborwest property (30 feet of easement and another 25 feet of buffer) in addition to the 30 feet of the neighbors property. Effectively, the Examiner is requiring the widest buffer to be established in the area that needs it the least.

Our conclusion is that if the plat is approved as we've proposed, no buffer is needed in this particular area because no structures can ever be built in the easement area and therefore it will function as a buffer. If however a road was built within the 60' wide easement area, no buffer would be needed or required. Either way, the Examiner's condition doesn't pass the common sense test.

Relief Sought – Delete condition #38 and allow Harborwest to build lots 146-149 as proposed.

I have read the appeal and believe the contents to be true.

Sincerely,

Carl E. Halsan
Project Manager

c: Don Huber
Clark McGowan
William Lynn

The Hearing Examiner issued a decision denying four appeals challenging the MDNS, and providing that any further appeal would be to the Superior Court. However, the Applicant's appeal of the school mitigation fees in the same MDNS was denied in a separate decision (which also approved the PUD) and which provided that any appeal would be to the City Council. The Applicant believes and asserts that this statement about the MDNS appeal being made to the City Council was erroneous. The Applicant intends to appeal the decision denying its MDNS appeal in the Superior Court. Nonetheless, to the extent the Council may have any jurisdiction, the Applicant challenges 1-5a. of the Examiner's decision denying the Applicant's SEPA appeal. The basis for this portion of the appeal is the same as set forth in the Applicant's SEPA appeal dated February 23, 1999, a copy of which is attached.

COPY

LAW OFFICES

GORDON, THOMAS, HONEYWELL, MALANCA, PETERSON & DAHEIM, P.L.L.C.

TACOMA OFFICE
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 572-5050
FACSIMILE (253) 620-6565

SEATTLE OFFICE
ONE UNION SQUARE
600 UNIVERSITY, SUITE 2101
SEATTLE, WASHINGTON 98101-4185
(206) 447-9565
FACSIMILE (206) 676-7575

REPLY TO TACOMA OFFICE

WILLIAM T. LYNN
ATTORNEY AT LAW
DIRECT (253) 620-6416
(206) 676-6416
E-MAIL lynnw@gth-law.com

February 23, 1999

Ray Gilmore, Planning Director
CITY OF GIG HARBOR
3125 Judson Street
Gig Harbor, WA 98335

RE: Harbor West

Dear Mr. Gilmore:

This letter shall serve as the appeal of the MDNS issued by the City on February 10, 1999. The Appellant is the applicant, Huber & McGowan Development. The name and address of Appellant and its attorney are set forth below:

Appellant:	Attorney:
Don Huber and Clark McGowan Huber & McGowan Development P.O. Box 64160 Tacoma, WA 98464 Tele: (253) 564-6069	William T. Lynn Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim P.O. Box 1157 Tacoma, WA 98401-1157 Tele: (253) 620-6416

This appeal challenges two mitigation measures set forth in the DNS, specifically the condition regarding school impact mitigation and the condition regarding park, recreation and open space. The bases for the appeal are as follows:

1. Neither of the mitigation measures identified are necessary to reduce the impacts of the project to a level of non-significance.

2. The mitigation measures are contrary to RCW 43.21C.060 because the mitigation measures are not based on impacts identified in the environmental documents and because the mitigation measures are not tied to any specific written adopted policies of the City cited in the MDNS.

[1003857 v1]

GORDON, THOMAS, HONEYWELL
MALANCA, PETERSON & DAHEIM, P.L.L.C.

3. The mitigation fees imposed are unlawful under RCW Chapter 82.02.020 et seq.

4. With respect to the school impact mitigation, the mitigation measure improperly delegates authority for environmental mitigation from the City to the School District, effectively giving the School District a veto power over school mitigation. In addition to wrongfully delegating the authority, the mitigation measure is erroneous because the School District's veto power makes it contrary to RCW 43.21C.060 which requires that mitigation measures be reasonable and capable of being performed.

5. The school mitigation measure is contrary to the Applicant's right to due process and is contrary to the procedural requirements of SEPA. The school mitigation measure is also contrary to the Applicant's constitutional rights because it is not sufficiently clear that it can be understood and/or reviewed by a decision-maker.

6. The parks, recreation and open space mitigation measure is unlawful because it does not reflect the actual impacts of the project as required by RCW 43.21C.060. Specifically, the mitigation measure fails to take into account the fact that the project will provide resource conservancy, resource activities and linear trails in an amount which exceeds the requirements of applicable City plans and policies.

7. Both of the mitigation measures cited above are in violation of the Applicant's constitutional rights because they are not even roughly proportional to the impacts of the project.

8. The mitigation measures are arbitrary and capricious, clearly erroneous, and contrary to law.

These conditions should be deleted. Please advise us if anything further is necessary to perfect this appeal.

Very truly yours,

William T. Lynn

WTL:fto
cc: Ray Gilmore, Planning Director
Carl Halsan
Clark McGowan
Don Huber

[1003857 v1]

Towslee, Molly (Gig Harbor)

From: Hazelgate@aol.com
Sent: Sunday, April 16, 2000 2:48 PM
To: towsleem@lesa.net
Subject: Bridge Opposition

Molly, Would you please distribute a copy of this letter to all City Council
Members and Mayor Wilbert. Thank you. G. & C. Bronson

Dear City Councilmember xx:

I am writing to request that the City of Gig Harbor appeal the Final

Environmental Impact Statement for the SR 16/Union Avenue Vicinity to SR 302

Vicinity project. The FEIS is inadequate as mitigation measures arelacking

or incomplete for numerous areas.

Please support the majority of voters in your City who feel that they are

getting a bad deal with the new Tacoma Narrows Bridge.

Signed: Gail and Chuck Bronson , 9522-86th Ave. NW, Gig Harbor, WA