

FILED

MAY 26 2011

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]/ **Respondents'**

v.

BADGER MOUNTAIN APARTMENTS I, LLC, a Washington Limited
Liability Company; BADGER MOUNTAIN APARTMENTS II, 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].

RESPONDENT'S BRIEF

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I. INTRODUCTION

This appeal arises out of a land use petition filed by the Neighbors¹ under the Land Use Petition Act (RCW 36.70C) challenging two land use decisions made by the City of Richland (hereinafter “the City”) related to the Badger Mountain Village Planned Unit Development (hereinafter the “PUD”) in Richland, Washington. The PUD was formed in 2005 for the express purpose of developing an age restricted retirement community for seniors. In June 2010, the Developer applied for an amendment to the PUD to permit the Developer to build non-age restricted apartment buildings. The City administratively granted the amendment without notice to the Neighbors and surrounding community, and without a public hearing. Subsequently, in September 2010, the City issued Building Permits to the Developer allowing them to proceed with construction of the apartment buildings despite the fact that the final development plan for that phase of the PUD (Parcel 2C) had not been approved by the City Council. The Neighbors assert that these land use decisions are unlawful and invalid, and the trial court agreed by invalidating the PUD Amendment and the Building Permits.

¹ For the sake of clarity, and to be consistent with the Appellant’s Brief, the Appellants are referred to herein as the “Developer” and the Appellees as the “Neighbors”.

II. STATEMENT OF THE CASE

A. Establishment of the Badger Mountain Village Planned Unit Development.

The City of Richland established the Badger Mountain Village Planned Unit Development in October 2005 when the City Council passed Ordinance No. 32-05.² To establish the PUD the owner of the property submitted a Planned Unit Development Application to the City in June 2005.³ This preliminary plan submitted by the owner was a detailed proposal outlining how they intended to develop the property. The plan was explicit as to the intended use of the property if the PUD was approved:

Proposed Uses – General

The applicant, Westcliffe Village, LLC, proposes to construct an age restricted Continued Care Retirement Community (CCRC) for seniors on 60 acres. The proposed development requires approval of a planned unit development within the existing R1M zone...

The development will provide 365 units in a variety of types of independent living to assisted living housing options for those people 55 and over in age...

The housing options range from for sale single-family residences, rental duplexes, attached town home style housing for independent senior living and an apartment building designed with various levels of increased care

² CP 449-453. Prior to establishing the PUD, the property was zoned Medium Density Single Family Residential.

³ CP 296-368

including the provisions of an assisted living care facility.⁴

As required under the Richland Municipal Code, the City prepared a Notice of Application which was delivered to the surrounding property owners, and scheduled a public hearing on the proposed development.⁵ The notice clearly described the development as an “age restricted retirement community” which would include a “90-unit independent senior apartment complex and a 2-story 45-unit assisted living facility”. The City also circulated notice to interested agencies regarding the proposal, and requested comment from those agencies.⁶ Like the public notice, the notice to the agencies described the development as an age restricted retirement community. In response to the notice the Richland School District submitted a written comment, stating “since the proposed development is for senior housing and is not anticipated to generate any students for the district, the district has no comment on the development at this time. If in the future, the use of this development changes to other than a retirement community, the district would appreciate notification and an opportunity to comment on the revised development plans.”⁷

⁴ CP 301 (emphasis added)

⁵ CP 375-376

⁶ CP 382-384

⁷ CP 413

The City of Richland staff prepared a comprehensive report for the Planning Commission to consider at the hearing.⁸ In recommending approval of the PUD, the staff report premised its findings and conclusions on the fact that the project was for senior housing. On August 24, 2005, the Planning Commission considered the application for the PUD and the City of Richland staff report at a public hearing.⁹ After due consideration, and after hearing comments both in favor and in opposition, the Planning Commission unanimously passed a motion to concur with the Findings and Conclusions set forth in the staff report, and recommend that the City Council approve the PUD.¹⁰ On October 4, 2005, the Richland City Council enacted the Ordinance changing the zoning designation to Planned Unit Development “to allow for development of an age restricted retirement community.”¹¹

B. Approval of Phase 2A

In May 2007, the owner submitted the first phase of the PUD development (referred to as Phase 2A or Parcel 2A) to the City, which was approved by the Council at an open public meeting.¹² The owner’s

⁸ CP 386-391

⁹ CP 440-448

¹⁰ CP 442, 446

¹¹ CP 449-456

¹² CP 585-592

submission included a comprehensive site plan including a site plan for Parcel 2C (the 30 acres at issue in this appeal).¹³ The site plan for Parcel 2C showed a mixture of housing including age-restricted senior apartments, an assisted living facility, and two family dwellings on the entire 30 acres. All of the housing established for Phase 2C was designated as “senior housing” in accordance with the approval for the PUD under Ordinance No. 32-05.¹⁴

C. The Developer’s “minor” amendment

Since the approval of Parcel 2A in May 2007, Parcel 2C remained undeveloped. On June 2, 2010, the Developer applied for an amendment to the Badger Mountain Village PUD to allow a 166 unit, non-age restricted apartment complex on 10.76 acres of the 30 acre site.¹⁵ In the application the Developer stated: “It is our belief that this *change of use* is consistent with the original PUD as amended and thus would qualify as a minor modification of the PUD.” The Developer also notified the City that they would be submitting a separate application for additional density for the unused acreage, because the proposed amendment used all of the approved density for the entire 30 acres.¹⁶ The significance in treating the amendment as “minor” rather than “major” is that the Developer avoids the time,

¹³ CP 591-592

¹⁴ CP 591

¹⁵ CP 470

¹⁶ CP 475, CP 576

expense, and public scrutiny associated with a major amendment. Under RMC 23.50.070, *minor* changes to a PUD may be administratively approved, but *major* changes are considered a new application for preliminary approval which requires notice to the surrounding property owners, a public hearing before the Planning Commission, and final approval by the City Council. RMC 23.50.040.¹⁷ Major changes are defined as a:

- 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

RMC 23.50.070.

On June 16, 2010, Rick Simon, the Development Services Manager for the City, sent correspondence to the Developer approving the Amendment, deeming it a “minor change”.¹⁸ The administrative amendment granted by the City entitled the Developer to: develop and build a non-age restricted apartment building; consolidate all of the density allowed on the entire 30 acres into apartments situated on approximately 10 acres; and to change the vehicle circulation pattern. Since the request was deemed

¹⁷ Copies of the relevant Richland Municipal Code sections are located at CP 186-196 and CP 621-626.

¹⁸ CP 490-493

“minor”, no notice of the application was given to the surrounding community, nor was there a public hearing to consider comment from the public on the requested change to the PUD. The approval letter was mailed to the Developer, but notably neither the Neighbors, nor the community at large were notified in any manner that the Developer had applied for the Amendment, nor that the City had granted it.

After obtaining the Amendment, the Developer submitted a subsequent application to amend the City’s Comprehensive Plan in order to increase the density allowed on the 30 acre parcel.¹⁹ This was necessary because the Amendment to the PUD allowing the apartment building had consumed all of the allowed density for the entire 30 acres.²⁰ The City prepared a Staff Report on the requested amendment to the Comprehensive Plan and scheduled a public hearing on that request for September 22, 2010.²¹ In advance of the hearing the City notified the surrounding property owners, including the Neighbors, that the Developer had applied for an amendment to the Comprehensive Plan, and that the Staff Report on the proposed Comprehensive Plan Amendment would be available to the public on September 17, 2010.²² Contained in the Comprehensive Plan

¹⁹ CP 593-598

²⁰ CP 596

²¹ CP 170

²² CP 170

Amendment Staff Report, was a copy of the June 16, 2010 letter from Rick Simon to the Developer approving the Amendment to the PUD.²³ This was the first time that there was any notice to the Neighbors or the general public that the PUD Amendment existed, or was publically available. Upon reviewing the Comprehensive Plan Staff Report, and seeing the PUD Amendment made by Rick Simon on June 16, 2010, the Neighbors immediately retained counsel and filed their land use petition on October 4, 2010 contesting the validity of the PUD Amendment on the basis that it constituted a major change to the PUD, and therefore required notice and a public hearing.²⁴

Despite the pending LUPA Petition, the Developer commenced construction of the non-age restricted apartment complex. The City issued Building Permits to the Developer on September 20, 2010. The Permits were issued despite the fact that Phase 2C of the PUD has not been approved by the City Council, unlike Phase 2A and Phase 2B.²⁵ The Neighbors contend that approval of Phase 2C by the City Council and/or the Planning Commission was a necessary prerequisite to issuance of the building permits. Since neither the City Council nor the Planning Commission did so, the building permits are invalid.

²³ CP 29-30

²⁴ CP 1

²⁵ CP 585-586, 602

D. Procedural Background

The Neighbors filed their Land Use Petition on October 4, 2010. The Developer and the City filed motions to dismiss asking the court to dismiss the Petition on the basis that the Neighbors failed to exhaust their administrative remedies, that they lacked standing, and that the Petition was untimely. The court declined to dismiss the Petition, finding that the Neighbors had standing, that they had no administrative remedies to exhaust, and that the Petition was timely based on the fact that the PUD Amendment was not issued until September 17, 2010, when it was made available to the public in the Comprehensive Plan Amendment Staff Report. The court set trial for January 25, 2011. After hearing argument from the parties at trial, the court ruled in favor of the Neighbors, declaring that the PUD Amendment and the Building Permits were invalid. This appeal by the Developer followed. The City declined to appeal.

III. ARGUMENT AND AUTHORITY

A. Standard of Review

LUPA is the exclusive means of judicial review of land use decisions. RCW 36.70C.030. When reviewing a superior court's decision under LUPA, the Court of Appeals stands in the shoes of the superior court, reviewing the ruling below on the administrative record. Citizens to

Preserve Pioneer Park, LLC v. City of Mercer Island, 106 Wn. App. 461, 24 P.3d 1079 (2001).

The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

- (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 a law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (d) The land use decision is a clearly erroneous application of the law to the facts;
- (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
- (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1)

Factual findings are reviewed under the substantial evidence standard, and conclusions of law de novo. Biermann v. City of Spokane, 90 Wash. App. 816, 821, 960 P.2d 434 (1998). The test of substantial evidence is

whether evidence is sufficient to persuade a fair-minded person of the truth of the declared premise. Schofield v. Spokane County, 96 Wash. App. 581, 589, 980 P.2d 277 (1999). A clearly erroneous application of law to the facts occurs if the court is left with the definite and firm conviction that a mistake was committed. Lakeside Industries v. Thurston County, 119 Wash. App. 886, 894, 83 P.3d 433 (2004).

B. The trial court did not err when it denied the Developer's Motion to Dismiss

The trial court did not err when it denied the Developer's Motion to Dismiss on the basis that the Neighbors had no administrative remedies available to them, and that the PUD amendment was not issued until it was made available on September 17, 2010 in the Comprehensive Plan Amendment Staff Report.

1. Since there were no administrative remedies available to the Neighbors, the Court has jurisdiction, and the Neighbors have standing.

The Developer's argument that the Neighbors did not exhaust their administrative remedies is two-fold: 1) that the Amendment was therefore not a "land use decision" by definition²⁶; and 2) that the Neighbors did not have standing²⁷. Both arguments fail on the basis that the Neighbors had no

²⁶ Appellant's Brief, §VI.B

²⁷ Appellant's Brief, § VI.C

administrative remedies to pursue, and therefore they met the exhaustion requirement.

a. "Land Use Decision"

A "land use decision" is defined 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." RCW 36.70C.020(2). The Developer contends that if the decision in question was not made by the City's body or officer with the highest authority to make the decision, including appellate bodies, the courts lack jurisdiction to review the decision. The Developer claims that the Neighbors could have administratively appealed the PUD Amendment to the Board of Adjustment, under RMC 23.70. RMC Chapter 19, however, governs project permit processing, including minor amendments to planned unit developments.²⁸ Chapter 19 supersedes conflicting ordinances within the code, and all conflicts are to be resolved in favor of Chapter 19. RMC 19.10.020.²⁹

The Developer is relying on procedures set forth in RMC 23.70 pertaining to the powers of the Board of Adjustment, as well as the time under which appeals need be made to the Board of Adjustment. The express

²⁸ CP 188

²⁹ CP 187

provisions of RMC Chapter 19, however, supersede and govern RMC 23.70. Under the framework established by Title 19, all development permit applications are classified as, Type I, Type II, Type III, Type IV or Type V actions. RMC 19.20.030. The City of Richland has adopted a matrix in RMC 19.20.030³⁰ which outlines various decision types, as well as the procedure for appeals of the various decision types. Minor amendments to planned unit developments are specifically identified as a “Type I” decision. RMC 19.20.030. Under the procedure outlined in the matrix, the final decision on a Type I application is made by the Deputy City Manager for Community and Development Services or his designee. RMC 19.20.020-030. There is no notice of application made to the public for a Type I decision and no public hearing on a Type I application unless the decision made by the Director is appealed. RMC 19.20.030. However, only *parties of record* may initiate an administrative appeal of a Type I decision. RMC 19.70.030(A). “Parties of record means: 1) the applicant; 2) any person who testified at the open record public hearing on the application and/or; 3) any person who submitted written comments concerning the application at the open record public hearing”. RMC 19.70.030(B). Since there is no open record public hearing on a Type I decision, the only party with standing to

³⁰ CP 188

initiate an administrative appeal on a Type I decision is the applicant, who in this case was the Developer.

Since the Neighbors could not initiate an administrative appeal of the Amendment, they had no administrative remedies to exhaust. Once the Developer's requested PUD Amendment was granted by the City, the land use decision was final because the Developer received the amendment they requested, and thus had no reason to appeal. The Neighbors, however, could not be "parties of record" because there was no open record public hearing to attend, or submit written comments to, and therefore no body with authority to hear their appeal.

b. Standing

For similar reasons the Developers' argument that the Neighbors did not have standing fails. In Smoke v. City of Seattle, 132 Wn.2d 214, 937 P.2d 186 (1997), the plaintiffs sought permits to build single family residences on four lots. The City only granted permits for two of the lots. The plaintiffs filed suit against the City for refusing to issue all of the building permits. The City argued that the plaintiffs had failed to exhaust their administrative remedies on the denial of the building permits, and therefore lacked standing to bring their claim. Like the Richland Municipal Code, the Seattle Municipal Code classified various project decisions into

“types”. The requested building permits were Type I decisions, and under the Seattle Municipal Code “Type I decisions are non-appealable decisions made by the Director which require the exercise of little or no discretion.” Smoke, 132 Wn.2d at 223. The Supreme Court noted that “one of the primary purposes of the doctrine to exhaust administrative remedies is to provide a more efficient process and allow the agency to correct its own mistakes.” Smoke, 132 Wn.2d at 226. “However, where there is no possible remedy at all there can scarcely be a failure to exhaust remedies.” Smoke, 132 Wn.2d at 225. The court held that because there was not an adequate administrative remedy from a Type I decision, the plaintiffs met the exhaustion requirement.

In the present case there was no administrative appeal available to the Neighbors. RMC 19.70.030 specifically excludes the Neighbors as parties who can initiate an administrative appeal of a Type I decision. Therefore, the Neighbors have exhausted their administrative remedies to the extent required by law as required under RCW 36.70C.060(2)(d), and have standing to bring this LUPA petition.

2. The PUD Amendment was issued on September 17, 2010, and therefore the Petition was timely.

The Developer contends that the Neighbors failed to file the Petition within LUPA's 21 day filing deadline after the PUD Amendment was issued.³¹ RCW 36.70C.040(3) states that the petition is timely if it is filed and served within 21 days of *the issuance of the land use decision*:

For the purposes of this section, the date on which a land use decision is issued is:

- (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) or (b) of this subsection applies, the date the decision is entered into the public record.

The Developer claims that the PUD Amendment 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 Neighbors, however, assert that the City did not mail the decision to them, and that the City didn't provide notice that the decision was publicly

³¹ Appellants' Brief, §VI.D

available until September 17, 2010 when the City included the PUD Amendment in the Staff Report related to the Developers application for the Comprehensive Plan Amendment. Therefore the PUD Amendment was not “issued” until September 17, 2010, under subsection (a). The Neighbors’ land use petition was filed and served on October 4, 2010³², well within the 21 day time limit.

The Petitioners’ argument is supported by the Supreme Court’s decision in Habitat Watch v. Skagit County, 155 Wn.2d 397, 120 P.3d 56 (2005). In Habitat Watch the Skagit County hearing examiner granted a special use permit for development of a golf course. At the time the initial permit was granted in 1993, Habitat Watch had raised the concerns of surrounding landowners regarding the negative impact that the golf course would have. Despite their objections the special use permit was granted for a two year period. The developer did not meet the deadline established by the special use permit, and requested a two year extension of the permit. Extensions, like the initial permit, required notice and a public hearing before the hearing examiner. Habitat Watch again participated in the proceedings and objected to the project. Despite their objections the hearing examiner granted the extension for the special use permit. Subsequently, the developer made two additional extension requests, but the County failed to

³² CP 1

provide notice and schedule a public hearing on the requests. The extensions were granted and ultimately set the deadline for commencement of construction to June 14, 2002.

In May 2002, Habitat Watch became aware of logging activity at the proposed site. Habitat Watch submitted a public disclosure request to the County, and the County provided records to Habitat Watch on June 24, 2002, wherein Habitat Watch first discovered that the County had granted two additional extensions without the required notice and public hearing. Habitat Watch ultimately filed a LUPA petition on July 31, 2002 challenging the permit extensions on the basis that the County failed to provide notice or a public hearing on the requested extensions. The trial court dismissed Habitat Watch's petition, and the Supreme Court granted direct review.

In analyzing the County's assertion that Habitat Watch's LUPA petition was untimely, the court stated:

Here, it is not clear from the record or the briefing when the final two permit extensions were issued within the meaning of RCW 36.70C.040(4). There is nothing in the record that shows the extension decisions were mailed to all parties of record, or otherwise made publicly known, or passed by ordinance or resolution. It is also unclear if and when the decisions were "entered" into the public record.

Habitat Watch, 155 Wn.2d at 408.

The court stated “at the very latest, the written decisions were issued when the County made them available on June 24, 2002 in response to Habitat Watch’s public disclosure request.” Habitat Watch, 155 Wn.2d at 409. By the date of the County’s response to Habitat Watch’s public disclosure request, the County had provided “notice that a written decision is publicly available” pursuant to RCW 36.70C.040(4)(a). Id. However, despite this analysis, the Court held that the trial court’s dismissal was proper because Habitat Watch did not file their LUPA petition until over 21 days after they had actually received copies of the permit extensions on June 24, 2002. The court conceded, in dicta, that had Habitat Watch filed the LUPA petition within 21 days of June 24, 2002, the court may not have dismissed the case. Habitat Watch, 155 Wn.2d at 409, fn 7.

In his concurring opinion, Justice Chambers further elaborated on the issue of the 21 day limitation with respect to parties who did not have notice of a decision. “We should not apply LUPA to bar the court house doors to those who had no notice, especially when the decisions at issue were decisions made by lower level staffers.” Habitat Watch, 155 Wn.2d at 420 (*concurring*).

The 21 day limitation is a reasonable time limit for filing a notice of appeal of a decision when the challenger has actual

notice. But an appeal assumes that the appealing party has meaningful notice of the action, the issues are already framed, and an opportunity to consider and arrange for representation has been afforded, some preliminary hearing or action has occurred, and the parties have had time to anticipate and consider appropriate responses to an adverse determination. The 21 day LUPA time limit is wholly inadequate for one whose first notice of a land use action has actual notice of work on the property and must discover what government action has been taken, arrange for representation and determine the appropriate course of action to follow.

Habitat Watch, 155 Wn.2d at 420 (*concurring*).

The Supreme Court has kept the door open for innocent third parties who are not given notice of an application for a land use decision, are not afforded an opportunity to participate in the decision making process through a public hearing, and who are not provided notice that a land use decision has been made. Under Habitat Watch, the Supreme Court has indicated that the court should look to the latest date that the decision could be “issued” within the meaning of RCW 36.70C.040(4).

In this case, the land use decision was a private letter from the City to the Developer.³³ No notice of the application was given to the Neighbors, nor was notice given that a decision had been made until the City included a copy of the PUD Amendment in the Comprehensive Plan Amendment Staff

³³ CP 9-12

Report which was made publically available on September 17, 2010. It was not until this point that the Neighbors received notice that proposed action pertaining to the 30 acre parcel was being considered by the City, and therefore the Neighbors had reason to seek information concerning the proposed action. In reviewing the Staff Report the Neighbors discovered the improper and unlawful PUD Amendment that had been issued in June. The Neighbors immediately sought out representation, and filed the petition in a timely manner.

The Developer points to a number of cases which they argue supports their position. These cases are distinguishable from the present case. For instance, they cite to Nickum v. City of Bainbridge Island, 153 Wn. App. 366, 223 P.3d 1172 (2009) for the proposition that the 21 day filing deadline under LUPA cannot be extended or tolled. In Nickum, however, the petitioners failed to file within 21 days of *actual* notice of the land use decision. The Nickum court acknowledged “our Supreme Court has suggested that a LUPA appeal filed within 21 days of actual notice of certain land use decisions . . . may be timely. But here, the Nickums failed to file their LUPA petition within 21 days of their actual notice of the permit; thus, we need not address this possibility.” Nickum, 153 Wn. App. at 382, FN11. Here, the Neighbors did file within 21 days of their actual notice.

The Developer cites to Samuels Furniture, Inc. v. Department of Ecology, 147 Wn.2d 440, 54 P.3d 1194 (2002) for the proposition that LUPA does not require a party receive individualized notice in order to be subject to the time limits for filing a LUPA petition. First it should be noted that Samuels Furniture was decided prior to Habitat Watch. Second, in Samuels the court found that the Department of Ecology (whose decision had been dismissed), did have actual notice of the project. Conversely, the Neighbors in this case had no notice until September 17, 2010. The 30 acres at issue had sat undeveloped and untouched for five years since the PUD had been established. During that time the Neighbors were under the belief that the only development allowed on the 30 acres was restricted to an age restricted retirement community.

The Developer further cites to Chelan County v. Nykreim, 146 Wn.2d 904, 52 P.3d 1 (2002). Nykreim is also distinguishable in that the Chelan County Planning Department had mistakenly issued a permit in violation of the Chelan County Code. The County subsequently revoked the permit and then filed suit in Superior Court for a declaratory judgment on whether or not the revocation of the permit was appropriate. The Supreme Court held that the County knew of its own decision for 14 months prior to filing the lawsuit. Nykreim, 146 Wn.2d at 924. The Nykreim court also addressed claims advanced by intervening third parties who did not have

notice of the land use decision. In addressing the interveners' claims, the court noted that the interveners did have actual notice when they sent a letter to the County challenging the propriety of the permits, but even applying the date of actual notice, the interveners had failed to file within 21 days.

The Developer also cites to Grundy v. Brack Family Trust, 116 Wn. App. 625, 67 P.3d 500 (2003). In that case, the plaintiff never filed a LUPA petition, instead filing a nuisance action. The Developer erroneously argues that the Court of Appeals dismissed the case because a LUPA action was not timely commenced. While the Court of Appeals made passing reference to the 21 day time limit, the court's holding was that the plaintiff's claim should have been brought under LUPA, as opposed to a nuisance action. The Court of Appeals did not make any specific findings or rulings on the timeliness of the lawsuit.

Finally, the Developer references Asche v. Bloomquist, 132 Wn. App. 784, 133 P.3rd 475. In that case, there was no dispute as to when the land use decision was "issued". Asche, 132 Wn. App. at 796. The Asche court also referred to Habitat Watch and noted that in Habitat Watch the record was unclear as to when the decision was issued. Id. at footnote 4.

In this case, there is clearly a dispute as to when the PUD Amendment was issued. The Developer claims it was either the date the

letter was written by the City, June 16, 2010, or three days later after it was mailed to the Developer, on June 19, 2010. The Neighbors assert that the decision was issued for purposes of RCW 36.70C.040(4) when the City gave notice that the PUD Amendment was publically available in the September 17, 2010 Staff Report to the Comprehensive Plan Amendment request. Prior to this, the PUD Amendment was nothing more than a private letter between the City and the Developer, for which no notice was given publically. That letter was never presented at a Planning Commission meeting, or a City Council meeting, or put on any agendas, nor was a copy forwarded to the Neighbors, nor was notice posted on the property. It was a private letter between the City and Developer which the Neighbors would have no reason to know about. Under RCW 36.70C.040(4)(a) and Habitat Watch, the Neighbors submit that the PUD Amendment was not issued until September 17, 2010, and that therefore the LUPA petition was timely.

C. The Trial Court did not err in finding that the PUD Amendment was “major”.

The Neighbors contend that the City’s determination that the June 16, 2010 PUD Amendment was “minor” was an erroneous interpretation of law, was not supported by substantial evidence, and was a clearly erroneous application of the law to the facts. RCW 36.70C.130(1)(b)-(d). Under

Richland Municipal Code (“RMC”) 23.50.070³⁴, major changes in the approved final development plan shall be considered as a new application for preliminary approval. Major changes include the following:

- 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

Here, there was a change in use, a major change in the vehicular circulation system, and an increase in density or relocation of the density pattern. In spite of the clear facts before them, the City deemed the changes minor, and administratively approved the PUDAmendment. Had the change been deemed “major”, then it would have been subject to notice and a public hearing, with an opportunity for the public to comment. RMC 23.50.040(A). Thus, the City engaged in an unlawful procedure because the decision was outside the authority of the administrative officer. RCW 36.70C.130(1) (a) and (e). As a result, the land use decision made by the City deprived the Neighbors of their constitutional due process right of notice and an opportunity to be heard. 36.70C.130(1)(f).

³⁴ CP 623-626

1. The PUD Amendment was a Change in Use.

The Amendment requested by the Developer, and approved by the City, changed the use from a mixture of senior housing (i.e. apartment building, attached single family residences, assisted living facility) to a non-age restricted apartment complex.³⁵ RMC 23.50.020 provides that “a planned unit development district may be approved for any use or combination of uses listed in Chapters 23.14 through 23.30 of this title. The uses permitted in any specific PUD district shall be enumerated in the ordinance establishing such district.” The 2005 Ordinance specifically rezoned the property “from Medium Density Single Family Residential (R1-M) to Planned Unit Development (PUD) to allow for development of an age restricted retirement community.”³⁶ This Ordinance was based upon a detailed preliminary PUD proposal which was clear in its intent to build senior housing, and in particular a senior apartment and an assisted living facility.³⁷

RMC 23.18.030 contains a chart setting forth various permitted residential uses. The chart specifically delineates “Senior Housing” and “Assisted Living Facility” as particular uses.³⁸ It also identifies

³⁵ CP 490-493

³⁶ CP 452

³⁷ CP 296-318

³⁸ CP 622

“Apartment/Condominium” as a separate and distinct use from Senior Housing or Assisted Living Facilities. By permitting a non-age restricted apartment building, the City changed the use, resulting in a “major” change to the PUD. RMC 23.50.070(A)(1).

Zoning ordinances are to be *liberally* construed so as to effectuate their intent. Mall, Inc. v. City of Seattle, 108 Wn.2d 369, 378, 739 P.2d 668 (1987). Although ambiguous zoning ordinances are strictly construed in favor of property owners, this preference is only warranted to the extent ambiguity exists. Id. Undefined, but unambiguous, terms in a statute are to be given their ordinary meaning. Mall, Inc., 108 Wn.2d at 379. While “use” is not defined in the Richland Municipal Code, it is not ambiguous either, and therefore should be liberally construed to effectuate the intent. Under the Richland Municipal Code, “Senior Housing” and “Assisted Living Facility” are specific residential “uses” that are separate from a non-age restricted “Apartment/Condominium”. RMC 23.18.030. Here, the intent of the City was to establish a mixed-use PUD for developing “age-restricted senior housing”. There is nothing in the ordinance to suggest that the City was authorizing uses that were not restricted to seniors. Thus, the Developer’s request to build a non-age restricted apartment building was a “change in use” which is a major change under RMC 23.50.070.

2. The PUD Amendment included a Major Change in the Vehicular Circulation System.

In the original PUD plan the interior road system had two access points onto Gala Way.³⁹ The PUD Amendment approved by the City, however, changed the interior road system and put access points on Gala Way and on Westcliffe Boulevard.⁴⁰ Westcliffe Boulevard separates the PUD from Applewood Estates. The City's administrator reasoned as follows:

The original project contemplated access to the site from Gala Way, with an internal, private street system. The current proposal would extend private driveways from Gala Way and also from Westcliffe Boulevard into the interior of the site. In both cases, direct access onto Brantingham Road is not provided. The current proposal does not represent a major change in the vehicular system.⁴¹

This reasoning, however, is incongruent with the reasoning employed by the City in amendments made in 2007⁴² and 2008⁴³. In the 2007 amendment, the points of access onto Gala Way were unchanged from the original proposal, and the City specifically noted that "no additional access points onto adjacent streets would be provided."⁴⁴ The City concluded "the only

³⁹ CP 338

⁴⁰ CP 471-472

⁴¹ CP 491

⁴² CP 460-463

⁴³ CP 465-468

⁴⁴ CP 462

changes to the vehicular circulation system are internal changes, not affecting the area surrounding the PUD and therefore do not constitute a major change in the circulation system.”

The 2008 amendment similarly considered whether or not the amendment affected the area surrounding the PUD.⁴⁵ In that amendment, the access was changed to a single access point on Gala Way, rather than the two originally planned. The City concluded, “this represents only an internal change to the vehicular circulation system and does not affect the area surrounding the PUD and therefore does not constitute a major change.” The distinguishing factor between the 2007 and 2008 amendments, and the Amendment at issue here is that the 2010 PUD Amendment changed the access point to an external street: Westcliffe Boulevard. The City, however, failed to even consider or analyze that this access point is an external change, and did affect the area surrounding the PUD, despite the fact that those factors were important enough to consider in the 2007 and 2008 amendments. Failing to find that this was a major change to the PUD’s vehicular circulation system was an erroneous interpretation of the law, and an erroneous application of the law to the facts.

⁴⁵ CP 467

Property rights are a two-way street, and those who live in the community surrounding the PUD are affected when modifications are made to a development plan. Here the Developer substantially changed the nature and character of the development in a variety of ways, including how residents of the development access the property. When the PUD was initially approved the access to this portion of the property was exclusively via Gala Way, and only affected residents within the PUD.⁴⁶ When initially proposed, the surrounding community had an opportunity to review the plans, and provide comments on issues pertaining to vehicular traffic.⁴⁷ Moreover, the traffic studies used to support the establishment of the PUD were premised on the use being limited to senior housing.⁴⁸ Now, however, the Neighbors were not given the opportunity to comment on how the change in vehicular access would affect their property. This is precisely why RMC 23.50.070 requires that major changes to the vehicular circulation system should be deemed a “major change”, which requires further public hearings to consider the proposal. The City’s approval of the amendments in 2007 and 2008 are simply further support that external changes which affect the surrounding area are major changes.

⁴⁶ CP 338

⁴⁷ CP 370, 375, 418, 441-442

⁴⁸ CP 316-317

The Court should take note that the Neighbors are a diverse group, and have varying opinions and desires with respect to the PUD development. Where vehicles enter and exit the development has a substantial and disparate impact on certain property owners who would have continual traffic entering and exiting a large apartment complex in front of their house. At night these property owners will have a barrage of headlights which stream through their windows. This is precisely the type of change that should be considered through the legislative process, which is opened to all concerned, as opposed to a closed administrative decision. By routing the vehicular access directly to an external street the change to the development is major given the effect on the area surrounding the PUD.

3. Taking all circumstances into account, the Developer was requesting an increase in density.

The PUD Amendment request submitted by the Developer on June 2, 2010, proposed to consolidate all of the allowed density in the PUD into apartments located on approximately 11 acres (out of 30).⁴⁹ This resulted in approximately 15 undevelopable acres because all of the density had been used. The City, however, was fully aware that the Developer's intention was to seek increased density for the PUD as soon as the PUD Amendment was administratively approved by the City, and the Developer

⁴⁹ CP 470

had building permits in hand.⁵⁰ The Developer stated in an email to the City on June 9, 2010, “once we receive our building permits for the apartments, or perhaps at the end of construction, we would submit for a major modification of the PUD wherein we would request permission to develop single family lots on the balance of the remaining vacant land.”⁵¹ True to their word, the Developer submitted a separate application for increased density on July 30, 2010.⁵² Given the City’s knowledge of the Developer’s intentions, the City engaged in an unlawful process by permitting the Developer to circumvent the spirit and intent of the Richland Municipal Code governing how a PUD is established and developed. The City permitted the Developer to submit their proposal in a piecemeal fashion in a concerted effort to avoid the time, expense, and public scrutiny of the PUD Amendment which allowed an apartment complex to replace what was supposed to be a senior housing development. Taken as a whole, and in light of the City’s knowledge, the Developer’s proposal sought an increase in density and therefore the City should have deemed it a major change. The City’s conduct in allowing the Developer to submit the proposal in a piecemeal fashion amounts to an unlawful procedure under RCW 36.70C.130(1)(a).

⁵⁰ CP 470, 475, 576.

⁵¹ CP 576

⁵² CP 593-597

The Richland Municipal Code is clear that a request for an increase in density is a major change. RMC 23.50.070. Had the Developer's two amendment requests, submitted on June 2, 2010⁵³ and on July 30, 2010⁵⁴, been considered together, the requests would have very clearly sought an increase in density. Had the City been unaware of the Developer's plans then it would be difficult to fault the City. However, the City was fully aware that the purported "minor amendment" was part of a larger scheme to gain approval of the apartment building without public process or scrutiny.⁵⁵ As previously noted, zoning ordinances are to be *liberally* construed so as to effectuate their intent. Mall, Inc. v. City of Seattle, 108 Wn.2d 369, 378, 739 P.2d 668 (1987). Moreover, "a literal reading must sometimes give way to the spirit or intent of the legislation to 'avoid unlikely, strained or absurd consequences which could otherwise result'". Mall, Inc., 108 Wn.2d at 379. The Developer admits that all of the allowed density was used in the apartments, leaving over fifty percent of the property undevelopable.⁵⁶ They assert that there is nothing wrong with requesting changes in stages. The PUD statute, however, provides for a comprehensive process to develop the property as a whole, instead of a piecemeal fashion. A preliminary PUD plan is required to include, among other things: the compatibility of the

⁵³ CP 470

⁵⁴ CP 593-597

⁵⁵ CP 475, 576

⁵⁶ CP 651

PUD with nearby uses; proposed uses for the PUD and building locations; location of streets; location of parks; building heights and setbacks; landscaping plans; ownership pattern; total acreage; total dwelling units; and dwelling unit density of adjacent subdivisions. RMC 23.50.040. This list is not exhaustive. When liberally construing the PUD statute to effectuate its intent, the Developer and the City skirted the requirement of a public hearing by splitting the changes into pieces. This is certainly not the intent of the PUD statute, or the requirement that major changes be considered as a new application for preliminary approval. RMC 23.50.070 (A).

4. The Amendment Relocated the Density Pattern.

Regardless of whether or not there was an increase in density, the PUD Amendment undeniably relocated the density pattern. The original PUD plan permitted 114 duplexes, 90 senior apartments, and 45 assisted living units, with an estimated population of 304 residents.⁵⁷ These dwelling units were evenly distributed throughout the 30 acre site, with approximately 50% of the residents residing in apartments and assisted living, and the other 50% residing in the duplexes.⁵⁸ The Amendment, however, permitted the Developer to take 100% of the dwelling units and population density, and consolidate them into apartment buildings constructed on one-third of the

⁵⁷ CP 491

⁵⁸ CP 338, 491

property, leaving at least 50% of the property vacant.⁵⁹ The City's finding that this does not represent a relocation of the density pattern is illogical. The City simply concludes that the original plan, and the proposed Amendment, called for apartments to be built in the central portion of the site, and therefore doesn't represent a relocation of the density pattern. The City completely ignores the fact that the original senior apartments and assisted living facility contemplated housing only 50% of the residents. The City makes no attempt to analyze or explain how taking 304 residents distributed across 30 acres and bunching all of them into 10 acres does not amount to a relocation of the density pattern. The City's conclusion is an erroneous application of the law to the facts, and is not supported by substantial evidence. RCW 36.70C.130(1)(c)-(d).

The Developer suggest that the phrase "relocation of density pattern" is undefined, and therefore ambiguous. Undefined terms, however should simply be given their ordinary meaning. *See, Mall, Inc.*, 108 Wn.2d at 379. Under the original PUD plan, roughly 50% of the population was located in the senior apartments and assisted living facility, and the other 50% of the population was located in single family houses and duplexes that surrounded the apartments and assisted living. Now, the "density pattern" has been

⁵⁹ CP 470, 491

“relocated” to approximately 1/3 of the 30 acre site in that all of the density is located in the apartments.

The City’s findings of fact are reviewed under a substantial evidence standard. Schofield v. Spokane County, 96 Wn. App. 581, 589, 980 P.2d 277 (1999). The test of substantial evidence is whether evidence is sufficient to persuade a *fair-minded person* of the truth of the declared premise. Id. Moreover, a clearly erroneous application of law to the fact occurs if the court is left with the definite and firm conviction that a mistake was committed. Lakeside Industries v. Thurston County, 119 Wn. App. 886, 894, 83 P.3d 433 (2004). No fair minded person can look at the City’s findings on the relocation of density, and conclude that there was substantial evidence to support the finding. The City simply ignored the fact that 100% of the approved density was now located on 30% of the property. The City’s findings were not supported by substantial evidence, and the application of law was clearly erroneous.

D. The City erred by prematurely issuing the Building Permits.

The City issued building permits to the Developer on September 20, 2010 (the “Permits”). The Neighbors contend that the City Council never approved Phase 2C and therefore the Permits are invalid. Phase 2A was

approved by the City Council on May 15, 2007.⁶⁰ Phase 2B was approved by the City Council on September 7, 2010.⁶¹ Phase 2C, however, has never been approved by the City Council.

Under Richland Ordinance No. 32-05 and the Property Use and Development Agreement between the City and the developer⁶², the PUD plans were required to be submitted for approval in accordance with “Richland Municipal Code (RMC) Section 23.74.244.” That section of the code does not exist. Nevertheless, the Property Use and Development Agreement contemplated final review and approval of the PUD by, at a minimum, the Planning Commission.⁶³ Moreover, the City’s prior course of conduct in having the City Council give final approval to Phase 2A and Phase 2B supports that the City’s intent was to require more than mere administrative approval. Since the City Council has not approved Phase 2C, the City administrative staff could not issue building permits for Phase 2C. The City failed to follow the prescribed process, and the administrative approval of the Permits was outside the authority of the City staff. RCW 36.70C.130(1)(a) and (e). In addition the City staff assured the Planning

⁶⁰ CP 585

⁶¹ CP 602

⁶² CP 449-456

⁶³ “Final PUD plans shall include detailed landscape plans...Plans shall include the specific design of the...privacy wall...Said wall shall be of masonry or concrete construction materials **unless otherwise approved by the Planning Commission during review of the final PUD plans.**” CP 161

Commission that the final PUD plan would be brought back before the Commission for approval⁶⁴:

Commissioner Long asked Staff if the final PUD would be coming back before the Commission for approval.

Mr. Simon confirmed that was correct.

Since no final PUD plan for Phase 2C has been approved by the City Council or the Planning Commission, the building permits were unlawfully issued.

IV. CONCLUSION

Since the Neighbors lacked an administrative remedy they had standing to bring the LUPA Petition, and the court had jurisdiction to hear it. Since the PUD Amendment was not issued until September 17, 2010 the Neighbors petition was timely. With respect to the merits of the LUPA Petition, the PUD Amendment should have been deemed “major” in light of the change in use, change in vehicular circulation, and the increase and relocation of the density pattern. Last, the Building Permits were prematurely issued given that neither the Planning Commission nor the City Council approved the final plan for Phase 2C. Based on the

⁶⁴ CP 445

foregoing, this Court should affirm the trial court in finding that the PUD
Amendment and the Building Permits are invalid.

RESPECTFULLY SUBMITTED this 25th day of May, 2011.

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By: _____


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CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that on the 25th day of May, 2011, a true and correct copy of the foregoing document was mailed, postage prepaid in the United States Mail, and e-mailed to:

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



Bonnie Johnson
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