

No. 36441-7-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BY: *Chm*

CITY OF BONNEY LAKE, a Washington municipal corporation,

Appellant,

v.

MILESTONE HOMES, INC., a Washington corporation,

Respondent.

RESPONDENT'S BRIEF

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

Margaret Y. Archer, WSBA No. 21224
John T. Cooke, WSBA No. 35699
Attorneys for Milestone Homes, Inc.

Suite 2100
1201 Pacific Avenue
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500

TABLE OF CONTENTS

I. INTRODUCTION1

II. STATEMENT OF FACTS2

 A. Milestone’s Preliminary Plat Application.....2

 B. Bonney Lake’s Staff was Fully Aware of the Methodology Used to Calculate Density3

 C. The Hearing Examiner Approved the Density Calculation Methodology.....5

 D. The City Council’s Final Decision Denying Milestone’s Proposed Plat7

III. SUMMARY OF ARGUMENT15

IV. ARGUMENT16

 A. Standard of Review.....16

 B. The City Council Erroneously Removed Five Lots From Milestone’s Preliminary Plat Application.....20

 1. The BLMC Does Not Require a “Possessory Interest” in the Lots that are Part of the Proposed Subdivision.24

 2. The BLMC Does Not Require that each Lot in a Preliminary Plat Application Be Divided in Order to be Part of a Preliminary Plat.25

 C. The Superior Court Properly Granted Milestone’s Motion to Supplement the Record.28

V. CONCLUSION.....31

TABLE OF AUTHORITIES

CASES

Biermann v. City of Spokane, 90 Wn. App. 816, 821, 960 P.2d 434
(1998).....17

Carson v. Fine, 123 Wn.2d 206, 214, 867 P.2d 610 (1994).....20

City of Seattle v. Crispin, 149 Wn.2d 896, 905, 71 P.3d 208
(2003).....17, 18

HJS Development, Inc., v. Pierce County, 148 Wn.2d 451, 467, 61
P.3d 1141 (2003).....16, 17

Isle Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 49
P.3d 867 (2002).....20

Jenson v. City of Bonney Lake, CPSGMHB Case No. 04-3-0010
(Final Decision and Order, September 20, 2004)6

Mall, Inc. v. City of Seattle, 108 Wn.2d 369, 385, 739 P.2d 668
(1987).....20

McClarty v. Totem Elec., 157 Wn.2d 214, 225, 137 P.3d 844
(2006).....26

Nagle v. Snohomish County, 129 Wn. App. 703, 712, 119 P.3d 914
(2005).....17

Sleasman v. City of Lacey, 159 Wn.2d 639, 646, 151 P.3d 990
(2007).....18, 19, 20, 23, 30

State v. C.J., 148 Wn.2d 672, 685, 63 P.3d 765 (2003).....20

State v. Delgado, 148 Wn.2d 723, 728, 63 P.3d 792 (2003)17, 22

State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007)29

United States v. City of Kent, 157 Wn.2d 545, 553, 139 P.3d 1091
(2006).....17, 22

Washington Pub. Ports Ass'n v. Department of Revenue, 148
Wn.2d 637, 62 P.3d 462 (2003).....20

In Re Marriage of Williams, 115 Wn.2d 202, 208, 796 P.2d 421
(1990).....20

RCW

RCW 36.70C.....16
RCW 36.70C.120.....26, 28, 29
RCW 36.70C.130.....17, 18
RCW 58.1720, 21
RCW 58.17.03322
RCW 58.17.10021, 22
RCW 58.17.19521

BONNEY LAKE MUNICIPAL CODE

BLMC 14.90.01024
BLMC 17.08.020(T).....25
BLMC 18.14.0602, 3, 5, 12, 25, 27

I. INTRODUCTION

The City of Bonney Lake succinctly summarized the issue before this Court in its Response Brief before Pierce County Superior Court. The City noted that under Milestone Homes, Inc. (“Milestones”) interpretation of the Bonney Lake Municipal Code (“BLMC”) the City Council would have to amend its subdivision ordinance to include the following underlined language in order to deny Milestone’s preliminary plat application:

“Subdivision” means a division of lands into 10 or more lots or other divisions of land for the purpose of development or transfer. A developer may not include lots from a previously-developed subdivision, which such developer has no intention of actually re-developing, for the sole purpose of creating an illusion that a proposed plat is less dense than it really is.

(CP at 383). While the City included a touch of sarcasm to the above language, the City’s facetious amendment demonstrates that the Bonney Lake Municipal Code does not expressly or implicitly prohibit including lots from a previously developed subdivision in a preliminary plat application. Yet, the City, through the guise of “construing” its ordinance, denied Milestone’s preliminary plat application for failing to meet density limitations by removing lots from Milestone’s preliminary plat because they were part of a previously developed subdivision.

Similarly, in an effort to cloud the fact that the BLMC does not

prohibit lots from a previously developed subdivision in a preliminary plat application, the City of Bonney Lake calls Milestone's preliminary plat a "cheat," "playing games" or "playing fast and loose" with the BLMC. (Appellant's Opening Brief at 4, 6 and 25). Yet, as the City is aware, this could not be further from the truth. Milestone did not proceed with its application without first disclosing its planned approach to calculate density to City staff and obtaining their consent. The City Hearing Examiner also reviewed Milestone's proposal and concurred with the City staff's approach.

II. STATEMENT OF FACTS

A. Milestone's Preliminary Plat Application

Milestone submitted a plat application for a proposed single-family development for a project known as Orchard Grove II. (CP at 32.) More specifically, Milestone proposes a 25-lot subdivision of 5.65 acres. The 5.65 acres is comprised of 4.03 acres of property that Milestone owns or has contracted to own that will be divided into 20 new lots, as well as five existing, previously developed lots owned by third parties, which lots are located within the subdivision known as Enchanted Estates phase II. (CP at 80). The property is zoned R-1 which permit 4-5 units per net acre of land. (*Id.*; BLMC 18.14.060.) There are no minimum lots sizes, however, for property with this zoning designation.¹ (BLMC 18.14.060.) The

¹ BLMC 18.14.060 requires that lots in the R-1 zoning designation have minimum width

property is also located within the Low Density Residential designation of the Bonney Lake Comprehensive Plan which encourages residential development to utilize available land in order to limit sprawl. (CP 69 at ¶ 7.) With consideration of the combined properties, the plat will have a density of 4.95 lots per acre, which is consistent with applicable R-1 zoning that permits 4 to 5 dwelling units per net acre. (*Id.* at ¶6; BLMC 18.14.060.)

B. Bonney Lake’s Staff was Fully Aware of the Methodology Used to Calculate Density

Milestone did not proceed with its application without first fully disclosing the planned approach to density calculation and obtaining consent to the approach from City staff. (CP at 361-364). Milestone submitted its plat application on March 15, 2006. (CP at 80). The site plan submitted clearly depicts the lots from the Enchanted Estates plat in the Orchard Grove II plat proposed by Milestone. (CP at 32.) Milestone’s application was deemed complete on June 28, 2006, only after all of the signed, notarized consent forms from the five lot owners were submitted to the City. (CP at 80, 82; Verbatim Transcript of Hearing Examiner Proceeding (“HE VTP”) at pp. 5-6.) Demonstrating its understanding of the proposed plat, the Bonney Lake planning staff clearly described the

of 55 feet, but there is not minimum square footage for the total lot area. All of the lots in Milestone’s proposed plat meet the minimum width requirement.

inclusion of the existing developed lots in its Staff Report to the Hearing

Examiner:

The six eastern most lots included in the boundary of this subdivision were originally part of the Enchanted Estates plat, including "Tract A." These lots, except for Tract A, currently have single-family residences and there is no proposed change to the existing parcel lines of these lots. Also, the applicant has indicated that these lots will not take part in the Orchard Grove II Homeowner's Association.

(CP at 80. *See also* HE VPT at pp. 4-8).

After disclosing to the Hearing Examiner that Milestone included existing developed lots in its plat, the Staff recommended that the Hearing Examiner approve the 25-lot plat as proposed. (CP at 79). With respect to the zoning and density limits for plat property, Staff noted:

The zoning and comprehensive plan designation of the site is Low-Density Residential (R-1). The purpose of the district is to establish and preserve low-density single-family neighborhoods in a large lot setting at a density of four to five units per acre, to create a stable environment for family life and to prevent intrusion by incompatible land uses. Single family residences are permitted.

Comment: This proposal, for 25 single family lots on a net acreage of approximately 5.05 acres (after deducting the critical areas, right-of-way, and storm facilities) calculates to be 4.95 lots per acre. Pursuant to the Growth Management Act, a city is required to develop at a net density of 4 to 5 dwelling units per acre. This development has a net density of 4.95 units per acre which meets this requirement and is consistent with the R-1 zoning designation. The proposal meets or can be made to

meet all setbacks and bulk requirements of BLMC
18.14.060.

(CP at 84). With regard to including the five existing lots to meet the R-1 density requirement, the City's planning staff candidly advised the Hearing Examiner: "In the end, we decided there wasn't anything in our, in our code that prevented them including these lots in their density population." (HE VPT at p. 12.)

C. The Hearing Examiner Approved the Density Calculation Methodology

Milestone's application proceeded to a hearing before the Hearing Examiner, Stephen Causseaux, on November 6, 2006. During the open public hearing the Hearing Examiner specifically questioned Raymond Frey, an agent for the Respondent, about the rationale for including five lots from a neighboring plat. The following colloquy transpired:

Causseaux: What, what is the purpose of adding these five lots in the tract from another plat, into this subdivision?

....

Frey: It is very simply to meet the density requirements in the City of Bonney Lake.

Casseaux: These are larger lots then?

Frey: Yes sir, exactly right.

(HE VPT at 12). With full knowledge that the five existing single-family lots were included in the plat and the density calculation, the Hearing

Examiner issued a decision on November 27, 2006 recommending that the City Council approve the Orchard Grove II preliminary plat. (CP at 66-67, 75). With regard to the density calculations, the Hearing Examiner found:

7. The site is located within the Low Density Residential designation of the Bonney Lake Comprehensive Plan which encourages residential development to take place in an orderly and cost efficient manner to best utilize available land and reduce sprawl. The applicant's unique proposal to increase density within an Urban Growth Area by adding five lots and an open space tract from an adjoining subdivision, satisfies said goal.

(CP at 69). This finding is consistent with the comments in the Staff Report that recognized the GMA objective to achieve a certain minimum density within Urban Growth Areas such as the City of Bonney Lake:

The Growth Management Act of 1990 (GMA) and its continuous amendments mandates in a very real sense what local government can and can't do with regard to development inside the corporate limits. In part, the GMA dictates that cities need to achieve a minimum net residential density of 4 units per acre within a 20-year planning horizon (currently set at 2022 A.D.).

(CP at 86).²

Finally, recognizing that there may be a need to formally remove

² Notably, prior to the adoption of its current Comprehensive Plan, the Central Puget Sound Growth Management Hearings Board criticized the City of Bonney Lake for encouraging the development of large lots that were inconsistent with densities expected in Urban Growth Areas. See *Jenson v. City of Bonney Lake*, CPSGMHB Case No. 04-3-0010 (Final Decision and Order, September 20, 2004). The Board noted in that decision that the *minimum* density appropriate for Urban Growth Area is 4 dwelling units per acres. *Id.*

the existing developed lots from the Enchanted Estates plat, the Hearing Examiner made the following a condition to his approval:

42. If required, the applicant shall process a plat alteration to the Enchanted Estates Phase 2 subdivision to remove lots 21-25 and Tract A from said subdivision and add said lots and parcel to Orchard Grove II.

(CP 75).

D. The City Council's Final Decision Denying Milestone's Proposed Plat

As contemplated by the Bonney Lake Municipal Code, the Orchard Grove II preliminary plat application was scheduled for review and consideration by the City Council on December 12, 2006. (CP 187 at ¶ 3). For reasons unknown to Milestone, the application was tabled until January 16, 2007. *Id.* Notably, when the matter was scheduled to be considered by the Council on January 16, 2007, it was scheduled without notice to Milestone. Milestone only learned that its application would be considered indirectly. Regardless, since the proceeding before the City Council was a "closed record" appeal or proceeding, to be decided based upon consideration of only the record presented to the Hearing Examiner and the Hearing Examiner's Decision, no representative of Milestone was afforded an opportunity to speak before the City Council. (CP at 48).

At the January 16, 2007 meeting, the City Council began its consideration, or lack thereof, of the Hearing Examiner's decision by presenting a pre-drafted Resolution denying the proposal. (CP at 41).

Remarkably, although the proceeding was supposed to be a closed record proceeding (limiting their review to the record before the Hearing Examiner), the Council asked the planning staff who were present questions with respect to the plat. Thus, though Milestone was not allowed to address the issues raised in the proceeding, the City staff were allowed to testify and comment on the propriety of Milestone's application. Likewise, the City attorney was allowed to present her interpretation of the applicable code provisions without the opportunity for counterargument from Milestone. (*See e.g.* CP at 41, 43 and 45).

One of the concerns raised by the Council was that Milestone's inclusion of the Enchanted Estates lots in the Orchard Grove plat proposal was not known by staff until recently and that Milestone had failed to respond to questions or concerns raised by the staff. As noted in the Council's Meeting Minutes:

Deputy Mayor Swatman said the legal department had created Resolution 1650 to confront problems with the plat. Council member Rackley inquired about the lot sizes, to which *Director* Leedy replied that there is an indication that something creative is being done with them. The reported density includes extra lots which appear to be outside of the development. *He further explained that staff was getting mixed responses from the developer when they inquired about the same thing.*

* * *

... City Attorney Haggard said no one seems to be clear as to whether or not these additional lots are part of the

subdivision.

(CP 187-188) (Emphasis added). Council Member Mark Hamilton stated:

I guess I'm confused, why is it before us tonight? I would think staff would have held off and simply waited until they got proper response from the developer before they moved this forward.

(CP at 42).

Though the City staff, including Bob Leedy, the Director of Planning & Community Development, openly offered testimony regarding their "concerns" about the proposed plat, they failed to provide the Council with the background with regard to the density calculations. Had Milestone been afforded an opportunity to speak, its representatives could have advised the Council of the following background with regard to the City's processing of the plat application.³

As noted earlier, Milestone did not proceed with its application without first disclosing the planned approach to density calculation and obtaining consent to the approach from City staff. Milestone specifically asked Elizabeth Chamberlain, the City planner then assigned to review the application, if it could include the five already existing and developed lots in its plat application including the five existing developed lots. After consulting with the City Attorney, Ms. Chamberlain advised that

³ The Superior Court granted Milestone's Motion to Supplement the Administrative Record with documents that corroborate the facts in this regard. The referenced documents were attached as Exhibits A, B and C to the Milestone's Motion to Supplement the Administrative Record. (CP at 351-364).

Milestone's proposed approach was acceptable and that it could proceed with the application. (*See* CP 359-364).

The plat, with full disclosure of the inclusion of the five existing lots, was thereafter proceeding through the review process and being prepared for presentation to the Hearing Examiner, when Ms. Chamberlain left the City's employ and was replaced by a new planner, Heather Stinson. Around August 2006, Ms. Stinson questioned whether it was appropriate to include the five existing lots in the plat. (*Id.*)

The radical change in position caused great concern for Milestone. With assurances from City staff, Milestone had expended substantial funds to proceed with this application.⁴ If the density was reduced, the project would no longer be profitable. Accordingly, in September 2006, Milestone's President, as well as its planning consultant, wrote letters to Bonney Lake's Director of Planning and Community Development objecting to the changed position. (CP 359-362). Director Bob Leedy responded on September 27, 2006, advising the City staff and Milestone

⁴ Based upon this representation, Milestone made substantial financial outlays to proceed with the plat application. Milestone owned some of the property that it wished to subdivide into 20 new single-family lots, but not all of the property. Thus, to proceed with the plat, Milestone contracted to purchase the remaining property. Milestone agreed to pay above-market prices for the property, but was willing to do so because of the previously obtained assurances from the City planner and a project with a density of 20 new lots would still yield profits with payment of the above-market purchase prices. The project would not, however, yield a profit at lower densities. Milestone also entered into contracts with each of the five lot owners in which Milestone made financial commitment to each owner in return for receipt of signed, notarized consents to include their properties in the Orchard Grove II plat. Again, Milestone went to this significant effort and committed its financial resources only after first obtaining City staff buy-in for the density calculation. (CP at 125, ¶4).

that Milestone's density calculations were not contrary to the Bonney Lake Municipal Code and, especially in light of the prior review history, Milestone should be allowed to proceed with its proposed plat. The Director wrote:

I have agonized long and hard over the density and ownership issues that have surfaced regarding this plat. On the basis of telephone conversations and review of materials it is my conclusion that we will process the plat as submitted and requested. Too much has been messed up with staff turnover and communication glitches for me to be unwavering in this situation.

I did chat with Elizabeth Chamberlain this morning, and she confirms that she gave the green light for submittal as it came down. Elizabeth says she did this after talking with [City Attorney] Jeff Ganson and getting his buy-off on the "creative" approach. Contrary to the notion that the applicant has to own the property, the BLMC says "All applications shall be signed by the property owner or an authorized representative." In the case of OG II, each of the "outside" parcels being included shows notarized authorization from each owner for Ron Newman to include the parcels. This is consistent with direction from our "outside planner" David Schroedel in his May 8 emails to Christy McQuillen. I have confirmed that Pierce County does allow this practice, so it isn't something new to the world.

There are just too many statements and recollections saying it is okay for us to now say it can't be accepted. If you see this practice as being problematic, clarification in the Code might be in order. I will notify the applicant of this decision. (Emphasis added.)

(CP at 364) (Emphasis added.) Thereafter, the City staff prepared a staff report to the Hearing Examiner and recommended approval of Milestone's

proposed plat, which was based upon density calculations that consider the acreage of the five existing single family lots. (CP 79-80).

Without even considering the report issued by its own staff, the Council adopted the pre-drafted Resolution 1650 (CP 14-15) in its entirety with respect to the proposed 25-lot preliminary plat. (CP 41-50). The Resolution made the following findings:

1. The proposed subdivision named Orchard Grove II is within an R-1 zone. The development density limits in R-1 zone are: “four to five dwelling units (rounded down) per net acre.” BLMC 18.14.060.

* * *

3. The proposed subdivision is proposed to create 20 new lots.

* * *

5. Lots 21 through 25 have already been platted and are currently part of a different subdivision, the Enchanted Estates Phase 2 subdivision.

6. Lots 21 through 25 are not proposed to be subdivided for the purpose of development or transfer as part of the proposed Orchard Grove II subdivision. Their inclusion within the Orchard Grove II plat appears to be for the sole purpose of artificially increasing allowed densities upon the portions of the plat actually being subdivided. The applicant has no possessory interest in such lots or any legal authority to limit future development activity on such lots.

7. The portion of Orchard Grove Plat II excluding lots 21-25 is proposed to be subdivided to provide 5.8 dwelling units per acre for the purposes of development or transfer.

8. By including the land acreage of lots 21 through 25, the applicant proposes to add the acreage of such lots to the density computations for the remainder of the plat, thereby proposing development of the plat at a higher density than is allowed by the BLMC for lots in an R-1 zone.

9. The City Council finds that the proposed subdivision does not comply with the BLMC since it includes lots external to the proposed subdivision lot, and those external lots are not proposed to be subdivided.

10. The City Council finds that the proposed subdivision does not comply with R-1 zoning density restrictions if lots 21-25 are not considered.

11. NOW THEREFORE THE CITY of Bonney Lake concludes that the proposed preliminary plat is denied; provided that the applicant shall have thirty (30) days for the date hereof in which to submit a revised application in conformance with the Bonney Lake Municipal Code and this decision. (Emphasis added.)

(CP 14-15).

Notably, there is no reference to any provision of the Bonney Lake Code to support the Council's decision that the plat, with the proposed density calculations, does not comply with the R-1 designation. Recall that City planner Heather Stinson testified to the Hearing Examiner that "there wasn't anything in our, in our code that prevented them including these lots in their density population." (HE VPT at p. 12.) Director Leedy also noted in his memorandum to Milestone that "Contrary to the notion that the applicant has to own the property, the BLMC says 'All applications shall be signed by the property owner or an authorized representative.' (CP 364). (*Id.*) This clarification was even made at the

January 16, 2007 Council Meeting. As noted in the Minutes:

City Attorney Haggard said the Hearing Examiner bases decisions on the Bonney Lake Municipal Code as well as the City's Comprehensive Plan. She said her understanding is that people who plat the property must have ownership or possessory interest of all properties. By including property you do not own in the plat, she explained, the residential density measurement is not valid. Councilmember King said there is not enough information as to whether or not the Hearing Examiner had proof of possessory interest for lots 21-25. Director Leedy said he was not aware of that requirement, only the need for the application to be signed by the owner or to include notarized authorization to the developers to be included.

(Emphasis added.) (CP 187-188). In the case of Orchard Grove II, each of the "outside" parcels being included shows notarized authorization from each owner for Ron Newman to include the parcels."

Planning staff present during the Council's review of Milestone's application noted that they were unaware of any provision in the BLMC that requires a possessory interest. At one point in the discussion councilmember David King questioned whether Milestone had a possessory interest in the property included in the application. Bob Leedy, the Director of the Department of Planning and Community Development, told the City Council:

I don't recall the phrase possessory interest or ownership in the Municipal Code, it may in there but I'm not aware of it. What I recall the BLMC saying was 'either signed by the owner or notarized authorization from the 5 property owners that are outside the actual plat boundaries and that what we relied on. Again I didn't see the phrase

'possessory interest' in the code.

(CP 44). Despite Mr. Leedy's warnings and reservations, the Council, without reviewing its own code, used the lack of possessory or ownership interest as a basis to exclude the five neighboring lots from the application. (CP 14-15 at ¶6). This is not only an erroneous interpretation of the code, but a complete and utter failure to even apply it.

Milestone appealed the Council's decision to the Pierce County Superior Court. The Honorable Judge Larkin presided over the appeal and ruled in favor of Milestone stating quite succinctly that:

There is a simple solution to solve this problem so that it doesn't happen in the future. Write a better ordinance that anticipates this.

(Verbatim Transcript of Proceedings, May 25, 2007, at page 5.) This Court should likewise reverse the decision of the City Council and remand this matter back to the Council to enter a decision consistent with the Hearing Examiner's decision.

III. SUMMARY OF ARGUMENT

The City of Bonney Lake's Municipal Code unambiguously allows applicants to include previously developed lots from another subdivision within their preliminary plat application. The Council acted contrary to both the City Staff and the Hearing Examiner's recommendations and denied Milestone's plat. The Council made its decision based on what it thought its code should be, not upon the actual code provisions that govern Milestone's application. The Council is free to amend its code, acting in

its legislative capacity, to prohibit the inclusion of existing lots in subdivision applications. The Council has no authority, however, to create such a prohibition while reviewing a pending, site-specific application under the existing code and acting in its quasi-judicial capacity.

This Court should reverse the decision of the City Council and remand this matter back to the Council to enter a decision consistent with the Hearing Examiner's recommendation.

IV. ARGUMENT

A. Standard of Review

The Land Use Petition Act ("LUPA"), chapter 36.70C RCW, governs judicial review of land use decisions. *HJS Development, Inc., v. Pierce County*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003). Under LUPA a reviewing court may grant relief from a final land use decisions when:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of law by a local jurisdiction with expertise;

....

(d) The land use decision is a clearly erroneous application of the law to the facts: . . .

In order to grant relief under this chapter, it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct.

RCW 36.70C.130 (emphasis added).⁵ When reviewing a superior court's decision the appellate court stands in the same position as the superior court. *Biermann v. City of Spokane*, 90 Wn. App. 816, 821, 960 P.2d 434 (1998).

The interpretation of an ordinance is a legal determination reviewed de novo.⁶ See e.g., *Nagle v. Snohomish County*, 129 Wn. App. 703, 712, 119 P.3d 914 (2005). If the meaning of the ordinance is plain on its face, the court must give effect to that plain meaning. *Id.* at 712. This means that if a jurisdiction omits language either intentionally or inadvertently a court is not permitted to read into the ordinance the language it believes was omitted. *United States v. City of Kent*, 157 Wn.2d 545, 553, 139 P.3d 1091 (2006); *State v. Delgado*, 148 Wn.2d 723, 728, 63 P.3d 792 (2003). This is especially true with respect to ordinances that regulate the use of land as it is well settled that "regulation of land use must proceed under an express written code and [can] not be based on ad hoc unwritten rules so vague that a person of common intelligence must guess at the law's meaning and application.:" *City of Seattle v. Crispin*,

⁵ The City asserts that only two of the standards are applicable. To the contrary Milestone asserted before the superior court and alleges here that the City Councils consideration of additional evidence during what was suppose to be a close record reviewed the provisions of the BLMC in addition to its due process rights. Milestone did not pursue that argument solely because the superior court granted its motion to supplement the record with evidence that refuted the City's one-sided presentation of additional evidence during the "close record" review of the Hearing Examiners recommendation.

⁶ Interpretation of local ordinances is governed by the same rules of construction as state statutes. *HJS Dev. v. Pierce County*, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003).

149 Wn.2d 896, 905, 71 P.3d 208 (2003) (Emphasis added).

If an ordinance is susceptible to more than one reasonable meaning it is ambiguous. LUPA's standard of review does not provide for absolute deference to a local jurisdiction interpretation of an ambiguous ordinance, but only "such deference as is due to a local jurisdiction with expertise." RCW 36.70C.130(c). Thus, under LUPA deference is not a guarantee. Instead, deference is only given when it is appropriate as set forth by the common law or "as is due," and then, it is only given to the local jurisdiction with expertise.

The City continues to misinterpret the proper standard of review under LUPA, specifically the error of law standard.⁷ The City erroneously asserts that "the Court must defer to the City Council's interpretation" of an ambiguous ordinance. (City's Opening Brief at 11) (Emphasis added); *see also* City's Brief at 18, 22 (LUPA "requires" deference to the City council's interpretation regardless of past enforcement). LUPA does not require that reviewing courts blindly defer to any interpretation of a land use ordinance that a local jurisdiction might concoct. To conclude otherwise would place landowners at the whim of local jurisdictions.

⁷ Contrary to LUPA's express directive, Appellants asserted during the previous proceeding before the superior court that an "arbitrary and capricious" standard of review should be employed when deciding whether the Council properly interpreted its ordinances. (CP 378). Here, Appellants have correctly dropped that argument, but again try to alter the appropriate standard of review under LUPA by requesting that this Court blindly defer to the City Council's interpretation of its ordinance.

Instead both LUPA and recent Supreme Court precedent mandate that deference to the construction of an ordinance by a local jurisdiction may not be provided unless there is an established pattern of enforcement. RCW 36.70C.130(c); *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007). In *Sleasman v. City of Lacey* the Supreme Court enunciated the common law rule with respect to providing deference to a local jurisdiction's interpretation of a land use ordinance. In that case landowners filed a LUPA petition appealing the decision reached by the City of Lacey's Hearing Examiner that upheld, but reduced, a fine issued by the City. An appeal was filed pursuant to LUPA that focused on the meaning of certain undefined words in the ordinance. On appeal the Supreme Court stated:

Although the Court of Appeals held the ordinance was plain on its face, it nonetheless gave deference to the city's construction. Ordinances with plain meanings are not subject to construction. Only ambiguous ordinances may be construed. However, even if the ordinance were ambiguous, Lacey's interpretation would not be entitled to deference. Lacey's claimed definition was not part of a pattern of past enforcement, but a by-product of current litigation. Often when an agency or executive body is charged with an ordinance's administration and enforcement, it will interpret ambiguous language within that ordinance. But the agency must show it adopted its interpretation as a "matter of agency policy." While the construction does not have to be memorialized as a formal rule, it cannot merely "bootstrap a legal argument into the place of agency interpretation" but must prove an established practice of enforcement.

[The City] bears the burden to show its interpretation was a matter of preexisting policy.

Sleasman, 159 Wn.2d at 646-647. In the absence of an agency policy, the construction of an ambiguous ordinance is not entitled to deference under LUPA. To the contrary, ordinances are construed against the municipality and in favor of the landowner. *Sleasman*, 159 Wn.2d at 644, fn 4.⁸ This interpretation is consistent with the common law. *See In re Marriage of Williams*, 115 Wn.2d 202, 208, 796 P.2d 421 (1990) (“Absent an indication that the Legislature intended to overrule the common law, new legislation will be presumed to be consistent with prior judicial decisions.”). *See also Carson v. Fine*, 123 Wn.2d 206, 214, 867 P.2d 610 (1994) (noting that statutes in derogation of the common law must be strictly construed).

B. The City Council Erroneously Removed Five Lots From Milestone’s Preliminary Plat Application.

Divisions of land are governed by chapter 58.17 RCW and applicable local ordinances. One of the central purposes behind chapter 58.17 is to “provide for the expeditious review and approval of proposed

⁸ As the Court in *Sleasman* noted, land use ordinances should be construed against the municipality because such ordinances are “in derogation of the common-law right” to use property to the fullest extent. *Sleasman*, 159 Wn.2d at 644 (quoting *Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 385, 739 P.2d 668 (1987)). Furthermore, neither *Isle Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002), *State v. C.J.*, 148 Wn.2d 672, 685, 63 P.3d 765 (2003), nor *Washington Pub. Ports Ass’n v. Department of Revenue*, 148 Wn.2d 637, 62 P.3d 462 (2003) addressed land use ordinances. Thus, they do not support the Council’s assertion that land use ordinances must be construed “to best advance” the legislative purpose. Instead land use ordinances are construed against the municipality. *Sleasman* 159 Wn.2d at 644.

subdivisions which conform to zoning standards and local plans and policies.” *Id.* To that end, chapter 58.17 directs local government to:

assure conformance of the proposed subdivision to the general purposes of the comprehensive plan and to planning standards and specifications as adopted by the city, town or county.

RCW 58.17.100 (emphasis added).⁹ Implicit, if not explicit, in these statutory directives is the requirement that proposed subdivisions¹⁰ be reviewed against code provisions that have been adopted by the City. *Id.*

After a summary review of Milestone’s preliminary plat application the City Council denied Milestone’s application. The City Council rationalized its decision by claiming that Milestone’s preliminary plat application exceeded the density limitation for the R-1 zone. Yet, Milestone’s preliminary plat, as proposed, met the City’s density limitations. This is undisputed.

The City Council was only able to reach its decision by removing five lots from Milestone’s application, thus, artificially lowering the acreage of the proposal. The City asserts the “BLMC unambiguously dictates rejection of the Milestone plat,”(Opening Brief at 14) but the only thing unambiguous about the BLMC, as admitted by City staff, is that

⁹ See also RCW 58.17.195 (“No plat or short plat may be approved unless the city, town, or county makes a formal written finding of fact that the proposed subdivision or proposed short subdivision is in conformity with any applicable zoning ordinance or other land use controls which may exist.”) (emphasis added).

¹⁰ A preliminary plat application is a proposal to subdivide land.

“there [i]sn’t anything in our, in our code that prevent[s] them including these lots in their density population [sic]. That’s it.” (HE VPT at 12).

The City Council attempts to condone its decision to exclude the lots for the following reasons: (1) Milestone had no possessory interest in the lots and no authority to limit development of those lots; and (2) the lots were not proposed to be subdivided. The BLMC, however, does not require that applicants have possessory interests in property included in a preliminary plat application, nor does it require that property be actually divided or transferred as a prerequisite to inclusion within a preliminary plat application. Where a legislative body omits language from a statute or ordinance, whether intentionally or inadvertently, courts are not permitted to read into the statute or ordinance the language it believes was omitted even under the guise of deference. *United States v. City of Kent*, 157 Wn.2d 545, 553, 139 P.3d 1091 (2006); *State v. Delgado*, 148 Wn.2d 723, 728, 63 P.3d 792 (2003). Thus, the Council unlawfully excluded the lots from Milestone’s plat application and erroneously denied its application for failing to meet density limitations. *Id.*; see also RCW 58.17.100.¹¹

¹¹ The City appears to recognize that there is no language in the Bonney Lake code to prohibit the inclusion of existing lots in a new subdivision application. After Milestone’s plat was denied, the Planning Director issued an Administrative Determination to address the “R-1 density loophole.” (CP 349-350.) Interestingly, even in this Administrative Interpretation, the City does not note any specific code language and does not consistently prohibit the inclusion of existing lots into new subdivision applications.

In reality, the City Council, after reviewing its own code in the context of this particular land use application, became dissatisfied with the legislation it had adopted. It appears that the City Council, after the fact, found their code to be incomplete. While the Council may, acting in its legislative capacity, later elect to amend its code to provide further subdivision limits, it cannot collaterally amend its code while acting in a quasi-judicial capacity reviewing a site-specific land use application. Upon review of the Hearing Examiner's decision, the Council was required to apply its code as written—which, in this case, is a code that does not include the subdivision limitations that the Council now seeks to apply. Again, land use ordinances are “in derogation of the common-law right” to use property to the fullest extent. *Sleasman*, 159 Wn.2d at 644. As such, the ordinances must be construed against the municipality and in favor of the property owner's free use of his land. *Id.*

Of course, even if the City decides to take legislative action, such action will not apply to the Orchard Grove II application, since it vested and must be processed under the code in effect at the time its application was deemed complete. RCW 58.17.033. At the time Petitioner submitted its application, the BLMC did not contain any provisions that required possessory ownership in the land to be divided. It also did not require that all lots with a proposed subdivision actually be divided. Thus, the City erroneously removed five lots from Milestone's application in order to

justify its ultimate conclusion that Milestone's plat application exceeded density limitations.

1. The BLMC Does Not Require a "Possessory Interest" in the Lots that are Part of the Proposed Subdivision.

The City Council excluded five lots from Milestone's plat application because "[t]he applicant has no possessory interest in such lots or legal authority to limit future development activity on such lots." (CP 14-15, ¶6) The City does not cite to a provision within its code that requires such authority over land sought to be subdivided because the BLMC does not actually require that an applicant have a possessory interest or legal authority to limit future development for the lots it wishes to subdivide.¹² The BLMC only requires that "applications shall be signed by the property owner or an authorized representative." BLMC 14.90.010 (emphasis added). In this instance, the applicant received written authorization from all property owners of the lots that were included in the preliminary plat application to sign the application on their behalf. (HE VPT at 5-6). Thus, Milestone complied with the unambiguous provisions of the BLMC.

¹² Notably, the City appears to have dropped that argument. Nevertheless, Milestone provides this brief response since that was one of the two reasons that City Council articulated as justification for its decision.

2. The BLMC Does Not Require that each Lot in a Preliminary Plat Application Be Divided in Order to be Part of a Preliminary Plat.

The Council also excluded the five lots because it concluded that they “are not proposed to be divided for the purpose of development or transfer as part of the proposed Orchard Grove II subdivision.” (CP 14-15, ¶6.) Again, there is no provision within the BLMC that imposes such a requirement. This is perhaps best acknowledged by the fact that a city planner, after discussing the issue with the City’s attorney, saw no reason to exclude the lots from a plat just because they would not be divided. (See CP 364)

The Council seems to have based its decision to remove the five lots on the definition of a “subdivision” in the BLMC.¹³ The BLMC defines a subdivision as “a division of land into 10 or more lots or other divisions of land for the purpose of development or of transfer.” BLMC § 17.08.020(T). The definition of subdivision, however, merely serves to identify what types of actions must go through the subdivision review process. It does not serve as a substantive provision of the BLMC that establishes approval criteria that can be used as a basis upon which to

¹³ The City argues that BLMC 18.14.060(A) “supports” the Council’s decision to deny Milestone’s application. (Appellant’s Opening Brief at 14). That provision states that: “Required density at the conclusion of any short plat or subdivision: four to five dwelling units (rounded down) per net acre.” Yet, the density at the conclusion of Milestone’s subdivision meets this standard. This is undisputed. The only way Milestone’s application does not meet this standard is if property is excluded from the application. The City does not describe how this provision gives it the authority to exclude lots from Milestone’s preliminary plat application.

judge Milestone's application. If Milestone's preliminary plat application does not meet the definition of a subdivision it is not subject to review.

Nevertheless, the City's reliance on the definition of subdivision still does not support its decision to remove five lots from Petitioner's plat. The definition of subdivision applies to the division of "land." Land is not specifically defined in the BLMC. Accordingly it should be given its ordinary and plain meaning, which is derived from a standard dictionary if possible. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 225, 137 P.3d 844 (2006). Webster's Dictionary defines land as "the solid part of the earth's surface." Webster's New World Dictionary (2nd ed. 2002) Under the City's interpretation, each lot or parcel would have to be divided "into 10 or more lots or other divisions . . . for the purpose of development or of transfer" in order to be included in a preliminary plat. Interestingly, the BLMC does not use the phrase lot—a plot of ground—or parcel—a piece (of land)—in their definition of subdivision. Thus, the City's argument is contrary to unambiguous definition of subdivision.

Allowing parcels or lots to be included in a preliminary plat even though it will not be divided furthers planning goals established by the Growth Management Act ("GMA") and the comprehensive plan. As the Hearing Examiner aptly pointed out:

7. The site is located within the Low Density Residential designation of the Bonney Lake Comprehensive Plan which encourages residential

development to take place in an orderly and cost efficient manner to best utilize available land and reduce sprawl. The applicant's unique proposal to increase density within an Urban Growth Area by adding five lots and an open space tract from an adjoining subdivision, satisfies said goal.

(CP 69) The BLMC calculates density for an R-1 zone as "four to five dwelling units (rounded down) per net acre." BLMC 18.14.060. Thus, it is possible that land in an R-1 zone will not be developed to its maximum potential because densities are calculated by rounding down the amount of units allowed per net acre. Accordingly, it is entirely within the bounds of the BLMC to include "extra" land from neighboring plats in order to "best utilize available land and reduce sprawl." (CP 69.)

Had the Council considered the information set forth above, it would have likely reached a different conclusion. The transcript from the City Council proceeding makes clear, however, that the Council rendered its decision based upon incomplete information. As this was a closed record appeal, the Council should have only considered the record before the Hearing Examiner, including the Staff Report and testimony from the applicant, when it reviewed the Hearing Examiner's Report and Decision. It is clear that the Council did not review the record before the Hearing Examiner when it considered and evaluated the Hearing Examiner's decision. Even worse, Council made inquiries of the City's attorney and planning staff, allowing them to opine as to the validity of the plat

application, without even allowing Milestone an opportunity to present counter arguments. When the permit history is reviewed, it is clear that prior to the January 16, 2007 Council meeting, the City planning staff, planning Director and even the City attorney had concluded that there was nothing in the Bonney Lake Code to preclude the density calculations proposed by Milestone. Had Milestone been afforded an opportunity to speak, this information could have been presented to the Council.

The Council rendered a decision based upon incomplete information and inaccurate analysis of its own code. The Council's decision should be reversed.

C. The Superior Court Properly Granted Milestone's Motion to Supplement the Record.

LUPA expressly grants the reviewing court the discretion, in certain circumstances, to admit additional evidence into the record. RCW 36.70C.120. The section, in relevant part states:

(1) When the land use decision being reviewed was made by a quasi-judicial body or officer who made factual determinations in support of the decision and the parties to the quasi-judicial proceeding had an opportunity consistent with due process to make a record on the factual issues, judicial review of factual issues and the conclusions drawn from the factual issues shall be confined to the record created by the quasi-judicial body or officer, except as provided in subsections (2) through (4) of this section.

....

(3) For land use decisions other than those described in

subsection (1) of this section, the record for judicial review may be supplemented by evidence of material facts that were not made part of the local jurisdiction's record.

RCW 36.70C.120 (emphasis added). A court's decision to admit evidence is reviewed for an abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). "Discretion is abused if it is exercised on untenable grounds or for untenable reasons." *Id.*

Judicial review is only confined to the record where the parties had "an opportunity consistent with due process to make a record on the factual issues." RCW 36.70C.120(1). While Milestone had the opportunity to create a record, that opportunity was not consistent with due process as the City Council freely considered additional information outside of the record during its self-described "closed-record" review. Interestingly, the City cites to the City Council's "closed-record" review of the proceeding before the Hearing Examiner as support for its argument that the Court erred in admitting additional evidence. The City's position appears to be that the City Council may consider one-sided evidence during their closed record review because it is not reversible error to do so. (Appellant's Opening Brief at 23).

Similarly, the City somehow comes to the conclusion that the documents admitted by the superior court are not relevant to this dispute. This argument is also unpersuasive. The City persistently maintains that this court must absolutely defer to the City Council's interpretation of its

ordinances. As noted earlier, however, LUPA, only requires that this Court provide such deference “as is due the construction of law by a local jurisdiction with expertise.” The Washington Supreme Court has further clarified that deference under LUPA is only due when there exists a clear pattern of enforcement. *See Sleasman*, 159 Wn.2d 646-647. Clearly, the conflicting interpretations reached by the City’s own staff and hearing examiner impact the amount of deference, if any, this Court should give the City Council’s ad-hoc interpretation of its ordinances.

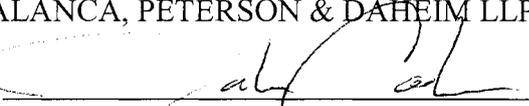
V. CONCLUSION

The BLMC does not contain anything either explicit or implicit that prohibits the inclusion of previously developed lots that are part of another subdivision in a preliminary plat application. The City seeks to amend its ordinance to include such a prohibition through the guise of statutory interpretation. The City is free to amend its subdivision ordinances while acting in its legislative capacity. The City Council, however, does not have authority to create such a prohibition while reviewing Milestone's application in a quasi-judicial capacity. Accordingly, Milestones respectfully requests that this Court affirm the decision reached by Pierce County Superior Court reversing the City Council's decision and reinstating the decision reached by the City Hearing Examiner.

Dated this 28th day of November, 2007.

Respectfully submitted,

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

By 

Margaret Y. Archer, WSBA No. 21224
John T. Cooke, WSBA No. 35699
Attorneys for Respondent Milestone
Homes, Inc.

No. 36441-7-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CITY OF BONNEY LAKE, a Washington municipal corporation,

Appellant,

v.

MILESTONE HOMES, INC., a Washington corporation,

Respondent.

CERTIFICATE OF SERVICE RE: RESPONDENT'S BRIEF

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

Margaret Y. Archer, WSBA No. 21224

John T. Cooke, WSBA No. 35699

Attorneys for Milestone Homes, Inc.

Suite 2100
1201 Pacific Avenue
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500

ORIGINAL

CERTIFICATE OF SERVICE

I certify that on the 28th day of November, 2007 I caused a true and correct copy of Respondent's Brief and this Certificate of Service to be delivered via ABC Legal Messengers, addressed to the following:

Kathleen J. Haggard
DIONNE & RORICK
601 Union Street, Suite 900
Seattle, WA 98101

Michael C. Walter
KEATING BUCKLIN & MCCORMACK
800 Fifth Avenue, Suite 4141
Seattle, WA 98101

WASHINGTON STATE COURT OF APPEALS, DIVISION II
David Ponzoha, Clerk/Administrator
950 Broadway, Suite 300
Tacoma, WA 98402-4454

I declare under penalty and perjury under the laws of the State of Washington that the foregoing is true and correct.


Cheryl M. Koulik
Legal Assistant to John T. Cooke
and Margaret Y. Archer