RESOLUTION NO. 552

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, RELATING TO LAND USE AND ZONING, RENDERING THE FINAL DECISION OF THE CITY ON CASE NO. SUB 98-01 FOR THE HARBORWEST SUBDIVISION AND PLANNED UNIT DEVELOPMENT APPLICATIONS, LOCATED AT 5200 - 76TH STREET N.W. IN GIG HARBOR, WASHINGTON.

WHEREAS, applicants Huber & McGowan Development submitted two applications to the City, one for a planned unit development under Gig Harbor Municipal Code ("GHMC") chapter 17.90 and one for a preliminary plat subdivision under chapter 16.05 GHMC, for a residential development known as the Harborwest PUD (hereinafter the "project"); and

WHEREAS, the City State Environmental Policy Act ("SEPA") Official issued an Mitigated Determination of Non-Significance ("MDNS") for the project on February 10, 2000; and

WHEREAS, the mitigation for school and open space/recreation impact fees identified in the MDNS was appealed by the applicant; and

WHEREAS, the Peninsula School District, Peninsula Neighborhood Association, Residents of North Creek Estates and the North Creek Homeowners Association appealed the MDNS issued by the City, asserting that the SEPA Responsible Official should have required that an Environmental Impact Statement issue for the project; and

WHEREAS, the City Hearing Examiner held open record public hearings on the planned unit development and preliminary plat applications as well as all SEPA appeals on May 5, 1999, May 19, 1999, May 26, 1999, June 11, 1999, June 18, 1999 and December 8, 1999; and

WHEREAS, the Hearing Examiner issued his decisions on the applications and all appeals on January 31, 2000; and

WHEREAS, the City received appeals of the Hearing Examiner's decisions from the applicant, the Northcreek Homeowners Association, the Peninsula Neighborhood Association, and Nicholas Natiello; and

WHEREAS, GHMC Section 18.04.230(E) provides that the Hearing Examiner's decision on a threshold determination (such as the decision whether an EIS should issue) is the final decision of the City; and

WHEREAS, GHMC Section 18.04.230(E) and (F) provide that appeals of the Hearing Examiner's decision on SEPA mitigation shall be filed with the City Council and consolidated with any appeals of the decision on the underlying permit; and

WHEREAS, appeals of the Hearing Examiner's decision on SEPA mitigation and the underlying permit are handled by the City Council pursuant to chapter 19.06 GHMC; Now, Therefore,

THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, HEREBY RESOLVES AS FOLLOWS:

FINDINGS AND CONCLUSIONS

Section 1. **Closed Record Public Hearings.**

A. Notice. The closed record hearing before the Gig Harbor City Council was convened on March 23, 2000. At the end of this hearing, the City Council closed the closed record hearing, but continued the closed record hearing for the purpose of continuing Council deliberations on April 10, 2000, April 24, 2000 and May 11, 2000. All required public notice was provided.

B. Appearance of Fairness.

1. Steve Ekberg. At the outset of the March 23, 2000, hearing, the Mayor asked the Council if any member wished to disqualify him or herself on appearance of fairness or conflict of interest grounds. Councilmember Steve Ekberg stated that he had one client among the appellants and one among the applicants, so he would disqualify himself. He left the room and did not participate in the remainder of the closed record appeal.

2. Mark Robinson. At the outset of the March 23, 2000, hearing, and at all subsequent continued deliberation sessions for the closed record appeal, the Mayor also asked if any member of the public wished to challenge the Mayor or any Councilmember's participation in the closed record hearing on appearance of fairness or conflict of interest grounds. Bill Lynn, attorney for the applicant, asked Councilmember Mark Robinson not to participate in the closed record hearing because of his status as a board member or recent board member of Peninsula Neighborhood Association, one of the appellants. Mr. Lynn also stated his objection in a letter (Exhibit 215) to City Attorney Carol Morris, dated March 22, 2000. Councilmember Robinson stated his intent to participate, and the remaining members of the Council then voted unanimously to disqualify Councilmember Robinson from participation in the remainder of the closed record appeal. Councilmember Robinson did not participate in the closed record hearing.

3. Derek Young. At the outset of the April 10, 2000 continued hearing, Councilmember Derek Young stated that he had recently learned of a possible conflict of interest relating to the project, due to his employment as a sales associate at a realty office that might handle sales of property from the project. A more detailed statement of Mr. Young's possible conflict of interest is contained in the letter from City Attorney Carol Morris to all appellants, dated April 7, 2000. Councilmember Young then disqualified himself and did not participate in any deliberations on the project.

4. Mayor Gretchen Wilbert. At the outset of the March 23, 2000, hearing, Mayor Wilbert disclosed that she was a dues paying member of the Peninsula Neighborhood Association, one of the appellants. She stated that she had not attended any regular PNA meetings. Mayor Wilbert was not challenged by any member of the public on appearance of fairness or conflict of interest grounds, and she participated in all of the hearings, with the exception of April 24, 2000 (due to a scheduling conflict).

5. Marilyn Owel. At the outset of the March 23, 2000, hearing, Councilmember Marilyn Owel disclosed that she was a dues paying member of the Peninsula Neighborhood Association, one of the appellants. She stated that she had not attended any regular PNA

meetings. Councilmember Owel was not challenged by any member of the public on appearance of fairness or conflict of interest grounds, and she participated in all of the hearings.

6. John Picinich. On April 21 and 24, 2000, the City received letters from Nicholas Natiello, challenging the further participation in the closed record hearing by John Picinich on appearance of fairness/conflict of interest grounds. City Attorney Morris responded to the letters of Mr. Natiello in her letters dated April 22 and 24, 2000. (Exhibits 236 and 237.) At the outset of the April 24, 2000, hearing, Mr. Natiello again raised the issue, and asked that John Picinich disqualify himself from further participation in the hearings. Councilmember Picinich was advised by the City Attorney that he need not disqualify himself and he continued his participation. As the rationale for the continued participation of Councilmember Picinich, the City Council hereby adopts by reference the letters of April 22 and 24, 2000 to Nicholas Natiello from City Attorney Morris (Exhibits 236 and 237).

Section 2. Record for Closed Record Hearing. The following documents were entered into the record for the Closed Record Appeal:

Exhibit No.	**Date**	**Description**
203	1-31-00	Hearing Examiner Decision on appeal of Peninsula School District, Peninsula Neighborhood Association, Residents of North Creek Estates and the North Creek Homeowner's Association
204	1-31-00	Hearing Examiner Decision on appeal of applicants Huber & McGowan and Decision on PUD and preliminary plat
205	2-2-00	Patrick Cumming to R. Gilmore
206	2-14-00	Notice of Appeal, applicant (by Carl Halsan)
207	2-14-00	Appeal of Nicholas Natiello
208	2-14-00	Notice of Appeal, PNA (by Bob Mack)
209	2-14-00	Notice of Appeal, Northcreek Homeowners
210	2-29-00	Letter to Warren Crum from Carol A. Morris
211	2-29-00	Letter to Harborwest appellants from Ray Gilmore

212	3-2-00	Letter to Carol Morris from Warren Crum
213	undated	Harbor West Subdivision Preliminary Plat Appeal Issues (Ray Gilmore)
214	3-10-00	Addendum to Notice of Appeal Northcreek Homeowners
215	3-10-00	Letter from William T. Lynn to Carol Morris
216	3-15-00	Annotated version of Natiello appeal
217	3-20-00	Memo to Mayor Wilbert and City Council from R. Gilmore
218	3-22-00	Letter to Carol Morris from William T. Lynn
219	3-23-00	Letter to City Clerk from Robert E. Mack
220	3-23-00	Letter to Mayor Wilbert and City Council from Carl Halsan
221	3-23-00	Addendum/Supplement to Appeal of PNA (Bob Mack)
222	3-24-00	Letter to Bob Mack from Carol Morris
223	4-3-00	Letter to Editor, Peninsula Gateway from Carol Morris
224	4-7-00	Letter to Mayor Wilbert and Councilmembers from Robert E. Mack
225	4-7-00	Letter to Northcreek Homeowners, Robert Mack, Clark Davis, Peninsula Neighborhood Association, Bill Lynn Nicholas Natiello and Steve Brown from Carol Morris
226	4-7-00	Letter to Mayor and City Council from Carol Morris
227	4-10-00	Briefing of Northcreek Homeowner's Association Re: access across 76th Street and density
228	4-10-00	Letter to City Council from Nicholas Natiello (hearing statement)
229	4-10-00	Letter to Steve Brown and Carl Halsan from Carol Morris
230	4-11-00	Letter to Carol Morris from Steve Brown
231	4-16-00	Letter to Mayor and City Council from P. Dale
232	4-17-00	Letter to Mayor Wilbert and City Council from Carl Halsan
233	4-18-00	Letter from Steve Brown to Carol Morris

234	4-18-00	Letter to Mark Hoppen from Nicholas Natiello
235	4-19-00	Letter to Mayor and City Council from Carol Morris
236	4-22-00	Letter to Nicholas Natiello from Carol Morris
237	4-24-00	Memo to Mayor and City Council from Carol Morris
238	4-24-00	Letter to Carol Morris from Nicholas Natiello (appearance of fairness)
239	4-24-00	Memo to Nicholas Natiello from Carol Morris
240	4-24-00	Letter to Carol Morris from Nicholas Natiello (re: closed record hearings)
241	3-25-00	(Subject: Harbor West Hearing of April 24, 2000) Letter to Mayor and City Council from Louis Willis, Northcreek Homeowners Association
242	4-25-00	Letter to Steve Brown from Carol Morris
243	4-27-00	Letter to Mayor and City Council from Louis Willis, Northcreek Homeowners
244	4-28-00	Memo to Mayor and City Council from Carol Morris
245	5-2-00	Letter to Mayor and City Council from Carl Halsan

Section 3. Witnesses. No witnesses testified at the public hearing. The appellants and/or their representatives were allowed to presented oral argument based on the issues identified in their appeals, but new evidence/testimony was prohibited. GHMC Section 19.06.005.

Section 4. Standard of Review in Closed Record Hearing. The Council makes the following conclusion of law regarding the appropriate standard of review in this closed record hearing. "Closed record appeals shall be on the record established at the hearing before the hearing examiner." GHMC Section 19.06.005(A). The Council has the authority to affirm, modify, reverse or under certain limited circumstances, remand the application to the Hearing Examiner. GHMC Section 19.06.005(A)(3). Legal issues will be reviewed de novo under the contrary to law standard by the City Council. Freeburg v. Seattle, 71 Wn. App. 367, 371, 859

P.2d 610 (1993). With regard to factual issues, the City Council is required to review the evidence before the Hearing Examiner to determine whether his decision was supported by substantial evidence. North/South Airpark v. Haggen, 87 Wn. App. 765, 942 P.2d 1068 (1997); East Fork Hills Rural Association v. Clark County, 92 Wn.App. 838, 965 P.2d 650 (1998).

Section 5. Planned Unit Development Approval Criteria. In order to approve the planned unit development application, the Hearing Examiner was required to make findings of fact that 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, spaces, wall and fences, parking, loading, landscaping and other features necessary to insure compatibility with and not inconsistent with the underlying district;
>
> B. That the site for the proposed use relates to streets, adequate in width and pavement type to carry the quantify and kind of traffic generated by the proposed uses and that adequate public utilities are available to serve the proposal;
>
> C. That the proposed use will have no significant adverse effect on existing uses or permitted uses;
>
> D. That the establishment, maintenance and/or conducting of the uses for which the development review is sought will not, under the circumstances of the particular case, be detrimental to the public welfare, injurious to the environment, nor shall the use be inconsistent with or injurious to the character of the neighborhood or contrary to orderly development.

GHMC Section 17.90.050. The project includes private roads, thereby triggering the following additional requirements:

> A. All roads shall be public roads and the configuration and design of such facilities shall be consistent with the adopted policies and standards of the City of Gig Harbor public works construction standards. Private roads within the PUD may be approved by the City if the following criteria are met:
>
> > 1. Physical limitations of the site preclude the possibility of future linkage with existing public roads or proposed public roads which are part of the City's adopted road or transportation plan;
> >
> > 2. The proposed street design, pedestrian access and layout represent a superior design, which meets the objectives of the public works standards;
> >
> > 3. A direct and tangible public benefit will accrue from the street design.

GHMC 17.90.040. The "intent" section of the planned unit development chapter states that "variations" from the underlying district regulations may be allowed, under certain limited circumstances:

> . . . the underlying district regulations, such as, but not limited to, minimum yards, density, uses and height and bulk of buildings may be varied; provided, however, such variances shall not compromise the overall intent of the comprehensive plan nor significantly impact existing uses or create adverse environmental effects. A planned unit development may be allowed in any district.

GHMC Section 17.90.010.

Section 6. Preliminary Plat Approval Criteria. In order to approve a preliminary plat, the Hearing Examiner must make the following findings:

> The hearing examiner shall make an inquiry into the public use and interest proposed to be served by the establishment of the subdivision and/or dedication, and shall consider: (A) whether the preliminary plat conforms to chapter 16.08 GHMC, general requirements for subdivision approval; (B) If appropriate provisions are made for, but not limited to, the public health, safety and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds, and shall consider all relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (C) whether the public interest will be served by the subdivision and dedication.

GHMC Section 16.05.003. Under GHMC Section 16.05.004, the Hearing Examiner may not approve the preliminary plat unless he makes written findings that appropriate provisions have been made for all of the criteria in GHMC Section 16.05.003.

The pertinent requirement from chapter 16.08 GHMC is:

> A. Zoning. No subdivision may be approved unless written findings of fact are made that the proposed subdivision or proposed short subdivision is in conformity with any applicable zoning ordinance, comprehensive plan or other existing land use controls.

GHMC Section 16.08.001.

Section 7. Underlying Zone Development Standards. The project is proposed in a Single-Family Residential Zone (R-1), located in the proximity of 5200 - 76th Street N.W. in Gig Harbor, Washington. The minimum development standards for this zone are as follows:

> A. * a minimum lot area is not specified for subdivisions of five or more lots. The minimum lot width shall be 0.7 percent of the lot area, in lineal feet.
> C. Minimum front yard setback - 25 feet.
> D. Minimum rear yard setback - 30 feet.

E. Minimum side yard setback - 8 feet.
F. Maximum impervious lot coverage - 40%.
G. Minimum street frontage - 20 feet.
H. Maximum density - 3 dwelling units per acre.

GHMC Section 17.16.060.

The applicants have requested variances from the underlying R-1 development standards, through the PUD process, to: "density, minimum yards, minimum lot area, minimum lot width and road standards." (Exhibit 69, letter to Ray Gilmore from Carl Halsan, p. 2.) The specific variances are:

> This proposal has a density of 3.58 dwelling units per acre. The minimum front yard in the R-1 District is 25 feet, we are proposing 15 feet. The minimum front yard in the R-1 District is 25 feet, we are proposing 15 feet. The minimum rear yard is 30 feet, we are proposing 10 feet. The minimum side yard is 8 feet, we are proposing a mixture of 5 foot and 0 foot side yards. The minimum lot area is 12,000 square feet, we are proposing an average of 5,000 square feet, the smallest lot is 4,200 square feet. The minimum lot width is 70 feet, we are proposing 52 feet. Finally, we are proposing some private roads for the development.

(Exhibit 69, p. 2.)

Section 8. Comprehensive Plan Land Use Designation. The City's comprehensive plan designates this area as RL (Urban Residential Low Density), which anticipates 3.0-4.0 dwelling units per acre.

Section 9. Additional Case Law Requirements. Prior to the applicants' submission of their planned unit development and subdivision applications to the City, the Washington Supreme Court decided Citizens for Mount Vernon v. City of Mount Vernon, 133 Wn.2d 861, 947 P.2d 1208 (1997). In this case, the Court held that "the legal effect of approving a planned unit development is an act of rezoning." Mount Vernon, 133 Wn.2d at 874. The following general rules apply to rezone applications:

> (1) there is no presumption of validity favoring the action of rezoning; (2) the proponents of the rezone have the burden of proof in demonstrating that conditions have changed since the original zoning; and (3) the rezone must bear a substantial relationship to the public health, safety, morals or welfare.

Mount Vernon, 133 Wn.2d at 874.

Section 10. Analysis of Certain Appeal Issues.

I. FINDINGS

A. **Dimensions of Private Streets**. The project's internal streets will be private. These internal streets will be 32 feet from curb face to curb face, but are shown on the proposed plat road cross sections as 40 feet of right-of-way. (Exhibit 37, letter from Bill Lynn to Wes Hill, p. 2.) Eight feet of this pavement will be for temporary additional or overflow parking on one side of the road. (Id.)

The typical road cross section of the public road area to be provided for ingress and egress to the plat shows a sixty foot right-of-way, and the minimum paved width is 38 feet. This 38 foot width is consistent with the City's Public Works Standards for public roads (see, Minimum Street Design Standards, p. 2-3.) The draft Covenants provided to the City demonstrates that the Homeowner's Association will impose fees and/or maintenance assessments on the homeowners for the private roads. (Exhibit 90, p. 2-4.)

B. **Private Utilities.** The storm drainage facilities in the project are private, and will need to be regularly maintained by the Harborwest PUD homeowners. (Exhibit 58, p. 9.) The water and sewer lines placed in private streets will also be privately maintained. (Exhibit 58, p. 7).

C. **Emergency Vehicle Access on Private Streets, Generally.** Pierce County Fire District No. 5 has stated that it requires a "minimum clear width of at least twenty-four feet." (Exhibit 22, p. 2, letter to Steve Bowman from Glen Stenbak.) This means that vehicles could not be parked on both sides of the private roads and still provide the required access. Because these roads are private, the City will not be able to post and enforce any "no parking" or parking limitations to prevent parking on both sides of the street.

D. **Enforcement of Parking Restrictions on Private Roads**. Pierce County Fire District No. 5 stated that their emergency vehicle access concern was satisfied after "further discussions" with the applicant, which provided them with "the understandings that parking on the roadway would be minimal since the garages are located on the alley side of most lots. In addition, off street parking is provided for recreational vehicles. The covenants, conditions and

restrictions for the project also outline the length of time any vehicle of this nature could be on the roadway." (Exhibit 22, p. 1, letter to Steve Bowman from Penny Hulse.)

The Covenants, Conditions and Restrictions contain the following restriction on parking:

> In no case shall a recreational vehicle, boat trailer of any kind, truck or automobile be parking in a public right-of-way or private road for a period of time exceeding forty-eight (48) hours, nor shall they be parked in the private roads or right-of-way on a daily basis. All guests staying more than 48 hours shall park their vehicles on private property. All residents must park their vehicles inside of their respective garage within 14 days of moving in and establishing residence. The garages are specifically intended for vehicle parking, and storage of personal property within the garage cannot prohibit or impede this stated intention.

(Exhibit 90.) Enforcement of the Covenants is described in Article VI as follows:

> The Association, or any owner, shall have the right to enforce, by any proceeding in law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration. Failure by the Association or by any Owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter.

(Exhibit 90, p. 8.) Thus, in order to enforce the parking restrictions on the private streets, an individual homeowner or the Association will be required to file a lawsuit against the violator.

E. **Southern Access.** The street layout did not conform to the 1997 Uniform Fire Code requirement for an alternate secondary access roadway ("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." UFC Section 902.2.1). Pierce County Fire District No. 5 informed the applicant that "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." (Exhibit 22, p. 2, letter to Steve Bowman from Gen Stenbak.) The applicant informed Pierce County Fire District No. 5 that he "is unable to obtain right of way for a southend access road." (Exhibit 22, p. 1, letter to Steve Bowman from Penny Hulse.)

The applicant thereafter submitted a request for an "alternate method or materials" under UFC Section 103.1.2. (Exhibit 113, Memo to Ray Gilmore from Steve Bowman.) Under this

procedure, the fire chief is authorized to approve alternate methods or materials, provided that the chief finds that "the proposed design, use or operation satisfactorily complies with the intent of this code and that the method of work performed or operation is, for the purpose intended, at least equivalent to that prescribed in this code in quality, strength, effectiveness, fire resistance, durability and safety." UFC Section 103.1.2.

The record demonstrates that the application submitted to meet the alternate method requirement under the Uniform Fire Code was documentation "which shows that the roadway separation as shown on the PUD conforms to the Pierce County Development Standards." (Exhibit 113, p. 1, memo to R. Gilmore from Steve Bowman.) The particular sections of the Pierce County Code relied upon by the applicant were:

> 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.
>
> Notwithstanding the requirements of this Manual, the number and location of major driveways may be more restrictive than described herein if deemed necessary by the County. The County shall base its determination on existing and projected traffic volumes and channelization and signalization on the existing County road, traffic and turning movements generated by the existing and/or proposed project and other applicable traffic design criteria.

(Exhibit 113, pp. 1-2, memo to Ray Gilmore from S. Bowman.)

Using the Pierce County Development Standards, the City Engineer "determined that additional internal roadway improvements may not be required in addition to those addressed in the PUD design and Gig Harbor Public Works Department preliminary review comments which were submitted to Carl Halsan. However, additional project requirements may be imposed in response to a review of the recently submitted traffic study." (Id., p. 2.) Apparently, the Pierce County Fire District No. 5 staff recommended that the alternate method be approved, if the Fire Marshal's conditions were also attached to the approval. (Id.)

The Council notes that two public streets are planned to provide access to this project, but the property upon which one public street will be built is the subject of an enforcement action by the U.S. Army Corps of Engineers. There is evidence in the record that the former property owner was notified by the Corps of the violation on the northwest corner of the property near 54th Avenue N.W., and to stop work. (Exhibit 8-2, letter to Peter Zammarello from James Rigsby of the Corps, 3-30-98.) Subsequently, the Corps informed the property owner that in order to resolve the violation, either the illegal fill and culvert would have to be removed or an after-the-fact permit had to be obtained. (Exhibit 17, letter to Peter Zammarello from James Rigsby, 4-29-98.) The property owners were told to "choose a course of action within 30 days" from the date of the 4-29-98 letter, and on July 6, 1998, the Corps informed the applicants that the culvert had to be removed as soon as possible. (Exhibit 39, letter to Peter Zammarello from James Rigsby, 7-6-98.) On March 29, 1999, the Chief of the Corps Enforcement Section informed the City that the applicants still had not removed the culvert, and that the Corps refused to accept an application for the proposed work until the violation had been resolved. (Exhibit 162, Letter to Ray Gilmore from Stephen A. Wright, March 29, 1999.) On August 23, 1999, the Corps wrote to the new property owners, the applicants herein, and informed them that the property was in violation of federal law, and that the violation still had not been corrected. (Exhibit 162, letter to Pacific Northwest Home Construction from James Rigsby, dated August 23, 1999.)

The Council finds no evidence in the record to demonstrate that the applicant has corrected the violation or that it has received the necessary permits from the Corps in order to construct the public street shown on the plat map as providing public access to the project. The Hearing Examiner's response to the problem created by the lack of this access route was to require "phasing" of the development. As stated by the Hearing Examiner, "if the proposed roadway which connects with 54th Avenue N.W. is not constructed in the first phase of the PUD, the first phase must be designed to generate less than 500 ADT (50) homes as determined by the City Engineer." (Exhibit 203, No. 5, p. 17.) The Hearing Examiner otherwise presumed construction of the road in this location, and merely required that the applicant "submit evidence

that a Section 404 permit from the U.S. Army Corps of Engineers, or from the Washington State Department of Ecology, and a HPA from the Washington Department of Fish and Wildlife have been issued." (Exhibit 203, No. 22, p. 19.) However, the Hearing Examiner required that "a final plat inclusive of all phases of the final plat and meeting all requirements of RCW 58.17 RCW, Title 16 GHMC and all conditions of approval shall be submitted to the Gig Harbor City Council within five years of the date of preliminary plat approval." (Exhibit 203, No. 31, p. 23.)

F. **Requirement for finding of "Superior Design and Direct Tangible Benefit."** As stated above, Section 17.90.040 allows private roads in a planned unit development if three criteria are met. The first criterion is not at issue here. The second criterion requires that the "proposed street design, pedestrian access and layout represents a superior design which meets the objectives of the public works standards." The record discloses that the applicant submitted a letter describing the applicant's belief that the private roads presented a superior design. (Exhibit 37, letter to Wes Hill from Bill Lynn.) Here is the applicant's statement on this issue:

> Physically, the proposed road layout and design provides relatively wide roads with all of the amenities required in an urban area. The road surface is more than adequate to accommodate traffic within the development. In fact the pavement width is the same as required for public roads. Planners and engineers have recognized the benefits of 'livable streets' as contemplated by this design. The enclosed article summarizes the benefit of this type of street design far better than we could. The benefits described in the article are very similar to those sought by the applicants in this case. We would be happy to elaborate but a review of this article along with the proposed design should clearly make the case.

(Exhibit 37, p. 2.) The following is the Public Works Director's statement on this point:

> Chapter 2 of the Public Works Standards states that 'the overall goal of this chapter is to encourage the uniform development of an integrated, fully accessible public transportation system that will facilitate present and future travel demand with minimal environmental impact to the community as a whole.' While private streets does not provide for an 'integrated, fully accessible public transportation system,' the lack of an immediately available and viable alternative connection to an arterial or neighborhood street, as noted above, limits the ability to achieve the stated goal. As such, internal streets, exclusive of the through connection of 76th Street, are not essential to the provision of a fully accessible public transportation system for the community. By providing public access for pedestrians and non-motorized vehicles in a protected area, including access to the wetland area, and sidewalks and planter

> strips on both sides of internal streets consistent with the Public Works Standards, a 'superior' layout to a fully public road system could be argued.

(Exhibit 58, p. 6.) It should be noted that the applicant no longer intends to provide sidewalks and planter strips on both sides of the internal streets consistent with Public Works Standards. The public street cross-section shown on the proposed plat map shows that a planter strip and sidewalk will be provided along one side of the private roads.

During the closed record hearing before the City Council, the applicants submitted a portion of the March 23, 1999 Staff Report (Exhibit 1, pages 13-14) in support of the "superior design" criterion. This copied the language from Exhibit 37, p. 2 verbatim (quoted above). In addition, the applicant submitted a letter dated May 2, 2000 (Exhibit 245), to address the private streets issue, which refers to the letter of January 15, 1999 from Wes Hill (Exhibit 58), quoted above.

The third criterion for the approval of private streets in a planned unit development requires the finding that "a direct and tangible benefit will accrue from the street design." GHMC 17.90.040. According to the City Public Works Director, private internal streets will provide a direct and tangible public benefit because "private streets reduce near-term costs to the City by eliminating the need for City services such as street sweeping, storm drainage system maintenance, snow removal, ice control, and pavement repair and maintenance." (Exhibit 58, p. 6.)

G. **Hearing Examiner's Findings and Conclusions relating to Private Streets.** The Hearing Examiner stated that:

> after a review of the proposal, the Examiner has concluded that the plat will make adequate provisions for streets, alleys and other public ways, <u>if</u> the roadway connection to 54th Avenue is made prior to the development of lot 51. If the roadway connection to 54th Ave. is not made, then the second phase should not proceed. After a review of the proposal, the Examiner has concluded that the existing sidewalk system through the plat of Gig Harbor Heights will provide adequate pedestrian ways between the proposed development and the schools on Rosedale Street N.W.

(Exhibit 203, p. 14.)

> The site for the proposed residential development relates to streets, adequate in width and pavement type to carry the quantity and kind of traffic generated by the residential use proposed. Private streets will largely serve the site itself and alleys and the site will be connected to Rosedale Street N.W. by two public streets. In addition, many of the proposed lots in the development will have legal access over 76th Street N.W. to 46th Ave. N.W. Furthermore, adequate public utilities are available to serve the proposal.

(Exhibit 203, p. 15.) The Hearing Examiner also adopted certain exhibits by reference in his decision. (The requirements were addressed in the Staff Advisory Report (Exhibit 1), modified conditions (Exhibit 178) and the staff response to questions and comments (Exhibit 188), which have all been adopted by the Examiner. Exhibit 203, No. 10, p. 15.)

H. **Impervious Surface Coverage**. The applicant did not request a variance through the PUD process, from the underlying R-1 development standards for impervious surface coverage requirements. (Exhibit 69, p. 2.) According to the SEPA checklist submitted by the applicant, the proposed ratio of building coverage to lot size is 18% percent. (Exhibit 6, Expanded SEPA Checklist.)

However, information was submitted to the Hearing Examiner by the appellants Peter Dale and Northcreek Homeowners, showing a low of 45.5% and high of 52.3% impervious surface per lot. (Exhibit 96, p. 3, tab "Plat Stormwater.")

II. CONCLUSIONS

A. **Hearing Examiner Decision Does Not Meet Standards for Legal Sufficiency**. The City Council concludes, from the above findings, that the Hearing Examiner's decision does not meet the legal standard of sufficiency for a final land use decision, which are:

> Findings of fact by an administrative agency are subject to the same requirement as are findings of fact drawn by a trial court. The purpose of findings of fact is to ensure that the decisionmaker 'has dealt fully and properly with all of the issues in the case before he [or she] decides it and so that the parties involved' and the appellate court 'may be fully informed as to the bases of his or her decision when it is made.' Findings must be made on matters 'which establish the existence or nonexistence of determinative factual matters. . . .' The process used by the decisionmaker should be revealed by findings of fact and conclusions of law. Statements of the positions of parties, and a summary of the evidence presented, with findings,

> which consist of general conclusions drawn from an 'indefinite, uncertain, undeterminative narration of general conditions and events' are not adequate.

Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 35, 873 P.2d 498 (1994) (citations omitted).

The City Council reverses the Hearing Examiner's decision because it is not supported by substantial evidence on the following: (1) whether the criteria for private roads in a PUD were met, if there was no showing that the internally private street design was "superior," or that they provided a "direct and tangible benefit;" (2) whether the requirements in the underlying zone for impervious surface coverage were satisfied (because no request for a variance from these requirements were requested); and (3) whether adequate provisions have been made for streets or roads in the subdivision, if the property upon which one of the public roads will be constructed for access by the residents is the subject of an enforcement action by the U.S. Army Corps of Engineers, and there is uncertainty when the road may be built, or what conditions may be attached to the permit by the Corps. Furthermore, the Council finds that the Hearing Examiner's failure to determine whether the applicant has met its burden to demonstrate all of the requirements for a PUD/rezone, as required by the Mount Vernon case, was an error of law.

B. **"Superior" Design of Roadway and "Direct Tangible Benefit" from Private Roads**. The Hearing Examiner's decision does not even mention the criteria in GHMC Section 17.90.040, so there have been no findings made or conclusions entered on the question whether the private roads may be permitted in the PUD. The Council is specifically concerned with the criterion requiring that the proposed street design, pedestrian access and layout represent a "superior design, which meets the objectives of the public works standards."

The Public Works Director's discussion of this criterion was extremely limited. The Council does not understand how private roads "provide public access for pedestrians and non-motorized vehicles in a protected area." Even if a gate were installed at an entrance(s) to the project, it would still allow residents to drive their cars into the project. The area is not "protected" merely because the general public is not allowed into the project, if residents, their

guests, delivery trucks and service providers can still "clash" with the pedestrians and non-motorized vehicles.

Furthermore, the scheme for parking enforcement on the private roads appears cumbersome and completely unworkable, compared to the manner in which parking limitations are enforced on public streets. While the applicant argues that the homeowners will not park in front of their homes, there is the substantial likelihood that the guests and invitees of the homeowners will park on the private roads. There is no requirement that the private roads be posted to prohibit parking along one side of the private roads. Therefore, there is the possibility that parking could occur on both sides of the private streets or that parking could occur beyond the durational limits in the Covenants. Under the current scheme, the only method for enforcement of the parking limitations is the filing of a lawsuit by one homeowner or the Homeowner's Association. It is extremely unlikely that any homeowner or that the Homeowner's Association will file a lawsuit to enforce the parking limitations in the project.

While covenants may be an effective means of preventing construction of incompatible structures or uses in a subdivision, the Council does not believe that they are a viable means of controlling behavior, which directly or indirectly affects public safety. Enforcement of the parking restrictions in this project is required because the streets are not public streets, and are not designed for traditional parking (on both sides of the street). The City has an interest in ensuring that the private roads are not blocked by cars that are parked on both sides of the street, which would prevent emergency vehicles from rendering assistance to persons in the project. The Council notes that as a matter of law, any covenants adopted by the homeowners may not be enforced if they are "habitually and substantially violated." Mountain Park Homeowners Association v. Tydings, 125 Wn.2d 337, 340, 883 P.2d 1382 (1994). As stated by the Mountain Park court: "if a covenant which applies to an entire tract has been habitually and substantially violated so as to create an impression that it has been abandoned, equity will not enforce the covenant." Mountain Park, 125 Wn.2d at 340. Thus, the Council does not find that private roads present a "superior design" or a "direct and tangible public benefit" if: (1) they are subject to an

impracticable method for parking enforcement; (2) a lack of parking enforcement could negatively affect public health and safety; and (3) and a lack of parking enforcement could prevent **any** future parking enforcement.

We note that the homeowners in the project will be paying, through private assessments collected by the Homeowners' Association, for the maintenance, operation, repair and reconstruction of the private roads and the stormwater facilities. Because the applicant has chosen to include private roads in the project, all of the utility facilities, such as water and sewer will also be private. Thus, the Homeowners Association will be charging private assessments from the homeowners in this project for the maintenance, operation, repair and reconstruction of the private roads, the storm water drainage facilities, the water facilities and the sewer facilities. Collection of these private assessments would occur through the same enforcement mechanism – a lawsuit filed by the Homeowners' Association against the defaulting homeowner(s). Again, the question is whether this scheme presents a "superior" design and layout, compared to a public street system, which would allow the installation of publicly maintained, operated and repaired facilities, with the associated statutory procedures available to a municipality for collection and enforcement of liens for non-payment of charges and assessments.

It does not make sense to state that the City will receive a "direct and tangible public benefit" because it does not have to maintain, operate or repair the private roads in the project, if the City's experience has been that the unhappy homeowners will ask the City to take over their private roads when the repair, maintenance and operation become too costly. These problems were acknowledged by the applicant, but the Covenants for this project do not demonstrate that adequate provision has been made to address them in the future to the extent that the Council can find that there is a "superior design."

The Council also notes that the proposed street design is "inferior" by definition, because it does not meet the requirements of the City's Uniform Fire Code, and that approval under the UFC was only achieved through a "code alternate" procedure. Applicants admit that the project does not comply with the Uniform Fire Code requirements for an alternate secondary access

roadway (UFC Sec. 902.2.1.) The Council acknowledges that the applicant was unable to obtain a right-of-way for the southend access road. While the City staff correctly allowed the applicant to submit materials in support of an "alternate method or materials" application under UFC Section 103.1.2, there is no explanation in the record to demonstrate that the application actually satisfied the criteria under UFC Section 103.1.2.

The fire chief is authorized to approve the alternate method if the chief finds that "the proposed design, use or operation satisfactorily complies with the intent of this code and that the method of work performed or operation is, for the purpose intended, at least equivalent to that prescribed in this code for quality, strength, effectiveness, fire resistance, durability and safety." UFC Sec. 103.1.2. The Council could find no indication in the record that any factual analysis of the relevant facts had been performed to lead to an approval of an alternate methods or materials decision under the UFC. There was, however, discussion about the manner in which the design satisfied the Pierce County Development Standards.

The Pierce County Development Standards are not mandatory in the City of Gig Harbor. Without any evidence in the record to demonstrate that the Standards are applicable in the City, the Council must assume that they are guidelines only. Black Nugget Road v. King County, 88 Wn. App. 773, 777 (1997). Furthermore, the Council questions the applicability of the Pierce County Development Standards to the issue presented by this project, as the Standards appear to address traffic problems (the prevention of too many "multiple major driveways" in close proximity to each other), not fire access. The Pierce County Standards require a "minimum of two major driveways" for developments generating 500 ADT or more, unless other mitigation measures are approved, and still allow the County the discretion to make the number and location of the driveways more restrictive "if deemed necessary." (Exhibit 113, p. 2.) This project will generate 1,505 ADT. (Exhibit 7, p. 13.)

While the undisputed evidence discloses that this high volume of traffic will be generated by the project, the timing for the construction of at least one of the two required public streets to handle the project's projected traffic is not certain. The record discloses that one of the access

routes is the subject of an enforcement action by the Corps of Engineers, and that this enforcement action has been pending for over two years with no action taken by the former property owner or the applicant to correct the violation. While the Hearing Examiner has determined that "phasing" of the project will address the traffic/access problem, there is no assurance that the second access route can be constructed prior to the deadline established in the Hearing Examiner's decision (and applicable law) for the applicant to submit for final plat approval.

If the applicant cannot obtain all of the necessary permits from the Corps to construct this second access route within the five-year deadline, then the final plat cannot be approved. (Exhibit 203, No. 32, p. 23.) The City may only approve a final plat if it finds that the "subdivision proposed for final plat approval conforms to all terms of the preliminary plat approval, and that said subdivision meets the requirements of [chapter 58.17 RCW], other applicable state laws, and any local ordinances which were in effect at the time of preliminary plat approval" RCW 58.17.170.

In addition, the Hearing Examiner's determination that the plat makes "adequate provisions" for streets, alleys and other public ways (as required by GHMC Section 16.05.003), was contingent upon the applicant's construction of the roadway connection to 54th Avenue. As stated by the Hearing Examiner: "If the roadway connection to 54th Avenue is not made, then the second phase shall not proceed." (Exhibit 203, p. 14.) The question raised by this language, which was never answered by the Hearing Examiner's decision, is just how the City would proceed if the roadway connection was not made. Obviously, the applicant could not meet the conditions of final plat approval, so the City would be required to deny the final plat. The Council concludes from the evidence in the record, that the applicant has not demonstrated that it can comply with the mandatory requirements for final plat approval for the entire project prior to the applicable deadlines. Only one application for a PUD and subdivision has been submitted to the City, and nothing in the Hearing Examiner's decision contemplates "phasing" that would

allow the applicant to submit a request for final plat of only one portion of the project if this second driveway cannot be constructed within the five year timeframe.

C. **Impervious Surface Coverage**. While the applicant argues (in Exhibit 232, letter to Mayor and City Council dated April 17, 2000) that the Hearing Examiner's decision required the applicant to meet the impervious surface requirement in the underlying zone in No. 5, p. 8 of the decision, we do not find this on page 8 of the decision. In No. 5 of page 8, there is merely a "project description" by the Hearing Examiner, which doesn't mention impervious surface coverage requirements.

It appears that the Hearing Examiner did not address this appeal issue at all, either by making a finding as to the amount of impervious surface coverage or fashioning a condition to prevent deviation from the underlying R-1 Zone requirements (as set forth in GHMC 17.16.060). The Council reviewed the plat map, the expanded SEPA checklist submitted by the applicant (in which the impervious surface coverage was listed as 18%), the information submitted by appellants Peter Dale and Northcreek Homeowners (showing a low of 45.5% and a high of 52.3% impervious surface coverage), and the information submitted by the applicant to refute the appellant's claims on this issue. The Council concludes that the applicant has not met its burden to demonstrate that this particular requirement has been met. If this Zoning Code requirement has not been satisfied, the Council concludes that the necessary finding under GHMC 16.05.003 cannot be made, namely, that the proposed subdivision is in conformity with the all applicable provisions of the Zoning Code. GHMC 16.08.001(A).

D. **Rezone Criteria in Mount Vernon case**. The Council concludes that the density of 3.5 dwelling units per acre is consistent with the underlying comprehensive plan designation, and that a planned unit development is allowed in the R-1 zoning district. GHMC Section 17.90.010. However, the applicant was informed, by the City Attorney and the appellants, of the existence of the recent Washington Supreme Court decision, Citizens v. Mount Vernon, 133 Wn.2d 861, 947 P.2d 1208 (1997). (See, Exhibit 187, p. 16.) In that case, the Supreme Court held that the legal

effect of approving a PUD is an act of rezoning, and that certain general rules applied to rezone applications. These rezone criteria have been cited above.

In Mount Vernon, the Court reversed the City's approval of a PUD because the Mount Vernon comprehensive plan and zoning code prohibited a commercial PUD on property zoned residential. An additional ground for reversal was also identified by the Court: "approval of a planned unit development is an act of rezoning which must be accompanied by a showing of significant changed circumstances. No showing was made which would justify approval of the project in this case." Mount Vernon, 133 Wn.2d at 877.

Similarly, the record does not demonstrate that the applicant has met its burden of proof to demonstrate that "conditions have changed since the original zoning." Nothing in the record shows that the applicant submitted any information in order to meet its burden of proof on this issue, or that the Hearing Examiner addressed it in any way.

DECISION

The City Council of the City of Gig Harbor hereby reverses the Hearing Examiners' decisions dated January 31, 2000 on Case No. Sub 98-01 for the Harborwest Subdivision and Planned Unit Development, for the reasons stated above. The applications for subdivision and planned unit development are denied.

PASSED ON THIS 11th day of May, 2000.

APPROVED:

_____
Mayor Gretchen Wilbert

ATTEST:

_____
City Clerk, Molly Towslee

APPROVED AS TO FORM:

_____

City Attorney, Carol Morris

Pursuant to RCW 36.70B.130, the City is required to include the following statement in its Notice of Final Decision: Affected property owners may request a change in valuation for property tax purposes, notwithstanding any program of revaluation. The City shall send a copy of this decision to the Pierce County Assessor's Office.

Appeal of this Decision: This is the final decision of the City of Gig Harbor. In order to appeal this decision, a land use petition must be filed in superior court within twenty-one days after the date the City Council passes this resolution, pursuant to RCW 36.70C.040 and chapter 36.70C RCW.