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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 298060

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

APPLEWOOD ESTATES HOMEOWNERS ASSOCIATION, a Washington
Nonprofit Corporation; BRANTINGHAM GREENS HOMEOWNERS
ASSOCIATION, a Washington Corporation; ROSS NEELY and MARY
JOANNE NEELY, husband and wife; and MICHAEL LAUDISIO and SHEILA
LAUDISIO, husband and wife,
Petitioners [in original action]/Appellees,

v.

BADGER MOUNTAIN APARTMENTS I, LLC, a Washington Limited Liability
Company; BADGER MOUNTAIN APARTMENTS II, LLC, a Washington
Limited Liability Company; BADGER MOUNTAIN APARTMENTS III, LLC, a
Washington Limited Liability Company; and WOLFF ENTERPRISES II, LLC, a
Washington Limited Liability Company,
Respondents [in original action]/Appellants,

and

CITY OF RICHLAND, a political subdivision of the State of Washington,
Respondents [in Original Action].

APPELLANTS' SUPPLEMENTAL BRIEF

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I. IDENTITY OF SUBMITTING PARTY

Appellants Badger Mountain Apartments I, LLC, Badger Mountain Apartments II, LLC, Badger Mountain Apartments III, LLC, (“Owners”) and Wolff Enterprises II, LLC (“Wolff Enterprises”) (collectively, “Developer”) offers this Supplemental Brief to discuss this Court’s recent decision in Vogel v. City of Richland, ___ Wn. App. ___, 2011 WL 1797181 (May 12, 2011).

II. DISCUSSION

A. Summary of Analysis.

Approximately three weeks after the Developer filed its appeal brief in this matter, this Court entered its decision in Vogel, which addressed a LUPA appeal of a minor amendment to a Plat granted by the City of Richland. Vogel dealt with an informal request for a minor amendment, which the City of Richland verbally approved. Here, the City of Richland provided written approval of a detailed proposed minor amendment after considerable analysis.

The Developer believes an analysis of Vogel may assist the Court in resolving the issues before it. First, the Developer will discuss why Vogel is distinguishable from the instant case. Alternatively, it will

explain why dismissal of the Neighbors' LUPA Petition is appropriate even using the Vogel analysis.

B. Vogel v. City of Richland

The issue before this Court in Vogel was whether a land use decision made on the basis of an oral request, to which there was an oral response is "issued" under LUPA as soon as there is some reference to it in a public meeting or a public record. The Court construed "issuance" under LUPA to require more than a mere reference: "there must be a memorialization sufficient to identify the scope and terms of the decision." Id at p. 3.

In Vogel, Bowder, the developer of Crested Hills, was given verbal approval sometime in February 2008 to construct a private street gated on either end. In May 2008, Vogel noticed construction of a rock retaining wall and contacted City of Richland personnel to inquire about the wall. At this time, Vogel was advised of the verbal approval provided to Bowder several months earlier.

On June 10, 2008, Vogel and others attended a city council meeting and expressed concern about the permission granted to Bowder. In particular, Vogel questioned the City of Richland's staff decision to treat Bowder's request as a "minor amendment" to the Crested Hills Plat, thereby requiring no notice or hearing. Earlier that day, City staff had

prepared a background memo for the City Council, which provided a general history of the situation, but did not specify Bowder's request or to what, specifically, City staff had agreed. The memo concluded by stating that staff would approve the project once it determined the project to be consistent with the City's development standards. Id at p. 4.

On June 17, 2008, the City of Richland's staff prepared a second memo defending the City's conclusion that Bowder's request could be processed as a minor amendment to the Plat, rather than a major one.

On July 9, 2008, the City's Public Works Department approved an entrance gate detail permit, as requested by Bowder.

On July 29, 2008, the Vogels filed a LUPA petition, challenging the reclassification of the street. Bowder moved to dismiss the petition as untimely, arguing that the challenged land use decision was issued on June 10, 2008, by virtue of the City staff's memo to the City Council on that date. The trial court determined that the street reclassification was known to the Vogels and made public on June 10, 2008, and dismissed the petition. Vogels appealed, challenging the dismissal of their petition as untimely and asking this Court to rule that the decision to reclassify a street from public to private constitutes a "major amendment" under the Richland Municipal Code.

In its analysis, this Court held that whether Vogel's petition was timely turns on the construction of when, under the circumstances, the land use decision was "issued." Id at p. 4. This Court correctly held that under LUPA's strict 21-day statute of limitation, the "issuance" of the land use decision is dispositive, not when the petitioner receives actual notice of the challenged decision.

Citing the Washington State Supreme Court's decision in Habitat Watch vs. Skagit County, 155 Wn.2d 397, 408, 120 P.3d 56 (2005), this Court recognized that LUPA "designates the exact date a land use decision is 'issued' based on whether the decision is written, made by ordinance or resolution, or in some other fashion." Applying this standard, this Court found that because Bowder's application and the City staff's response was verbal, the decision was "issued" on the date the decision was entered into the public record. Id at p. 4 (citing RCW 36.70C.040(4)(c)).

Quoting further from Habitat Watch, this Court discussed the "likely" meaning of RCW 36.70C.040(4)(c), shedding light on what is meant by entering the decision into the public record:

[I]f a decision is neither written (as provided for in subsection (a)) nor made by ordinance or resolution (subsection(b)), then it is issued on the date it is entered into the public record. Subsection (c), then, does not include decisions covered under subsections (a) and (b), but would include other types, such as decisions made orally at a City council meeting.

Id at p. 5 (citing Habitat Watch, 155 Wn.2d at 408, n. 5).

In assessing when the City's decision was "issued," the Court rejected Bowder's argument that the triggering event was the City staff's decision that substitution of a private street constituted a minor plat amendment, as reflected in the June 10 and June 17, 2008, memoranda to the City council. Id at p. 5. Because this decision did not "regulate the improvement, development, modification, maintenance, or use of real property, it was not a land use decision" under LUPA. Id. This Court found that the oral decision to grant Bowder approval "was only a decision about the process to be followed in making a land use decision. The trigger for the 21-day limitations period is the final land use decision itself, not any earlier procedural decision, even if a flawed procedure leading up to the land use decision might later be a basis for a LUPA challenge under RCW 36.70C.130(a)." Id. at p. 5.

This Court found that the June 10 and June 17 memo's from City staff only referred to a decision having been made by the City to permit substitution of a private road and did not purport to memorialize the terms of the decision, even summarily. Id. at p. 5. "The memoranda discussed the private road proposal in non-final terms." Id. Based on this, the Court held that whether an oral land use decision is simple or complex, "until its scope and terms have been memorialized in some tangible, accessible

way, even the most diligent citizen cannot know whether the decision is objectionable or, if it is, whether there is a viable basis for a challenge.” Id. at p. 6. This Court held that there was nothing in the record that purports to tell what the City staff actually authorized Bowder to do. “[T]he earliest that a final land use decision was issued allowing Mr. Bowder to substitute a private road for the public road provided by the Crested Hills Plat was on July 9, 2008, **the date of the first public record finalizing the change.**”¹ Id. (emphasis added). For this reason, this Court held that the LUPA petition was timely, as it was filed within 21-days of that date.

C. **Vogel is Distinguishable From this Case.**

At first blush it may be tempting to draw certain factual parallels between this case and Vogel to the extent both involve minor amendments administratively approved by the City of Richland without public notice. However, upon closer examination, Vogel is readily distinguishable.

As pointed out by this Court in Vogel, the minor amendment approved by the City of Richland was an informal oral decision wherein the City agreed to approve the street request once it determined that the

¹ Of note, there is nothing in Vogel that suggests the July 9, 2008 decision was provided to the Vogels. It was sufficient that it was available to them as part of the public record.

project was consistent with the City's development standards. This is markedly different than the facts in this case.

Here, the June 16, 2010, approval of the minor change to the Badger Mountain PUD was a detailed written decision rendered after considerable analysis. It addressed most of the features of the Badger Mountain PUD on a formal basis and in a way that bound the City and the Developer. Unlike its informal oral decision in Vogel, the City of Richland's June 16, 2010, decision did in fact regulate the improvement, development, modification, maintenance or use of real property and was not just a decision about the process to be followed in making a land use decision. See RCW 36.70C.020(1)(b). Indeed the Developer, Neighbors and the trial court all viewed the June 16, 2010, decision as the salient land use decision that was subject to LUPA analysis.

D. Alternatively, If the June 16, 2010 Minor Amendment Did Not Trigger the LUPA Appeal Period under Vogel, the City's August 4, 2010, Final PUD Plan Approval Did.

All parties and the trial court viewed the June 16, 2010, minor amendment as the decision subject to the LUPA analysis. If this Court determines that the June 16, 2010, approved minor PUD amendment was not a final land use decision subject to LUPA appeal, then the applicable decision would be the City's August 4, 2010, final approval of the PUD

plan. There, the City advised that “[t]he Application constitutes, and is hereby approved as, a revised final PUD plan as provided under RMC Sections 23.50.050 and 23.50.040(D).”² CP 579. Assuming the June 16 minor amendment did not trigger LUPA appeal rights, then the August 4 decision would have been the “first public record finalizing the change.” Vogel, at page 6.

Like in connection with the June 16 decision, the Neighbors failed to pursue available administrative remedies to challenge the August 4 decision, thus barring their LUPA action. Additionally, the Neighbors failed to file their LUPA action within 21 days of the issuance of the August 4, 2010 decision.

1. **Neighbors failed to exhaust available administrative remedies concerning the August 4, 2010 final PUD plan approval.**

RCW 36.70C.020(2) defines a “land use decision” as a “final determination” by a local jurisdiction’s body or officer with the highest level of authority to make the determination, including those with the authority to hear appeals. If an appeal is available and is not pursued, there

² On July 23, 2010, the City advised the Developer that its proposal constituted “a revised final PUD plan.” CP 578. Assuming the June 16 decision did not trigger the LUPA clock, this letter did. However, for the purposes of this discussion, the Developer will use the City’s August 4, 2010, decision. CP 579. Using either July 23 or August 4, 2010, the Neighbors’ Petition was still untimely.

is no “final” land use decision subject to judicial review under LUPA.

Even assuming the City’s August 4, 2010, decision was the “land use decision” subject to LUPA review, the RMC still provided the Neighbors with an appeal right to the Board of Adjustment, which was not pursued.

RMC 23.50 contains the City’s regulations pertaining to PUD’s. RMC 23.50 describes the administrative review procedures for the City’s zoning decisions, including administrative approvals of final PUD plans. The Board of Adjustment is empowered under this Chapter “to hear and decide appeals when it is alleged that there is an error in any order, requirement, decision or determination made by an administrative official in the enforcement of this title [Title 23 – Zoning Regulations].” RMC § 23.70.060(A). The very next section confirms that “an appeal to the Board of Adjustment concerning interpretation or administration of this Title [Title 23 – Zoning Regulations] may be taken by **any person aggrieved**”. RMC § 23.70.070 (emphasis added). The RMC is clear on its face that any person aggrieved by an administrative official’s approval of a final PUD plan has the right to appeal that decision to the Board of Adjustment.

It is undisputed that the Neighbors never attempted to assert such an appeal. As no “final determination” constituting a “land use decision”

reviewable under LUPA has been made, the trial court lacked jurisdiction to address the claims in the Neighbors' Petition.

The Neighbors assert that an administrative appeal right was not available to them in connection with the minor amendment because it was a Type I decision appealable only by "parties of record". See Neighbors' Response Brief at pgs. 12-13. However, final approval of a PUD plan is not specifically designated as a Type I decision under the RMC. Thus, even under the Neighbors' view, Title 19 does not apply to the administrative review analysis. Rather, the general appeal rights granted under RMC 23.70 govern. Since this section provides the Neighbors with an administrative appeal right they did not pursue, even under an expansive reading of Vogel, this Court lacks jurisdiction to consider their Petition

2. Neighbors failed to commence their LUPA action within 21-days of the "issuance" of the August 4, 2010 final PUD plan approval.

This Court in Vogel confirmed that the relevant inquiry as to whether the Neighbor's petition was timely turns on the construction of when, under the circumstances, the land use decision was "issued". Vogel at p. 4. Citing Habitat Watch, this Court also confirmed that subsection (c) of RCW 36.70C.040(4), which states that a decision is issued when it

is “entered into the public record,” applies when neither subsections (a) nor (b) apply.

As stated in Developer’s previous submittals, the 21-day clock commenced under subsection (a) three days after the written decision was mailed by the local jurisdiction. Using the August 4 approval of the final PUD plan as the triggering decision, the 21-day clock began to run on August 7, 2010, three days after the decision was mailed. As the Neighbors did not file their LUPA petition until October 4, 2010, it was not timely.

The Neighbors assert the decision was not mailed to them and, therefore, the “mailing” subsection of (a) does not apply. Rather, they focus on the second part of subsection (a), which sets the issuance date as the date the local jurisdiction provides notice that a written decision is publicly available. The Neighbors contend this was sometime in September and that their Petition was therefore timely. They claim that subsection (c) is inapplicable because the second part of subsection (a) applies. They argue, therefore, the date the decision was entered into the public record is irrelevant. However, Vogel confirms that “entry into the public record” is the date which should be used if mailing did not start the LUPA clock.

Assuming the Washington Supreme Court's "likely" construction of this section is the current state of the law, then subsection (c) only applies if neither subsections (a) or (b)³ are applicable. If mailing did not trigger the LUPA clock, all that is left is the second part of subsection (a), dealing with instances when decisions are made publically available. However, in cases such as this one involving the administrative approval of a final PUD plan following a minor amendment, no public notice is required. The second part of subsection (a) is simply not applicable in these type of cases. Applying the rationale of both Habitat Watch and Vogel, if the issuance date is not three days after the August 4, 2010, letter was mailed to the applicant, then subsection (a) is inapplicable because the City was not obligated to provide any public notice. As such, the default is subsection (c), which defines the issuance date as the date on which the decision is entered into the public record.

In Vogel, this Court applied subsection (c), holding that the date the land use decision was issued (the granting of an entrance gate permit) was July 9, the date the City approved that permit. Vogel at pgs. 3-4. Applying the Vogel analysis here, the date the City *issued* its decision granting administrative approval of the Badger Mountain final PUD plan was August 4, 2010, when it was placed into the public record. Given the

³ It is undisputed that subsection (b) does not apply here.

holding in Vogel, the Neighbors had until August 25, 2010, to assert their rights under LUPA. As it is undisputed that the Neighbors failed to file their petition by August 25, 2010, under Vogel their Petition was untimely and must be dismissed.

III. CONCLUSION

For the reasons set forth herein, under Vogel, the Neighbors' Petition should be dismissed.

RESPECTFULLY SUBMITTED this 2nd day of August, 2011.

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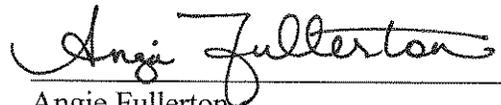
CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that on the 2nd day of August, 2011, a true and correct copy of the foregoing document was mailed, postage prepaid in the United States Mail to:

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