

No. 298060

FILED  
APR 13 2011  
COURT OF APPEALS  
STATE OF WASHINGTON  
BY \_\_\_\_\_

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

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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]/ **Respondents'**

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].

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APPELLANTS' BRIEF

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## **I. INTRODUCTION - SUMMARY OF ARGUMENT**

### **A. The Trial Court Erred in Not Dismissing the Amended Petition on Jurisdictional and Standing Grounds.**

A court only has jurisdiction under Washington's Land Use Petition Act (LUPA) to review "land use decisions." LUPA defines a "land use decision" as "a final determination by a local jurisdiction body or officer with the highest level of authority to make the determination, including those with authority to hear appeals." RCW § 36.70C.020(2).

Here, the Neighbors<sup>1</sup> challenge the City of Richland's (City) June 16, 2010, administrative decision to approve a minor amendment to the Badger Mountain PUD (PUD). Under the Richland Municipal Code (RMC), the City's administrative decision was subject to review by the Board of Adjustment, a five-member board appointed by the Richland City Council. RMC § 23.70.040. The Neighbors admit they did not file an appeal with the Board of Adjustment. Because there was no final "land use decision," the trial court lacked jurisdiction to resolve the Amended Petition, and it should have been dismissed.

Alternatively, the Neighbors lacked standing under LUPA. To have standing, the Neighbors were required to exhaust all administrative remedies. RCW § 36.70C.060(2)(d). The Neighbors do not allege they

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<sup>1</sup> Appellants are collectively referred to herein as "Developer" and Appellees as "Neighbors."

exhausted available administrative remedies. Accordingly, the trial court erred in not dismissing the Amended Petition.

Assuming there was a final "land use decision" under LUPA and the Neighbors are excused from exhausting administrative remedies, they nonetheless failed to initiate this action within LUPA's 21-day review period. RCW § 36.70C.040(3). Because the Neighbors did not commence this action within 21 days of the issuance of the City's June 16, 2010 minor amendment to the PUD, the trial court lacked jurisdiction and should have dismissed the case.

**B. The Trial Court Erred When it Reversed the City's June 16, 2010, Administrative Decision.**

Even if the Neighbors possessed standing and the trial court had jurisdiction to consider the claims raised in the Amended Petition, the court erred in not affirming the City's findings and decisions.

In assessing the Neighbors' LUPA claim, the trial court sat as an appellate court. Based on the record before it, the trial court needed to discern whether the City's interpretations of the RMC were correct, affording the City's decision "great weight" if any term in the RMC was ambiguous. As to factual issues, the trial court had to construe all evidence, and reasonable inferences drawn therefrom, in favor of affirming the City's decision, unless it concluded a finding was clearly

erroneous. In reviewing the trial court's decision, this Court engages in the same analysis.

The Neighbors claimed the City mistakenly considered the Developer's June 2010 request to modify the PUD as a "minor" change to the PUD under RMC § 23.50.070(B). Prior to the amendment, the PUD allowed for the construction of 251 housing units on 30 acres, including 34 single family residences, 82 rental duplexes, a 3-story 90-unit apartment complex, and a 45-unit senior assisted living facility, for a total of 304 residents. After the minor amendment, a total of 177 non-age restricted apartment units were permitted for the same number of residents – 304.

At trial, the court examined whether the City was clearly erroneous in finding that removal of the age restriction of the PUD was not a "change of use." The court also determined whether the City was clearly erroneous in finding that the Developers' project did not create a relocation of the PUD's density pattern.

Giving "great weight" to the City's construction of the RMC concerning ambiguous terms, and viewing all evidence and reasonable inferences drawn therefrom in its favor, there was ample evidence in the record for the trial court to affirm the City's decision, which it should have done. The change from an age to non age-restricted apartment facility was

a change in user not a change in use, and the City did not commit error in so finding.

What is more, there was nothing in the record to justify overturning the City's factual finding that the location of density was materially changed by the PUD modification, especially given the standard of review. Nor does the RMC support the Neighbors' claim that the PUD final plan needed City Council approval before building permits were issued. RMC § 23.50.040(D) provides that final PUD plans are to be approved by the "Administrative Official," not the City Council.

The trial court's reversal of the City's June 16, 2010, administrative decision and invalidation of the Developer's building permits was unwarranted and not supported by the law.

## **II. APPELLANTS' ASSIGNMENTS OF ERROR**

1. The trial court erred in finding it had jurisdiction to address the Amended Petition, where the City's June 16, 2010, decision was not issued by the highest level of authority under the RMC and, therefore, was not an appealable "land use decision" under LUPA.

2. The trial court erred in finding that the Neighbors possessed standing under LUPA, as they failed to exhaust available administrative remedies.

3. The trial court erred in not dismissing the Amended Petition, which was filed months after LUPA's 21-day jurisdictional filing deadline had run.

4. The trial court erred in finding that the Neighbors carried their burden of proof under LUPA to show that the City's June 16, 2010, administrative decision was a clearly erroneous application of law to facts or not supported by substantial evidence.

5. In considering the relocation of density, the trial court erred in finding that the Developer's project covered "10 to 15 acres" of the PUD, when it covered 15 acres.<sup>2</sup>

6. The trial court erred in finding that the June 16, 2010, amendment to the PUD, which permitted non-age restricted apartments, amounted to a change in use under RMC § 23.50.070(A).<sup>3</sup>

7. The trial court erred in finding that the June 16, 2010, amendment to the PUD relocated the density pattern under RMC 23.50.070(A).<sup>4</sup>

8. The trial court erred in finding that the Neighbors' constitutional right to notice and opportunity to be heard was violated.<sup>5</sup>

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<sup>2</sup> Clerk's Papers (CP) 832 - Findings of Fact 5.

<sup>3</sup> CP 835-837 - Conclusions of Law 9, 13, 14, 15, 17, 19, and 20.

<sup>4</sup> CP 836-837 - Conclusions of Law 12, 13, 14, 15, 17, 19, and 20.

<sup>5</sup> CP 837 - Conclusion of Law 18.

9. The trial court erred in invalidating the Developer's building permits, as the City's June 16, 2010 minor PUD amendment decision was a valid administrative action, the building permits were properly issued, and the City Council did not need to approve the PUD Final Plan before they were issued.<sup>6</sup>

### **III. ISSUES REGARDING ASSIGNMENTS OF ERROR**

1. Whether the City has enacted any administrative remedy to challenge a decision to grant a minor amendment to a PUD.

2. Whether the Neighbors pursued available administrative remedies.

3. Whether the City's June 16, 2010, administrative approval of the minor amendment to the Badger Mountain PUD was a final "land use decision" appealable under LUPA.

4. Whether the Neighbors lacked standing to bring a claim under LUPA because they did not exhaust available administrative remedies.

5. Whether the court lacks jurisdiction to consider the Neighbors' LUPA claims since they were asserted more than 21-days after the challenged land use decision.

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<sup>6</sup> CP 837 - Conclusion of Law 20.

6. Whether, after consideration of the record as a whole, reviewed in the light most favorable to the City and the Developer, and giving the required deference to the City's factual determinations and construction of law, the City's June 16, 2010, administrative decision was a clearly erroneous application of law to facts or was not supported by substantial evidence.

7. Whether the June 16, 2010, amendment to the PUD, which permitted non-age restricted apartments, amounted to a change in use under RMC 23.50.070(A).

8. Whether the June 16, 2010, amendment to the PUD relocated the density pattern under RMC 23.50.070(A).

9. Whether, in assessing relocation of density, the Developer's minor amendment covered 15 acres of the PUD.

10. Whether the Neighbors' constitutional right to notice and opportunity to be heard was violated by the City's June 16, 2010, administrative decision.

11. Whether the City, after approving the minor modification to the Badger Mountain PUD, properly issued building permits to the Developer.

12. Whether the Badger Mountain PUD Final Plan had to be approved by the City Council prior to the City issuing building permits.

#### **IV. STATEMENT OF THE CASE**

##### **A. Factual Background**

This LUPA action concerns the Badger Mountain PUD, which is generally located south of Westcliffe Boulevard and west of Brantingham Road, in Richland, Benton County, Washington.<sup>7</sup>

##### **1. Parties**

Appellees Applewood and Brantingham are homeowners associations whose members live in vicinity of the Badger Mountain PUD.<sup>8</sup> The individual Appellees (Neely and Laudiso) also live in the vicinity of the Badger Mountain PUD.<sup>9</sup>

Wolff Enterprises II, LLC is the developer of the project. Badger Mountain Apartments I, LLC, Badger Mountain Apartments II, LLC, and Badger Mountain Apartments III, LLC are the owners of the Property.

##### **2. Creation of the Badger Mountain PUD**

In June 2005, the City was presented with a proposal to create the Badger Mountain Village Planned Unit Development.<sup>10</sup> The PUD proposal included a request for the phased construction of 365 housing units for those who were 55 and older, including for-sale single family residences, rental duplexes, attached town homes, apartments and an

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<sup>7</sup> CP 29 (Amended Petition at Para. 2.1).

<sup>8</sup> CP 29 (Amended Petition at Paras. 2.2 and 2.3).

<sup>9</sup> CP 29 (Amended Petition at Paras. 2.4 and 2.5).

<sup>10</sup> CP 296-368.

assisted living care facility.<sup>11</sup> Access to the PUD was planned from both Gala Way and Westcliffe Boulevard.<sup>12</sup>

The PUD plan contemplated construction in 6 phases. 120 single family residences would be completed in Phases 1 and 2 on roughly one-half of the 60 acres.<sup>13</sup> Phases 3-6 were to be constructed on the remaining half. Phase 3 was to be a “multi-family type apartment building of 90 independent living and 45 assisted living units.” Phases 4 and 5 were to include for-rent duplexes, and Phase 6 was to be for-sale attached row-house type zero-lot line structures.<sup>14</sup>

Under the PUD plan, Phase 3 was to be constructed on 11 acres on Parcels 2C and 2E, with the apartment complex to be located in the center of the site and buffered by open areas landscaped by trees and berms.<sup>15</sup> The main lodge consisted of two distinct buildings with a central 2-story main entry connector. The plan contemplated a 3-story independent living wing with 90 apartments, while the 45 assisted living units were going to be in a 2-story structure.<sup>16</sup> The applicant described use of this property as

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<sup>11</sup> CP 301.

<sup>12</sup> CP 397.

<sup>13</sup> CP 301 and 375.

<sup>14</sup> CP 302.

<sup>15</sup> CP 303 and 338.

<sup>16</sup> CP 303-304.

“similar in use to a R3 zone.”<sup>17</sup> Under the RMC, an R3 zone is for multiple-family residential. RMC § 23.08.010.

Phases 4-6 were to be constructed on Parcels 2D, 2E and 2F on a total of 22 acres.<sup>18</sup> 82 duplexes and 34 townhomes were planned in these phases.<sup>19</sup> Thus, for the 30+ acres of land on which Phases 3-6 were to be constructed under the original PUD, 251 living units were permitted, including the 45 unit assisted living center.

On or about October 4, 2005, the City approved the Badger Mountain PUD through Ordinance No. 32-05.<sup>20</sup>

**3. Badger Mountain Phase 1 -- Parcel 2A.**

On or about May 15, 2007, the City staff recommended to the City Council that it approve the first phase of the Badger Mountain PUD development, Phase 2A.<sup>21</sup> As this was a residential subdivision, the final subdivision plat was submitted to the City Council for approval.

Unlike a final subdivision plat required for resale of residential lots, the final plans for the Badger Mountain PUD did not need City Council approval. Rather, under the Richland Code, final PUD plans are

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<sup>17</sup> CP 335-336.

<sup>18</sup> CP 303-304.

<sup>19</sup> CP 375.

<sup>20</sup> CP 449- 456.

<sup>21</sup> CP 585- 586.

approved by the City's Administrative Official. RMC § 23.50.050 and 23.50.040(D).

Notably, despite the fact that the original Badger Mountain PUD contemplated 60 acres of senior residences, the May 2007 subdivision plat submitted to the City Council recommended approval of Phase 2A *with no age restrictions*: "The approved plans provided for the phased development of a 60-acre site into lots and tracts for development of 116 single family detached housing units, 32 single family attached townhome style housing units, 41 duplex style homes (82 dwelling units), a 90-unit senior apartment complex and a 45-unit assisted living facility."<sup>22</sup> As can be seen, the age restriction contemplated in 2007 was only in relation to the apartment complex and assisted living facility. Phase 2A had no such restrictions. This is confirmed by the Badger Mountain Covenants, Conditions and Restrictions governing the PUD ("CC&R's"), which were recorded in Benton County on April 20, 2007,<sup>23</sup> and amended on February 11, 2008.<sup>24</sup> None of the permitted uses in either set of CC&R's impose any age restrictions.<sup>25</sup> Accordingly, when the Developer sought its minor

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<sup>22</sup> CP 585.

<sup>23</sup> CP 662- 723.

<sup>24</sup> CP 724-802.

<sup>25</sup> CP 696-710 (2007 CC&R's) and 734 (2008 Amended CC&R's). The only age restriction in either the 2007 or 2008 CC&R's relates to the 45-

amendment in 2010, the PUD was not limited to “housing for older persons,” as permitted by RCW § 49.60.222 and 42 U.S.C. § 3607.

4. **Request No. 1 for Minor Amendment to PUD Phases 3-6 – Approved July 2007.**

In 2007, the prior owner of the Property petitioned the City for an amendment to the PUD to allow for a reconfiguration of the housing units in Phases 3-6. Considering the factors set forth in RMC § 23.50.070, Rick Simon – the City’s Development Services Manager – exercised his judgment and approved the minor amendment.<sup>26</sup>

It appears that under the approved 2007 minor amendment, the 90-unit apartment complex and assisted living facility were relocated onto about seven acres of the property at the northwest corner of the 30 acres where Gala Way and Westcliffe Boulevard intersect.<sup>27</sup> This is approximately where the apartments are now being constructed.<sup>28</sup> There has been no LUPA appeal filed concerning this minor amendment.

5. **Request No. 2 for Minor Amendment to PUD Phases 3-6 – Approved May 2008.**

In 2008, the prior owner of the Property again asked the City to amend Phases 3-6 of the PUD. This time, the proposal contemplated an

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unit assisted living care facility. CP 710 (2007 CC&R’s) and CP 735 (2008 Amended CC&R’s).

<sup>26</sup> CP 461-463.

<sup>27</sup> CP 460.

<sup>28</sup> CP 487.

elimination of the apartments and assisted living facility.<sup>29</sup> Again, analyzing the factors in RMC § 23.50.070, Mr. Simon exercised his judgment and approved the minor amendment on May 16, 2008.<sup>30</sup>

**6. Request No. 3 for Minor Amendment to PUD Phases 3-6 – Rejected April 19, 2010**

In March 2010, the prior owner again requested a minor modification to the 30 acres comprising Phases 3-6 of the PUD.<sup>31</sup> The request was to modify Phases 3-6 of the PUD to allow 180 apartments and 72 lots in exchange for donating park land to the City.<sup>32</sup> After analyzing the issues and exercising his judgment and discretion, Mr. Simon *rejected* the proposed amendment, concluding that it increased the density of the PUD and was therefore a "major" change under RMC § 23.50.070 that required a new application for preliminary PUD approval.<sup>33</sup>

**7. Request No. 4 for Minor Amendment to PUD Phases 3 – 6 – Approved June 16, 2010.**

On June 2, 2010, the Developer applied for a minor modification to the PUD to allow for a 166 unit, non-age restricted, apartment complex on 15 acres of Parcel 2C.<sup>34</sup> Under the proposal, the remaining 15 acres were going to remain vacant. The proposed location of the apartment

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<sup>29</sup> CP 465- 468.

<sup>30</sup> Id.

<sup>31</sup> CP 502 - 524.

<sup>32</sup> CP 508.

<sup>33</sup> CP 571-572.

<sup>34</sup> CP 470.

complex was approximately the same as that envisioned under the original PUD.<sup>35</sup>

On June 4, 2010, Mr. Simon forwarded the proposal to members of several City departments for comment and evaluation.<sup>36</sup> In addition to discussing the issues at a meeting,<sup>37</sup> various City staff members provided Mr. Simon with input regarding the proposal via email.<sup>38</sup>

In response to an inquiry from the Developer, Mr. Simon described how many apartments could be constructed under a minor amendment in a letter dated June 9, 2010.<sup>39</sup> Mr. Simon reminded the Developer that density to the PUD could not be increased without obtaining approval through a major amendment, which would involve the submittal of a new application.<sup>40</sup> The Developer then submitted plans for a 176-unit apartment complex on the 15 acres, which did not increase density.<sup>41</sup>

On June 16, 2010, Mr. Simon administratively approved the "minor modification" requested by the Developer under RMC

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<sup>35</sup> Compare CP 338 (original PUD) with CP 487 (proposed amendment).

<sup>36</sup> CP 475.

<sup>37</sup> CP 476.

<sup>38</sup> CP 476- 480.

<sup>39</sup> CP 482-483.

<sup>40</sup> *Id.*

<sup>41</sup> CP 486-488. The trial court erred in finding the plans covered "10 to 15 acres." CP 832 (Finding of Fact 5).

§ 23.50.070, allowing 177 non-age restricted apartment units.<sup>42</sup> The minor amendment was approved because, in his judgment, Mr. Simon concluded that the proposed changes (1) did not represent a change in use, (2) did not represent a major change in the vehicular system, (3) did not result in an increase in population or density when compared to the original PUD, (4) did not represent an increase in either density or the relocation of density patterns when compared to the original PUD, (5) did not result in a decrease of open space area, (6) did not require changes in exterior boundaries, and (7) did not result in an increase in building heights.<sup>43</sup>

As the City determined the amendment consisted of minor changes, no public notice was required. RMC § 19.20.030. In reliance on the June 16, 2010, decision, the Developer proceeded with its development plans for the Property.

**8. City Approves Final PUD Plan.**

On July 23, 2010, the City confirmed that its June 16 decision constituted a minor amendment to the final PUD plan, as required under RMC § 23.50. The City also confirmed that the submitted building permit application constituted "a revised final PUD plan as required under RMC

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<sup>42</sup> CP 489-493.

<sup>43</sup> Id.

§ 23.50.050 and replaced the former final PUD plan that was in place for the project.”<sup>44</sup>

On August 4, 2010, the City confirmed that the Developer's application constituted, "and is hereby approved as, a revised final PUD plan as provided under RMC Sections 23.50.050 and 23.50.040(D). This letter constitutes final approval by an Administrative Official under RMC Chapter 23.50 of the minor modification and the final PUD plan, such that building permits will not be withheld under RMC Sections 23.50.050(C) or 23.50.070.”<sup>45</sup>

**9. Building Permits.**

After the City approved the final PUD plans, Badger Mountain Apartments LLC, I-III, purchased the 30 acres. On or about September 20, 2010, the City issued building permits to the Developer to construct the apartment buildings.<sup>46</sup> The Neighbors claim that the City should not have issued the building permits because Richland's City Council did not approve the final PUD plat for the development.<sup>47</sup> The Neighbors claim

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<sup>44</sup> CP 578.

<sup>45</sup> CP 579.

<sup>46</sup> CP 30 (Amended Petition at Para. 2.9).

<sup>47</sup> CP 30 (Amended Petition at Para. 2.10).

that approval by the City Council of the final PUD plat for the project was required prior to the issuance of building permits.<sup>48</sup>

### **B. Procedural Background**

This action, originally filed on October 4, 2010, and amended on October 8, 2010, involves a Petition under LUPA challenging the City's June 16, 2010, decision that the modifications to the PUD were minor. The Neighbors allege they learned of the June 16 decision on or about September 17, 2010, when the decision was allegedly first made publically available.<sup>49</sup> They contend the City erroneously determined that the PUD changes were minor, arguing instead they were major changes requiring public notice, and asked the Court to set aside the June 16, 2010, decision. The Neighbors claimed that the building permits issued by the City on September 20, 2010, were invalid because the final PUD plans for the Property were not approved by the City Council.

The initial hearing under LUPA was conducted on December 10, 2010, at which time the Developer and City's Motions to Dismiss were heard. Among other things, the Developer and the City argued that the Neighbors failed to exhaust administrative remedies and did not file their

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<sup>48</sup> *Id.*

<sup>49</sup> CP 29-30 (Amended Petition at Para. 2.6) and CP 170 (Resp. to Motion to Dismiss).

LUPA Petition within 21 days of the City's June 16 decision. The trial court denied the motions<sup>50</sup> and the matter was tried on January 25, 2011.

At trial, the court invalidated and rescinded the Developer's building permits, concluding that the June 16, 2010, minor amendment decision was a clearly erroneous application of law to the facts and was not supported by substantial evidence in that the amendment allowed a change in use and allowed for a relocation of the density pattern.<sup>51</sup> A Judgment was thereafter entered in favor of the Neighbors<sup>52</sup> and the Developer timely appealed.<sup>53</sup>

#### **V. STANDARD OF REVIEW**

Under LUPA, this Court reviews land use decisions on the basis of the administrative record rather than the superior court's record or decision. Milestone Homes, Inc. v. City of Bonney Lake, 145 Wn.App. 118, 125, 186 P.3d 357 (2008). In reviewing an administrative decision, an appellate court stands in the same position as the superior court. Habitat Watch v. Skagit County, 155 Wn.2d 397, 405-406, 120 P.3d 56 (2005).

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<sup>50</sup> CP 289-291.

<sup>51</sup> CP 830-839. The trial court affirmed the City's decision that the PUD amendment did not reflect a major change in vehicular circulation and did not increase density. CP 835.

<sup>52</sup> CP 840-843.

<sup>53</sup> CP 844-863.

Relief from a local land use decision may be granted **only** if the party seeking relief carries the burden of establishing that one of six standards listed in RCW § 36.70C.130(1) has been met. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 175, 4 P.3d 123 (2000). The Neighbors maintain that the City's decision was an error of law, was not supported by substantial evidence, and was clearly erroneous.<sup>54</sup>

**A. City Made No Errors of Law.**

Construction of statutes and local ordinances<sup>55</sup> present questions of law reviewed *de novo* under the error of law standard. See Waste Management of Seattle, Inc., v. Utilities and Transp. Comm'n., 123 Wn.2d 621, 627-28, 869 P.2d 1034 (1994). However, in a LUPA action, when determining whether there was an error of law, the court must afford "such deference as is due the construction of a law by a local jurisdiction with expertise." RCW § 36.70C130(1)(b). When ambiguity exists in a local ordinance, courts must afford great deference to the local jurisdiction's construction:

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<sup>54</sup> CP 612.

<sup>55</sup> Courts interpret local ordinances the same as statutes. Sleasman v. City of Lacey, 159 Wn.2d 639, 643, 151 P.3d 990 (2007).

When a statute is ambiguous - as in the instant case - there is the well known rule of statutory interpretation that the construction placed upon a statute by an administrative agency charged with its administration and enforcement, while not absolutely controlling upon the courts, should be given **great weight** in determining legislative intent. The primary foundation and rationale for this rule is that considerable judicial deference should be accorded to the special expertise of administrative agencies. Such expertise is often a valuable aid in interpreting and applying an ambiguous statute in harmony with the policies and goals the legislature sought to achieve by its enactment. At times, administrative interpretation of a statute may approach 'lawmaking,' but we have heretofore recognized that it is an appropriate function for administrative agencies to 'fill in the gaps' where necessary to the effectuation of a general statutory scheme.

Hama Hama Co. v. Shorelines Hearings Bd., 85 Wn.2d 441, 448 536 P.2d 157 (1975)(emphasis added) (internal citations omitted). For this reason, the Washington Supreme Court has held that when construing an ordinance, "in any doubtful case, the court should give great weight to the contemporaneous construction of an ordinance by the officials charged with its enforcement." Morin v. Johnson, 49 Wn.2d 275, 279, 300 P.2d 569 (1956).

What is more, when construing the RMC provisions at issue, this Court must be mindful that zoning regulations "are in derogation of the common-law right of an owner to use private property so as to realize its highest utility. Such ordinances must be **strictly construed** in favor of property owners and should not be extended by implication to cases not

clearly within their scope and purpose.” Morin v. Johnson, 49 Wn.2d at 279 (emphasis added).

**B. City’s Findings Supported by Substantial Evidence.**

Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted. Cingular Wireless, LLC v. Thurston County, 131 Wn.App. 756, 768, 129 P.3d 300 (2006). In reviewing the factual determinations made by Mr. Simon and the City, "a reviewing court must be deferential to factual determinations by the highest forum below that exercised fact-finding authority." Schofield v. Spokane County, 96 Wn.App. 581, 586, 980 P.2d 277 (1999). In affording deference under the substantial evidence standard, this court is required to consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. Cingular Wireless, 131 Wn.App. at 768 (deferring to the factual findings made by the Thurston County hearing examiner.); see also First Pioneer Trading Co., Inc. v. Pierce County, 146 Wn.App. 606, 613, 191 P.3d 928 (2008) (because review of facts is deferential to the trier of fact, the court viewed the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum exercising fact-finding authority, which was the Pierce County hearing examiner).

**C. Application of Law to Facts was Not Clearly Erroneous.**

A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed. Wenatchee Sportsmen, 141 Wn.2d at 176. Like the substantial evidence standard, this Court must defer to factual determinations made by Mr. Simon, as he was the highest City official that had fact-finding authority. Citizens to Preserve Pioneer Park, L.L.C. v. The City of Mercer Island, 106 Wn.App. 461, 473, 24 P.3d 1079 (2001). In this regard, the evidence and all reasonable inferences must be viewed in a light most favorable to Mr. Simon in support of his decision that the proposed PUD change was "minor" under the RMC. See Cingular Wireless, 131 Wn.App. at 768.

**VI. LEGAL ARGUMENT**

**A. Washington's Land Use Petition Act (LUPA)**

In 1995, the legislature enacted LUPA, the purpose of which was "to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review." RCW § 36.70C.010. LUPA applies only to actions that fall within the statutory definition of a

“land use decision.” Post v. City of Tacoma, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009).

LUPA's stated purpose is “timely judicial review.” RCW § 36.70C.010. It establishes a uniform 21-day deadline for appealing the final decisions of local land use authorities. “[A] land use decision becomes unreviewable by the courts if not appealed to superior court within LUPA's specified timeline.” Habitat Watch, 155 Wn.2d at 407. “[T]he act quite clearly declares legislative intent that chapter 36.70C RCW is to be ‘the exclusive means of judicial review of land use decisions.’” Id. at 407 (quoting RCW § 36.70C.030(1)).

“The procedural requirements of the Land Use Petition Act have to be strictly met before a trial court's appellate jurisdiction under the Act is properly invoked.” Citizens to Preserve Pioneer Park LLC v. City of Mercer Island, 106 Wn.App. 461, 467, 24 P.3d 1079 (2001). In fact, in San Juan Fidalgo Holding Co. v. Skagit County, 87 Wn.App. 703, 943 P.2d 341 (1997), *review denied*, 135 Wash.2d 1008, 959 P.2d 127 (1998), the court dismissed the case because the attempted delivery of the petition occurred **20 minutes** after the Auditor's office closed to the public. Similarly, the court in Overhulse Neighborhood Ass'n v. Thurston County, 94 Wn.App. 593, 599, 972 P.2d 470 (1999), held that “because LUPA provides unequivocal directives, the doctrine of substantial compliance

does not apply" and affirmed the trial court's dismissal of the land use petition. Id.

**B. The City's June 16, 2010, Decision was not an Appealable "Land Use Decision" under LUPA.**

Proceedings for review under LUPA must be commenced by filing a petition in superior court challenging a "land use decision." RCW § 36.70C.040(1) and (3). Therefore, in order for the Neighbors to avail themselves of the jurisdiction of the court, the City must have issued a "land use decision," as defined by LUPA. That is to say, if no statutorily defined "land use decision" was rendered, the trial court lacked jurisdiction under LUPA to address the Neighbors' claims.

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 authority to hear appeals. ..." If the decisions in question were not made by the City's body or officer with the highest authority to make them, including appellate bodies, the trial court lacked jurisdiction to review them. Indeed, the Neighbors concede that a final land use decision is required to confer jurisdiction on the court to resolve a LUPA dispute.<sup>56</sup> They also concede that a final land use decision must be issued by the

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<sup>56</sup> CP 172.

“highest level of authority to make the determination, including those with authority to hear appeals.”<sup>57</sup>

The procedure for processing permits in the City is set forth in RMC § 19.20.030, which states that "minor amendments to a PUD" are Type I permit decisions which can be made by administrative officials without public notice.<sup>58</sup> These decisions are appealable to the Board of Adjustment. See RMC § 19.30.040 and the matrix at § 19.20.030.

<b>ACTION TYPE</b>					
<b>PROJECT PERMIT APPLICATION TYPE AND PROCEDURE</b>					
	TYPE I	TYPE II	TYPE III	TYPE IV	TYPE V
Recommendation made by:	N/A	N/A	Physical Planning Commission (PPC)	N/A	PPC
Final decision made by:	Director	Board of Adjustment (BOA) or PPC	City Council (CC)	CC	CC
Notice of application:	No	Yes	Yes	No	No
Open record public hearing:	Yes, if appealed to BOA or PPC	Yes before BOA or PPC	Yes before PPC	No	Yes before both PPC and CC

<sup>57</sup> CP 172.

<sup>58</sup> A copy of RMC 19.20 is located at CP 269-272.

Closed record appeal/final decision:	No	Yes before CC on appeal	Yes closed record final decision by CC	No	No
Judicial appeal:	Yes	Yes	Yes	Yes	Yes

DECISIONS				
TYPE I	TYPE II	TYPE III	TYPE IV	TYPE V
permitted uses not requiring other land use review	Shoreline Permits	Site specific rezone	Final plats	
Home occupation approvals	Binding site plans >200,000 sq. ft.	Planned unit development		Development regulations
Minor amendments to PUD	Special use permits	Preliminary plats		Zoning text amendments
Flood plain development permit	site plan approvals			Annexations
Short plats				Area wide rezones
Binding site plan <200,000 sq. ft.				

RMC § 23.50 contains the City's regulations pertaining to Planned Unit Developments.<sup>59</sup> RMC § 23.50.070 discusses the factors used to determine whether a change to a PUD is a Type I minor amendment subject to administrative approval: "Administrative Official may approve changes in the development plan which, in his judgment, are minor changes and are consistent with the approved plan." RMC § 23.50.070(B). *These Type I decisions are appealable to the Board of Adjustment.* See RMC §§ 23.50.070(B), 23.70.060 and 23.70.070, as well as the matrix at § 19.20.030.<sup>60</sup>

RMC § 23.70 describes the administrative review procedures for the City's zoning decisions, including minor changes to PUDs.<sup>61</sup> 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

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<sup>59</sup> A copy of RMC 23.50 is located at CP 255-258.

<sup>60</sup> Similarly, the issuance of the building permits was appealable to the Board of Adjustment as a Type 1 decision. See RMC § 19.20.030; RMC § 23.70.060(A) and § 23.70.070.

<sup>61</sup> A copy of RMC 23.70 is located at CP 260-264.

title [Title 23 – Zoning Regulations] may be taken by any person aggrieved.” RMC § 23.70.070 (emphasis added).<sup>62</sup>

Under the RMC, there is no body with authority to review a determination of the Board of Adjustment. In the City of Richland, therefore, the Board of Adjustment is the body with the highest level of authority to make a determination as to whether the Director’s decision relating to the grant of a minor change to a PUD is valid. A decision by the Board of Adjustment on such an action constitutes a “land use decision” under RCW § 36.70C.020(2), while a decision of the Director does not.

In Ward v. Board of County Comm. Skagit County, 86 Wn.App. 266, 270-271, 936 P.2d 42 (1997), the court confirmed that the presence of a “land use decision” was jurisdictional. The court stated that under LUPA, a “land use decision” is a “final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals.” Id. Based on LUPA’s express language, the Ward court held that “[i]n order to obtain a final determination of the local governmental body with the highest level of authority to make the determination, one must, *by*

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<sup>62</sup> Notably, other provisions of the RMC also permit any aggrieved party to seek administrative appeal relief. See RMC § 22.09.220 (SEPA) and RMC § 24.13.090 (Plats and Subdivisions).

*necessity*, exhaust his or her administrative remedies." Id. at 270-271 (emphasis added). "Thus, exhaustion of administrative remedies is a *necessary prerequisite* to obtaining a decision that qualifies as a 'land use decision' subject to judicial review under LUPA, whether the party seeking review is an owner, applicant, or other aggrieved party." Id. (emphasis added).

In Ward, the court found that the Wards failed to timely file an appeal with the Board and did not obtain a final determination from the Board on their applications. "Consequently, they failed to exhaust their administrative remedies and failed to obtain a 'land use decision' subject to judicial review under LUPA. The trial court was therefore correct in dismissing the Wards' petition under LUPA." Id. at 272.

Here, the June 16, 2010, administrative decision was appealable to the City's Board of Adjustment. See RMC § § 23.70.070 and 19.20.030. The Board of Adjustment, therefore, was the highest level of review authority and its decision was required to create the jurisdictionally mandated "final determination" appealable under LUPA. The Amended Petition contains no allegation that an appeal of the Director's decision was taken to the Board of Adjustment, or that the Board of Adjustment made any final determination on the salient question. 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 Amended Petition.

**C. Neighbors Lack Standing Because They Failed to Exhaust Available Administrative Remedies.**

Pursuant to RCW § 36.70C.060(2)(d), standing to bring a land use petition under LUPA is limited to situations where the "petitioner has exhausted his or her administrative remedies to the extent required by law." Accordingly, judicial review of a land use decision may not be obtained under LUPA unless all the administrative remedies have been exhausted. Ward v. Board of County Com'rs Skagit County, 86 Wn.App. 266, 270-72, 936 P.2d 42 (1997).

Recently, the court in West v. Stahley, 155 Wn.App. 691, 229 P.3d 943 (2010), confirmed that because of LUPA's express purpose of timely judicial review, "LUPA's 21-day statute of limitations is a strict, uniform deadline for appealing the final decisions of local land use authorities." Id. at 699. The court thus held that "[j]ust as a LUPA petitioner must bring a petition within 21 days of the final land use decision, a LUPA petitioner must exhaust all administrative remedies before obtaining a final land use decision. Therefore, like the 21-day statute of limitation, exhausting administrative remedies is a fundamental tenant under LUPA; failure to do either is an *absolute bar* to bringing a

LUPA petition to superior court.” Id. "Exhausting administrative remedies is *always* a condition precedent to challenging a ‘land use decision’ that is subject to review under LUPA.” Id. at 697.

Here, the Neighbors fail to allege they exhausted, or even attempted to exhaust, available administrative remedies. Instead, they erroneously assert that there are no available administrative means to challenge the administrative decisions in question.<sup>63</sup> However, as discussed above, the decision relating to the PUD minor amendment and the issuance of building permits were both appealable to the Board of Adjustment. See RMC §§ 23.50.070; 23.70.060; 23.70.070; and RMC § 19.20.030. Because the Neighbors acknowledge they never attempted to exhaust available administrative remedies, they lack standing to bring their LUPA claims.

**D. The Trial Court Should Have Dismissed the Amended Petition Because it was Filed After LUPA's 21-Day Appeal Deadline.**

A LUPA petition is timely if filed and served on all necessary parties within 21 days of the issuance of the challenged land use decision. RCW § 36.70C.040(3). The LUPA 21-day filing deadline controls access to the trial court's jurisdiction over LUPA actions and, thus, cannot be extended or tolled. See Nickum v. City of Bainbridge Island, 153

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<sup>63</sup> CP 31 (Amended Petition at Para. 2.12).

Wn.App. 366, 381, 223 P.3d 1172 (2009). “Although the statute does not use the word ‘jurisdiction,’ the legislature’s use of the phrases ‘is barred’ and ‘may not grant review’ demonstrate the legislature’s intent to prevent a court from considering untimely filings.” Nickum, 153 Wn.App. at 381.

The court in Nickum held that “the LUPA time-of-filing requirements control access to the superior court’s substantive review of any LUPA decision and the failure to timely file an appeal prevents court access for such review; thus, the Nickums’ arguments urging equitable tolling cannot be considered. Consequently, the trial court did not err in concluding that the Nickums could not avail themselves of the court’s jurisdiction over LUPA actions.” Nickum, 153 Wn.App. at 382.

RCW § 36.70C.040(4) states that in calculating the 21-day time period to file a land use petition, the 21 days commences:

- (a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;
- (b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or
- (c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

With respect to the mailing requirement in section (a), the Supreme Court has held that “the statute does not indicate to whom the decision

should be mailed (or other notice provided), and appears to presume that this specification is indicated elsewhere.” Habitat Watch v. Skagit County, 155 Wn.2d 397, 408, 120 P.3d 56 (2005). Regarding when a decision is “entered into the public record,” a sound rationale exists for concluding that a decision is “entered” into the public record when it becomes a document subject to disclosure under the Public Records Act. This view was forcefully articulated by Justice Sanders in a concurring/dissenting opinion in Habitat Watch. Id. at 422-424.

Here, the June 16 decision was either “issued” on June 19, 2010, three days after it was mailed to the Developer under section (a), or on June 16, 2010, when it was entered into the public record under section (c). The Petition was filed in October 2010, almost 4 months after the June 16 decision was issued by the City. To conclude that the Petition was timely filed would be an affront to LUPA’s stated purpose – “timely judicial review.” RCW § 36.70C.010. As the Supreme Court held in Chelan County v. Nykreim, 146 Wn.2d 904, 52 P.3d 1 (2002):

To allow Respondents to challenge a land use decision beyond the statutory period of 21 days is inconsistent with the Legislature's declared purpose in enacting LUPA. Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner.

Id. at 933.

The Neighbors assert the 21-day jurisdictional period does not bar their claim because they did not get personal notice of the June 16, 2010, administrative decision until after the 21-day period expired. However, LUPA does not require personal notice, for if it did, land use decisions could be perpetually subject to attack, which would place "property owners in a precarious position." Id. at 933.

The Washington Supreme Court has held that "LUPA does not require that a party receive individualized notice of a land use decision in order to be subject to the time limits for filing a LUPA petition." Samuel's Furniture, Inc. v. State, Dept. of Ecology, 147 Wn.2d 440, 462, 54 P.3d 1194 (2002). The concurring opinion in Habitat Watch confirmed the scope of the Supreme Court's prior holding in Samuel's on notice: "In Samuel's Furniture, we effectively approved the practice of giving no notice, even to those entitled to it by law, by nonetheless finding LUPA barred an appeal of a land use decision." Habitat Watch, 155 Wn.2d at 420 (concurring).

Under Samuels, which is the Washington Supreme Court's most recent announcement on LUPA notice, the Court ruled that LUPA does not mandate specific, personal notice of a land use decision for the 21-day clock to begin. Based on the binding precedent in Samuels, the

Neighbors' LUPA claim was time barred, even if they did not receive actual notice of the challenged decision until after the 21-day LUPA appeal period had expired.

That the Petition was not timely filed is supported by Asche v. Bloomquist, 132 Wn.App. 784, 133 P.3d 475 (2006), a case decided after Habitat Watch. There, homeowners filed a nuisance action against neighbors and the County to stop construction of a house that impeded views. The court held that the Asche's failure to file a LUPA action within 21-days of the land use decision was determinative. Id. at 788. The Asches claimed that the Bloomquists had been granted a building permit on September 9, 2004, and that they did not receive notice of the permit until December 6, 2004. Id. at 788-789. Because of assurances by the County that it would take care of it, the Asches did not file their nuisance action until February 2005. The Asches claimed the building permit was erroneous because the County misapplied the zoning ordinance and miscalculated the maximum allowable height of the structure.

After concluding that the Asches were "aggrieved" under LUPA, the court found that they had proper standing. The court then discussed LUPA's 21-day statute of limitation, as applied to the Asches' petition and the fact that the Asches did not learn of the subject land use decision until well after the expiration of the 21-day period. The court held that because

the Asches admitted their petition was filed more than 21 days after the building permit was issued, "if their suit falls within LUPA, the trial court properly determined that the Asches were time-barred from challenging the validity of the permit." *Id.* at 795. Citing Habitat Watch, the court in Asche noted that the 21-day period begins running on the date that a land use decision is issued and that the land use decision was "issued" on the day the decision was mailed or notice was given that the decisions were publicly available. *Id.*

Applying Habitat Watch, the Asche court held that there was "no dispute in the instant case as to when the land use decision was issued, it was September 9, 2004; the Asches' complaint was filed February 2, 2005. That was well beyond the 21-day limit provided by statute. To the extent that the Asches' claim depends on challenging the validity of a land use decision, the trial court did not err in granting the CR 12(b)(6) motion; the Asches were barred because they failed to file their action within 21 days after the land use decision was issued." Asche, 132 Wn.App. at 796.

Significantly, the court in Asche did not use the date when the Asches learned of the decision. Of further significance is the fact that the court found the "issuance" date was the date when the permit was granted and placed into the public record (September 9, 2004), not when notice was given that the decision was publicly available.

Like the Neighbors, the Asches also claimed their due process rights would be violated if they were subject to the 21-day LUPA period without receiving actual notice of the issuance of the building permit within that time period. While the court found that the Asches were entitled to procedural due process protection, their due process claim failed.

Our Supreme Court has established a bright-line rule in Habitat Watch; LUPA applies even when the litigant complains of lack of notice under the procedural due process clause. We note that Habitat Watch had been given notice and had participated in proceedings to oppose the special use permit. Then, in two instances, Habitat Watch was not given notice required by the local ordinance and therefore did not have the opportunity to challenge the special use permit's extension. The court held that despite the lack of notice, LUPA barred Habitat Watch's challenges. The court stressed that LUPA's "statute of limitations begins to run on the date a land use decision is issued," and that "even illegal decisions must be challenged in a timely, appropriate manner." Given that position, we are constrained to hold that the Asches' due process challenge fails. ***Having failed to file a land use petition within 21 days of the building permit's issuance, they have lost the right to challenge its validity.***

Asche, 132 Wn.App. at 798-799 (quoting Habitat Watch, 155 Wn.2d at 401-403) (internal citations omitted) (emphasis added).

Further support for the Developer's position is found in Grundy v. Brack Family Trust, 116 Wn.App. 625, 67 P.3d 500 (2003). There, the County granted a building permit to raise a seawall without notice to any

neighbors. Id. at 628. No notice was required because the County determined that the project qualified for an exemption from the permitting requirements for substantial development on the shoreline. Months later, and well after the 21-day LUPA limitation period, Grundy learned of the project and later filed a nuisance action. Among other things, Grundy argued against application of LUPA because she "lacked notice of the land decision." Id. at 630. Despite the lack of notice and the due process concerns raised by Grundy, the Court of Appeals dismissed the case because a LUPA action was not timely commenced. A similar outcome is warranted here. Because the Petition was not filed within 21 days of the land use decision at issue, the trial court erred in not promptly dismissing it.<sup>64</sup>

**E. City's Minor PUD Amendment Decision Was Supported by Substantial Evidence and Not Clearly Erroneous.**

The Neighbors assert that the June 16, 2010, amendment to the PUD, which the City found to be a "minor change" under RMC §

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<sup>64</sup> The Neighbors also attacked the validity of the Developer's building permits. However, they cannot collaterally attack the June 16, 2010, decision by challenging the building permits. Wenatchee Sportsmen Association v Chelan County, 141 Wn.2d 169, 181-182, 4 P.3d 123 (2000) (holding that the petitioner could not collaterally challenge a rezone decision by way of a LUPA petition that challenged a Plat approval when the period for challenging the initial rezone decision had already passed) and Habitat Watch, 155 Wn.2d at 410-411.

23.50.070(B), and therefore subject to administrative approval without notice or public hearing, was in fact a "major change."<sup>65</sup> They also maintain that the final PUD plans had to be approved by the City Council, rather than Mr. Simon acting as the City's Administrative Official.

In resolving these claims, the Neighbors agreed that the trial court sat as an appellate court, reviewing the City's actions and decisions under the applicable review standards.<sup>66</sup>

1. **Changes to PUD's Under Richland's Municipal Code.**

RMC § 23.50 deals with Planned Unit Developments and subsection 23.50.070 addresses changes and modifications to PUDs. A "major" change to a PUD is defined in RMC § 23.50.070(A) as follows:

- (1) Change in use;
- (2) Major change in the vehicular circulation system;
- (3) Increase in density or relocation of density pattern;
- (4) Reduction of open space;
- (5) Change in exterior boundaries except survey adjustments;
- (6) Increase in building height.

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<sup>65</sup> CP 30 (Amended Petition at Para. 2.7).

<sup>66</sup> CP 611.

RMC § 23.50.070(B) provides that “The Administrative Official may approve changes in the development plan which, *in his judgment*, are minor changes and are consistent with the approved plan.” *Id.* (emphasis added). “Administrative Official” is defined as “such persons as the City Manager shall designate to administer and enforce” the zoning regulations. RMC § 23.06.195. Here, the Administrative Official is the Deputy City Manager for Community and Development Services or his designee, Rick Simon. RMC § 19.20.020.

While the terms in RMC § 23.50.070 are not defined, when read in context with the rest of the zoning code, they are meant to prohibit “major” changes to PUDs that would negatively impact the community. Zoning ordinances, such as RMC § 23.50.70, “are in derogation of the common-law right of an owner to use private property so as to realize its highest utility. Such ordinances must be strictly construed in favor of property owners and should not be extended by implication to cases not clearly within their scope and purpose.” *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956). The Court must be mindful of this strict rule of construction when examining the issues in this case, for whether a “major” change exists is largely a question of degree, rather than an absolute. For example, it could be argued that an increase in building height of one inch is a “major” change under a literal reading of RMC § 23.50.070.

However, in light of the strict construction standard for zoning issues favoring free use of property, if such an increase was found to have no negative impact on the community, the City would be justified in concluding it was not a “major” change.

The Neighbors claim the City erred in concluding that the proposed PUD changes were "minor" because they constituted a change of use, reflected a major change in the vehicular circulation system, and created an increase in density or relocation of density patterns. The trial court affirmed the City's traffic and density decisions, but reversed its decision that the amendment was not a change in use and did not result in relocation of density patterns. Affording the City the legally required review deference, the trial court erred in not affirming the City's discretionary decision that the PUD change was "minor."

**2. Removing the Age Restriction Was not a Change in How the PUD Property was Used.**

The RMC does not contain a definition of "use" or "change of use." The record shows that the City and Mr. Simon construed "change of use" under RMC § 23.50.070 to mean an actual change in how the property is used. Here, the original PUD approved multi-family use, including an apartment complex. The June 16 minor amendment to the PUD did not change this use. It still provided for the same type of use -

multi-family housing. The only change concerned who could occupy the apartments. That is to say, what changed from the original PUD is not the use of the property (e.g. residential apartments), but who could occupy the apartments (e.g. persons of all ages). The actual use of the property as a multi-family project remained the same. Finding that that proposed amendment contemplated construction of multi-family housing, as did the original PUD, Mr. Simon was not clearly erroneous in concluding that there was no "change in use."

The Neighbors assert that by allowing people of all ages to occupy the apartments, the use changed. However, the Neighbors conflate the issue of change of use with change of user. A change of use means something more than a change of user.

It is undisputed that under the original PUD, multi-family housing similar to that under a R3 zone (Multi-Family Residential District) was contemplated.<sup>67</sup> In particular, a three-story complex was approved, with 90 apartments and 45 assisted living units. The property was clearly approved for use as multi-family residential housing in the 2005 PUD. This "use" of the property remains unchanged. In his June 16 decision, Mr. Simon found that the original PUD "contemplated a variety of

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<sup>67</sup> CP 335.

housing types *designed* for seniors ..."<sup>68</sup> As discussed, while the original PUD was designed for seniors, there was no requirement that only those 55 or older could live in the PUD.<sup>69</sup> Mr. Simon and the City were correct to conclude that allowing persons of all ages to live in the apartments was not a change in how the property was used.

At best, the Neighbors' argument *could* render the phrase "change in use" ambiguous. Under LUPA and the rules of ordinance construction, Mr. Simon's construction of this phrase must be given "great weight." Hama Hama, 85 Wn.2d at 448. Specifically, the Washington Supreme Court instructs that when ambiguity is found to exist in an ordinance "the court should give *great weight* to the contemporaneous construction of an ordinance by the officials charged with its enforcement." Morin v. Johnson, 49 Wash.2d 275, 279, 300 P.2d 569 (1956) (emphasis added). Further, zoning ordinances, such as RMC § 23.50.070, "are in derogation of the common-law right of an owner to use private property so as to realize its highest utility. Such ordinances must be strictly construed in favor of property owners and should not be extended by implication to cases not clearly within their scope and purpose." Id. at 279.

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<sup>68</sup> CP 490.

<sup>69</sup> CP 662- 802.

In Citizens to Preserve Pioneer Park LLC v. City of Mercer Island 106 Wn.App. 461, 475, 24 P.3d 1079 (2001), residents claimed in a LUPA appeal that the city council adopted subjective review standards dependent on a telecommunication carriers' business objective of seamless wireless coverage. In assessing this argument, the court held that under LUPA, the council was entitled to "such deference as is due the construction of law by a local jurisdiction with expertise" and that "courts generally accord deference to an agency's interpretation of an ambiguous ordinance." Id. (citing RCW § 36.70C130(1)(b)). The court then found that the term at issue required interpretation because the meaning was not apparent from the plain language of the ordinance. The court affirmed the city council's construction. Id.

Here, what the Neighbors may really be complaining about is the demographics of those they contemplate occupying the apartments. To the extent they believe these demographics will result in a higher population density, that issue was separately considered by Mr. Simon and affirmed by the trial court. Indeed, the City reduced the total number of permitted housing units under the minor amendment based on the higher average occupancy rate of non-age restricted dwellings vs. age-restricted units.

To the extent the Neighbors complain that the "character" of the PUD has been changed to non-age restricted, this occurred long before the 2010 minor PUD amendment. Both Phases 2A and 2B are not age restricted, and the pertinent CC&R's contain no age restrictions. Further, nothing in the PUD Ordinance, CC&R's or any other document in the record show that any portion of the PUD complies with state and federal anti-discrimination housing laws for the creation of a community restricted to "housing for older persons" See 42 U.S.C. § 3607(b)(2) and RCW § 49.60.222. Accordingly, as a matter of law, the PUD has never been legally "age restricted," which further undermines the Neighbors' "change of use" claim.

**3. No Change in Relocation of Density Patterns.**

In support of his June 16 decision, Mr. Simon found that the proposed PUD modification did not represent a relocation in density pattern. Like the other terms in RMC § 23.50.070, "relocation of density pattern" is undefined. Also like the other terms in that section, to the extent the phrase is ambiguous, Mr. Simon's construction must be afforded "great weight." Hama Hama, 85 Wn.2d at 448. Further, in applying the law to the facts, after considering the evidence and all reasonable inferences drawn therefrom in favor of Mr. Simon, his findings must be affirmed unless they are found to be clearly erroneous.

Exercising his judgment under RMC § 23.50.070(B), Mr. Simon concluded that under both the original PUD plan and the proposed amendment, the primary density driver – the three-story apartment complex – was to be located in the central portion of the land.<sup>70</sup> When comparing the plans, this conclusion is accurate.<sup>71</sup> While it is correct that 15 of the 30 acres are now left in open space, whether this constitutes a sufficient change in location of density so as to become a “major” change is a uniquely factual issue best left to the professional judgment and opinion of individuals like Rick Simon who deal with similar issues daily. Indeed, the Neighbors have pointed to nothing in the record indicating that their community will be adversely impacted in any way by the apartments being constructed in their current location, especially as the trial court found that the overall site density has not changed. Viewing the evidence in a light most favorable to Mr. Simon and the City, it cannot be said the decision was clearly erroneous.

**4. The Neighbors' Constitutional Rights Were Not Infringed.**

The Neighbors allege that the City's amendment was a major change to the PUD, and the City's failure to provide notice and a public hearing violated their due process rights. As such, if the City was correct

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<sup>70</sup> CP 491.

<sup>71</sup> Compare original PUD plan (CP 338) with proposed change (CP 487).

that the amendment was "minor," the Neighbors' constitutional claim fails. What is more, the Neighbors failed to show that as property owners in the vicinity of the Project, they had a constitutional right to notice and an opportunity to be heard on the PUD amendment issue. In any event, a decision affirming the City's minor PUD amendment disposes of the Neighbors' due process claim, as it is undisputed that they had no constitutional right to notice and an opportunity to be heard on a Type I administrative decision.

**F. City Council Approval of the Final PUD Plan Was Not Required for Valid Building Permits.**

The Neighbors' only challenge to the issuance of the building permits is a contention that the City Council did not approve the final PUD plan for the development of Parcel 2C.<sup>72</sup> Relying on the Ordinance creating the Badger Mountain PUD and the November 8, 2005, Property Use and Development Agreement attached thereto, the Neighbors argue that final PUD plans were to be submitted for approval "in accordance with the Richland Municipal Code (RMC) RMC § 23.74.244." As the cited provision does not exist, the Neighbors argue, without any legal support, that the City Council had to approve the final PUD plan for Parcel 2C at an open public meeting prior to the issuance of building permits.

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<sup>72</sup> CP 30 (Amended Complaint at Para. 2.10).

However, nothing in the PUD Ordinance, the Property Agreement, or the Richland Code mandates City Council approval. In making their argument, the Neighbors ignore provisions of the RMC on this precise issue.

RMC § 23.50.050 sets forth the requirements for approval of a PUD plan. The RMC specifically states that final PUD plans are approved at the administrative level. Specifically, RMC § 23.50.050(B) states that “approval of the final PUD plan shall be in accordance with Section 23.50.040(D).” RMC § 23.50.040(D) in turn provides that an applicant "shall submit to the *Administrative Official* for review within the provided time limit its final development plan as provided in the final approval section" and the "*Administrative Official* shall thereupon approve or disapprove the final development plan.” In conformity with these code provisions, the City sent the Developer a letter on August 4, 2010, stating the following:

The 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). This letter constitutes final approval by an Administrative Official under RMC Chapter 23.50 of the minor modification and the final PUD plan, such that building permits will not be withheld under RMC Sections 23.50.050(c) or 23.50.070.<sup>73</sup>

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<sup>73</sup> CP 579 .

Ignoring RMC § 23.50, the Neighbors cite to the City Council's role in the approval of the final *Plats* for Phases 2A and 2B as support for their claim that similar approval was required for Phase 2C. However, final Plats are only needed where the property is to be subdivided for the purpose of sale or lease. Unlike Parcels 2A and 2B, Parcel 2C was subject to a PUD plan and not a residential subdivision and, therefore, a final Plat and City Council approval was unnecessary. That the City Council may have approved the final Plats for Phases 2A and 2B is irrelevant.

It is the Administrative Official, not the City Council, who approves or disapproves final PUD plans and determines if the final plans conform substantially to the original PUD. Since the RMC does not empower the City Council with authority to approve final PUD plans, the Neighbors' challenge to the issuance of the building permits fails.

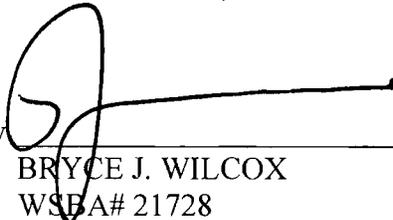
## **VII. CONCLUSION**

The failure of the Neighbors to exhaust administrative remedies not only deprives them of standing to maintain a LUPA action, but also deprives the Court of jurisdiction under LUPA for failure to obtain a final "land use decision" for review by the Court. The Court is similarly deprived of jurisdiction by the Neighbors' failure to initiate their LUPA action within the 21-day appeal period. The trial court erred in not dismissing the Neighbors' Amended LUPA Petition.

If the Court concludes there is sufficient jurisdiction to consider the merits of the Neighbors' claims, it should affirm the City's discretionary land use decision. The City's factual findings that the proposed PUD amendment was not a change in use and did not result in a relocation of the density pattern were both supported by substantial evidence and were not clearly erroneous. It was inappropriate for the trial court to substitute its judgment for the City's when ample evidence existed in the record to support the City's decision. The City's June 16, 2010 decision should be affirmed and the Developer's building permits reinstated.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of April, 2011.

LUKINS & ANNIS, P.S.

By   
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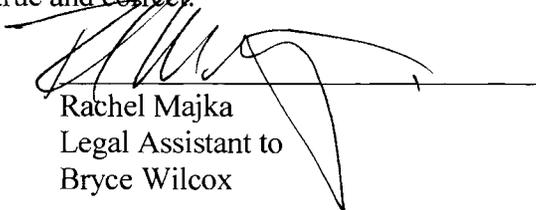
## CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that on the 25<sup>th</sup> day of April, 2011, a true and correct copy of the foregoing document was mailed, postage prepaid in the United States Mail to:

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



Rachel Majka  
Legal Assistant to  
Bryce Wilcox