The Law Office of
Jonathan C. Hatch, P.S.
152 - 3rd Avenue S., Suite 104
Edmonds, Washington 98020
Phone (425) 771-4846 Fax (425) 774-9842

Jonathan C. Hatch

June 6, 2016

To: Snohomish County Council
c/o Department of Planning and Development Services
2nd Floor
County Administration - East Building
3000 Rockefeller Avenue M/S 604
Everett, WA 98201

From: Regatta Estates Homeowners Association

Re: Appeal From Hearing Examiner Decision
File 05-123050 SD (Frognal Estates)
Dated: May 25, 2016

Pursuant to SCC 30.72.080, Regatta Estates Homeowners Association (Appellant), a party of record, hereby appeals the decision of the Snohomish County Hearing Examiner with respect to File 05-123050 SD (Frognal Estates) as follows:

1. Grounds For Appeal: Appellant asserts that certain conclusions of law set forth in the decision of the Hearing Examiner with respect to Section IV thereof (Plat Alteration) are erroneous with respect to the Applicant's compliance with applicable law related to the application process for plat alteration as mandated by RCW 58.17.215 and SCC 30.41A.710(2). Specifically, the Appellant contends that Conclusions of Law C.13, C.14, and C.18 of the Hearings Examiner's decision contain errors of law and/or are unsupported by substantial evidence in the record and applicable

law. The full language of these Conclusions of Law are as follows:

C.13 A majority of homeowners affected by the proposed alteration of the plat must sign the alteration application. Frognal is the sole owner of the affected lot. Its signature alone is therefore sufficient. That plat may be altered without the approval of Regatta Estates homeowners.

C. 14 Altering the plat as requested will not violate any covenant, condition, or restriction of Regatta Estates.

C. 18 Frognal fulfilled the requirements for altering the Regatta Estates plat to remove restriction 9.

3. Argument in Support of Appeal:

Issue on Appeal. The essential issue presented by this appeal is whether the Applicant has, as found by the Hearing Examiner, complied with the necessary legal requirements for submission and processing of a plat alteration affecting the existing Plat of Regatta Estates; which plat was filed of record on February 21, 1996 (Exhibit D.4).

This Appellant asserts that the Hearing Examiner's conclusions in that regard are erroneous in that they fail to address or confirm, by evidence in the record, that the requirements set forth in RCW 58.17.215 and SCC 30.41A.710(2) were complied with by the Applicant in submitting the plat alteration application affecting the Plat of Regatta Estates.

This issue to highly relevant to this application due to the fact that the Corrected Division of Development Decision, dated September 23, 2015 gave conditional approval to the Frognal Estates project contingent upon, among other things, a filed plat alteration of the Plat of Regatta Estates which would include a removal of Restriction No. 9 on the face of the recorded plat. (F.153) Restriction No. 9 reads, in full:

"Lot 1 shall be treated essentially as a native growth protection area provided that

a single homesite with access thereto may be developed on said lot. Site development plans for the access driveway and homesite including clearing and revegatation plans and detailed geotechnical analysis will be required to have received approval from the planning division prior to the issuance of any site development permits or any disturbance of the lot."

The Hearing Examiner concluded that the Applicant had complied with the appropriate application procedures for a plat alteration application. We assert that his conclusion in that regard is erroneous and not supported by the record.

A. APPELLANT'S RIGHT TO APPEAL

It is anticipated that the Applicant will attempt to circumvent the Appellant's assertion of errors of law discussed below by arguing that the Appellant is precluded from prosecuting this appeal. Before the Hearing Examiner the Applicant argued that Article VII, Section 7.1 of the Declaration of Covenants of Regatta Estates prohibits the Appellant from opposing the Applicant's project. Article VII, Section 7.1 states:

The owners of Lots in the Plat of Regatta Estates shall take ownership subject to the right of the Declarant and/or its successors to further subdivide Lot 1 pursuant to applicable rules, ordinances and/or regulations of the governmental entity regulating development of the same. Accordingly, no lot owner shall have the right to protest and/or object to the Declarant or its successors efforts to subdivide said real property so long as such subdivision is being requested and/or completed consistent with the rules or regulations of the municipality regulating development at the time of such subdivision."

The Applicant's assertion, raised prior to issuance of the Hearing Examiner decision, is erroneous for at least three reasons. First, this appeal does NOT address the Hearing Examiner's decision related to preliminary plat approval of the project subdivision. It is limited in scope to the Hearing Examiner's decision related to the Applicant's application for alteration of the existing Plat of Regatta Estates, an issue distinguishable on the facts and as a matter of law from an application for subdivision approval. Secondly, the Appellant has asserted in this appeal that the Applicant's plat

alteration application is statutorily deficient and therefore is not being "...completed consistent with the rules and regulations of the municipality regulating development....", a position which, under no rationale argument, would be prohibited by Article VII, Section7.1, set forth above. Finally, this appeal is not being prosecuted by a "lot owner" of Regatta Estates. The Regatta Estates Homeowner's Association is not an individual "lot owner" objecting to the subdivision of Lot 1. Rather it is a non-profit corporate entity carrying out its fiduciary duty to defend the restrictive covenants affecting the entire Plat as mandated by Article IV, Section 4.2 of the Declaration of Covenants and RCW 64.38, *et.seq* (Homeowner's Associations). RCW 64.38.020 states in relevant part with respect to the authority of a homeowner's association:

Unless otherwise provided in the governing documents, the association may:

...

(4) Institute, defend, or intervene in litigation or administrative proceedings in its own name.....on matters affecting the homeowner's association.... .

The ability of a homeowner's association to enforce covenants affecting the subdivision over which its management authority extends has been confirmed by the appellate courts of Washington. *See, Rodruck v. Sandpoint Maintenance Comm'n*, 48 Wn. 2n 565(1956); *Lakemoor Community Club v. Swanson,* 24 Wn. App. 10 (1979).

B. FACTUAL BACKGROUND.

The existing Plat of Regatta Estates contains seventy-eight (78) lots. The Applicant's project would include, and subsume, Lot 1 of Regatta Estates into the proposed subdivision of Frognal Estates (F.131). A reading of the face of the recorded Regatta Estates plat discloses a number of restrictive covenants, one of which is contained in Paragraph 9 set forth above.

Coincident with the recording of the final Plat of Regatta Estates, a document entitled "Declaration of Covenants, Conditions, Restrictions and Easements for Regatta Estates" (hereinafter

"Declaration of Covenants) was recorded under Snohomish County Auditors File # 9605290598. The document is an exhibit of record in this application (Exhibit M.16.2).

The Declaration of Covenants contains numerous provisions. Among other things it created a Homeowner's Association (Article IV); established numerous use restrictions (Article III), and established certain architectural standards and created Architectural Control Committees (ACC) for enforcement of those standards (Article V)

When Shergar Land Corporation, the developer of Regatta Estates, conveyed title to individual lots in Regatta Estates, including Lot 1, each conveyance was encumbered by the Declaration and the obligation of all owners, and their successors in interest, to conform to the covenants and restrictions imposed upon the lots by the Declaration, *including those on the face of the Plat.*

> The Declaration of Covenants states in relevant part in Recital C.:
> "Declarant hereby declares that all lots within the Plat of Regatta Estates shall be held, sold and conveyed subject to and together with the following easements, restrictions, covenants and conditions together with the restrictions (etc.) recorded on the face of the Plat, all of which are for the purpose of enhancing and protecting the value, desirability and attractiveness of the real property." (Underlining added).

Additionally, the Declaration of Covenants provides in Article I, Section 1.1 thereof that:

> "These easements, covenants, restrictions and conditions hereinafter set forth are for the benefit of the above-described real property and for the each owner of any portion thereof and shall run with the land and shall be binding on all parties having or acquiring any right, title or interest in said properties or any part thereof, and shall inure to the benefit of and pass with said property and each and every parcel thereof and shall apply to and bind the successors in interest any owner thereof." (Underlining added)

Lest there be any confusion as to the applicability of the Declaration of Covenants to every single lot in the Plat of Regatta Estates, Article I, Section 1.2 thereof states, in relevant part:

> "AREA COVERED.The area covered by these Covenants is the **Plat of Regatta Estates,** as identified above and described in Exhibit A."

An examination of Exhibit A to the Declaration of Regatta Estates discloses that it contains the legal description of the entire Plat of Regatta Estates. The fact that the Covenants, which include the restrictions on the face of the Plat map, apply to every single lot in the Plat of Regatta Estates is confirmed by the Hearing Examiner in his decision, wherein he states in his Finding of Facts that:

> "All 78 lots in the Regatta Estates Plat are subject to, and bound by, the Declaration of Covenants, Conditions, Restrictions and Easements for Regatta Estates, recorded under Snohomish Conty Recording No. 9605290598 ("Declaration"), which was recorded in 1996 shortly after the recording of the Regatta Estates Plat." (F.149)

This appeal turns upon the interpretation of a state statute and a corresponding Snohomish County ordinance which respect to their interaction with the Declaration of Covenants. The state statute is RCW 58.17.215 and the ordinance is Snohomish County Code 30.41A.710. Both enactments address the procedure for making application for the alteration of a previously recorded subdivision plat.

C. HEARING EXAMINER'S LEGAL ANALYSIS. In his written decision, the Hearing Examiner discussed the effect of RCW 58.17.215 and SCC 30.41A.700(1), both of which concern the application requirements for alteration of a previously recorded subdivision plat. (Hearing Examiner Decision, pages 25-27).

RCW 58.17.215 states in relevant part:

> § 58.17.215. Alteration of subdivision-Procedure
> When any person is interested in the alteration of any subdivision or the altering of any portion thereof, except as provided in RCW 58.17.040(6), that person shall submit an application to request the alteration to the legislative authority of the city, town, or county where the subdivision is located. The application shall contain the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered. If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof. (Underlining added).

Snohomish County Code 30.41A.700 states in relevant part:

> **30.41A.700 Application For Subdivision Alteration**
>
> (1) An application for a subdivision alteration shall contain the signatures of a majority of those persons having an ownership interest in lots, tracts, parcels, sites, or divisions in the subdivision or portion to be altered.
>
> (2) If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof.
>
> (3) The applicant shall present a certificate of title showing the names of all persons who would be affected by the proposed alteration, as well as any easements or other encumbrances on the property subject to the proposed alteration.

In his legal analysis of the effect of these statutory provisions, the Hearing Examiner takes pains to point out that no party to the hearing identified any differences between RCW 58.17.215 and SCC 30.41A.700(1). (See footnote 132, page 26). The Appellant's position is that that comparison is misplaced and that the Hearing Examiner's analysis of these statutes, as they pertain to the subject application, was legally insufficient due to his failure to address the effect of SCC30.41A.700(2) , rendering his ultimate conclusion regarding the sufficiency of the Applicant's application for plat alteration erroneous.

D. HEARING EXAMINER'S CONCLUSIONS CONSTITUTE ERRORS OF LAW.

The Hearing Examiner's Conclusions of Law C.13, C.14, and C.18 are erroneous as a matter of law. His conclusion that the only party required to be included in the application for plat alteration is the Applicant is not supported by, and is at odds with, applicable statutory law.

In his decision analysis related to the Applicant's application for plat alteration, the Hearing Examiner references both the state statute and Snohomish County ordinance quoted above, outlining

the process for plat alteration application. In doing so, however, he discusses the effect of a the *first portion* of RCW 58.17.215 and the first *section* of SCC 30.41A.700, but his analysis, and the conclusions he reached regarding the requirements for an application for plat alteration completely ignore the *second portion* RCW 58.17.215 and the *entirety* of SCC 30.41A.700(2), and, for that matter, SCC 30.41A.700(3). Nowhere in the entire written decision does the Hearing Examiner cite or discuss the requirements of SCC 30.41A.700(2) which respect to an application for a plat alteration. In fact, in setting forth his view of applicable law related to plat alteration, the Hearing Examiner makes the following statement in his Decision:

> *"State law and Snohomish County Code establish criteria and procedures for altering a recorded final subdivision.*[132] (Decision, page 26)

Footnote 132 to the Decision references RCW 58.17.215 and SCC 30.41A.700(1), but makes no reference to SCC 30.41A.700(2). It appears that the Hearing Examiner neither viewed SCC 30.41A.700(2) as part of the procedure for plat alteration, nor did he consider it in his Decision.

Acknowledging that there is a paucity of legal case authority regarding compliance with the statutory provisions he did cite, he ultimately concludes that "(t)he most appropriate reading of the ordinance and statute is that "...a majority of the lots directly affected by the alteration must agree on the application." (Hearing Examiner's Decision, Page 26). This conclusion fails to take into account, or even address, significant portions of both the County ordinance and the state statute, which preclude the determination reached by the Hearing Examiner.

It is undisputed that the only party who signed the plat alteration applicant is the Applicant and the Hearing Examiner so found. (F.144) It is also clear, however, that the Applicant was on notice of the fact that the Declaration of Covenants of Regatta Estates affected Lot 1 and that at the

time the Applicant acquired Lot 1 it was encumbered by said Covenants. The title insurance report offered by the Applicant clearly so indicated. (Exhibit N.30)

While is it undisputed that the first part of RCW 58.17.215 requires that a plat alteration application must be signed by a majority of persons having an ownership interest in lots or tracts to be affected by the plat alteration, the statute continues by additionally requiring that, where a plat alteration application involves a subdivision which is subject to restrictive covenants (plural), and the plat alteration would violate a covenant (singular), the application must also include an agreement signed by all owners subject to the covenants (plural) agreeing to a plat alteration which *terminates* a covenant. That is precisely the situation in the instant application. As noted above, the Hearing Examiner found that all 78 lots of Regatta Estates are bound by the Declaration of Covenants of Regatta Estates, which covenants include Paragraph 9 on the face of the Plat of Regatta Estates; a covenant that was filed at the time of original plat approval. A plain reading of RCW 58.17.215 leads to no other logical, or legally supportable, conclusion but that the application in question is statutorily deficient because it lacks a written agreement signed by the others Regatta Estate owners who are bound by the covenants.

The Hearing Examiner appears to have focused entirely on ownership of Lot 1 and the degree to which the proposed plat alteration "directly affects" other lots. In addition to failing to define what type of impacts would qualify as "directly affecting" another property owner, his decision does not provide any legal justification or support for failing to require the Applicant to comply with RCW 58.17.215(2) dealing with covenants. In a rather strange sentence in support of his conclusion that only lots "directly affected" by the plat alteration are required to approve a plat alteration, the Hearing Examiner stated in his Decision:

"Approval of a subdivision alteration that would violate a restrictive covenant

> requires the approval of **"all parties subject to the covenants"** of alteration or termination of the covenants that would be violated. RCW 57.17.250 (emphasis added by Hearing Examiner)." (Lines 3-5, Page 27 of Decision)

Setting aside for a moment the fact that the grammatically awkward sentence seems to support the Appellant's position, the citation offered in support of the statement by the Hearing Examiner, RCW 57.17.250, has absolutely nothing to do with plat alteration. RCW 57.17.250 is entitled **"Survey of subdivision and preparation of plat"** and solely addresses the requirement for a registered land surveyor to certify a subdivision plat map. The Hearing Examiner's citation of authority is simply inaccurate.

In attempting to provide support to his conclusion that only owners of properties "directly affected" by the plat alteration are required to agree to the alteration, the Hearing Examiner attempts to argue by analogy that the "pattern" of Title 58.17 suggests that result. In doing so, he references the process for vacation of all or a part of an existing recorded subdivision. He states in his Decision:

> "For example, the previous section of RCW chap.58.17 clearly indicates that vacation of a subdivision in whole or in part requires 'signatures of all parties having an ownership in **that portion of the subdivision subject to vacation."** RCW 58.17.220 (1987)" (Line 28, Page 26 through Line 2, Page 27 of Decision)

Setting aside the fact that his citation to RCW 58.17.220 is, again, entirely erroneous because the cited statute deals with penalties for violation of a court order arising from Title 58.17 and not plat vacation, the Hearing Examiner concludes that this suggests an unstated intent that only the owners of property directly affected by the vacation request must agree to the vacation application. However, just as he did with respect to his discussion of RCW 58.17.215 (plat alteration), the Hearing Examiner only reports part of the story. The full text of the applicable paragraph of RCW 58.17.212 (the correct citation of the statutory provision for plat vacation) reads as follows:

> "Whenever any person is interested in the vacation of any subdivision or portion thereof, or any area designated or dedicated for public use, that person shall file an application for vacation with the legislative authority of the city, town, or county in which the subdivision is located. The application shall set forth the reasons for vacation and shall contain signatures of all parties having an ownership interest in that portion of the subdivision subject to vacation. If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for vacation would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the vacation of the subdivision or portion thereof." (Underling added)

Turning a blind eye to the "covenant" language in RCW 58.17.215 (Plat Alteration) is one thing. Attempting to justify his conclusion by use of another statute in an attempt to establish a statutory "pattern" and then failing to refer to that portion of the corollary statute which is inconsistent with his conclusion is deceptive and disingenuous. Nowhere in either RCW 58.17.215 (Plat Alteration) or RCW 58.17.212 (Plat Vacation) does the term "directly affected" appear, and any reasonable interpretation of either statute suggests a different intent.

The error in the Hearing Examiner's decision is made even more apparent following a review and analysis of SCC 30.41A.700. Although similar to RCW 58.17.215, SCC 30.41A.700 is structured in such a way that the distinction between an ownership interest and being subject to plat covenants is made clear. *See, SCC 30.41A.700(1) and (2).* While the verbiage of SCC 30.41A.700(1) and (2) virtually mirrors the language of RCW 58.17.215; the *structure* of the Snohomish County ordinance, in that it breaks the language down into subsections, clearly appears designed to clarify the drafter's intent that two different issues are being addressed. It is equally clear that the provisions of both SCC 30.41A.700(1) and SCC 30.41A.700(2) must be applied to any plat alteration application, where applicable.

The structure of SCC 30.41A.700 identifies at least two classes of property owners who must

participate in the plat alteration process; (1) a majority of persons with an ownership interest in the lot or tract to be altered, and (2) all of the owners of lots in the subdivision who are subject to the Plat covenants (plural). It is arguable that SCC 30.41A.700(3) adds an additional class of persons; those who will be "affected" by the proposed alteration, irrespective of any ownership interest or covenant compliance. It is not necessary to analyze the potential impact of SCC 30.41A.700(3), on this plat alteration application, however, because the failure of the Applicant in this case to comply with the requirements set forth in SCC 30.41A.700(2) is sufficient to render the plat alteration application incomplete and, therefore, invalid.

The Hearing Examiner's assertion that the only subdivision owners required to sign a plat alteration application are those whose lots are "directly affected", is a *sui generis* textual addition imposed by the Hearing Examiner upon both RCW 58.17.215 and SCC 31.41A.700(2). If the Washington State Legislature and the Snohomish County Council had intended this additional provision to be included in these two statutory enactments, they could have so provided. They did not.

The failure of the Hearing Examiner to specifically address compliance with SCC 30.41A.700(2) in his decision is inexplicable given the fact that the Appellant raised the issue extensively in a Memorandum accompanying a letter from the undersigned mailed to the Hearing Examiner prior to the commencement of the public hearing on the Appellant's application. (Exhibit I.452) The failure of the decision of the Hearing Examiner to address the requirements of SCC 30.41A.700(2), and the failure of Applicant's plat alteration application to comply therewith, renders the Applicant's plat alteration application legally deficient and the Hearing Examiner's decision, with respect thereto, erroneous as a matter of law.

CONCLUSION

Based upon the errors of law contained in the Hearing Examiner's Conclusions of Law, specifically, C.13, C.14 and C.18, the Snohomish County Council is requested to reverse the Hearing Examiner's decision approving the Applicant's plat alteration application related to the Plat of Regatta Estates and to remand the application to the Snohomish County Department of Planning and Development Services for further processing, including the requirement that the application, to be deemed complete, must comply with SCC 30.41A.700(2); which compliance requires submission of a written agreement giving approval to the application signed by all lot owners in the Plat of Regatta Estates subject to the Declaration of Covenants of Regatta Estates.

Respectfully submitted,

Jonathan C. Hatch, WSBA #4641
Attorney/Representative for the
Regatta Estates Homeowners Association
152 3rd Avenue S., Suite 104
Edmonds, WA 98020
Telephone: (425) 771-4846

Appellant Contact Information:

Regatta Estates Homeowners Association
PMB 1102,
11700 Mukilteo Speedway, Suite 201
Mukilteo, WA 98275

E-mail: info@regattaestates.com

Telephone Contact:

Bruce Droppelman, Treasurer
Regatta Estates Homeowners Association
(425) 745-1451