

ORIGINAL

NO. 36441-7-II

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

CITY OF BONNEY LAKE, a Washington municipal corporation,

Appellant,

v.

MILESTONE HOMES, INC., a Washington corporation,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This appeal arises under the Land Use Petition Act (LUPA), RCW 36.70C. Milestone Homes, Inc. filed a LUPA Petition seeking reversal of the decision by the Bonney Lake City Council to deny its application for preliminary plat approval. The City Council denied the plat because Milestone was playing games with the Bonney Lake Municipal Code (BLMC), which caps the densities of plats at 4-5 dwelling units per acre in single family (R-1) zones. In an effort to crowd more homes onto a residential plat than the zoning would otherwise allow, Milestone drew the plat boundaries around five lots from an existing subdivision next door, and claimed those lots were part of its plat. This artificially increased the acreage of the Milestone plat, making its density seem lower. Milestone was initially able to persuade the City's former planning director to allow the plat by contending that the BLMC does not expressly forbid this "creative" approach. But the City Council put its foot down, rejecting the proposal as an artificial creation designed to circumvent the R-1 density maximum of 4-5 dwelling units per acre.

This Court now stands in the shoes of the trial court and directly reviews the City Council's decision. This Court should find that Milestone cannot carry its burden of proving that the Council either misinterpreted or misapplied the BLMC when denying the plat.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in reversing the Bonney Lake City Council's decision to deny the preliminary plat proposed by Milestone Homes, Inc.
2. The trial court erred in admitting three irrelevant documents into the closed record, while failing to consider whether any of the requirements for supplementing the record under the Land Use Petition Act (LUPA), RCW 36.70C.120, had been met.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Has Milestone failed to meet its burden of proving that the Bonney Lake City Council erroneously interpreted or applied the BLMC in denying its plat?
2. Did the trial court err in admitting three extraneous documents into the record, when the documents are irrelevant to the issues at hand and none of the LUPA criteria for supplementing the record had been satisfied?

IV. STATEMENT OF THE CASE

Milestone Homes, Inc., a residential development company, filed its application for preliminary plat approval for the Orchard Grove II residential subdivision in March 2006. Milestone's plat presented a "unique" approach that neither City planning staff nor the Hearing Examiner had ever seen before.¹ Even

¹ At the public hearing on the plat, the Hearing Examiner stated:

I'm a little confused I guess on the, the houses or the lots from, from another plat being included in this plat . . . [I]f we're taking lots away from [Enchanted Estates] . . . will that require a plat alteration of Enchanted Estates?

Verbatim Transcript of Proceedings of Public Hearing held on November 6, 2006 (sent under separate cover from Clerk's Papers). City Planner Heather Stinson answered:

[Sigh] I don't know. I don't know off the top of my head. We weren't quite sure how to, how to deal with it [chuckle]. . . something we haven't seen before.

though maximum densities in the R-1 zone would only allow a maximum of eighteen new lots on a plat the size of Orchard Grove II, Milestone had drawn twenty new lots.² As a way around the density maximums, Milestone circled the boundaries of its proposed plat around five large lots from a neighboring subdivision, Enchanted Estates II.³ The inclusion of these lots (which already had occupied homes on them) artificially increased the total acreage of Orchard Grove II, thereby artificially decreasing the plat's density. Despite being puzzled at this anomaly, City planning staff recommended to the Hearing Examiner that the plat be approved.⁴ In turn, the Hearing Examiner recommended plat approval to the City Council.⁵

At a closed-record hearing on January 16, 2007, the City Council rejected the Hearing Examiner's recommendation and denied the plat. The City Council felt that Milestone was trying to cheat by crowding more homes onto the plat than

Id. at 8-9.

² See Preliminary Plat, Orchard Grove II (received March 27, 2006), CP 271. Milestone admits that Orchard Grove II needed the extraneous land from Enchanted Estates in order to comply with the density maximum. Opening Brief of Petitioner at page 3, CP 292 ("With consideration of the combined properties, the plat will have a density of 4.95 lots per acre, which is consistent with applicable R-1 zoning that permits 4 to 5 dwelling units per net acre.") (emphasis added).

³ Milestone does not dispute that the five lots belong to Enchanted Estates. Opening Brief of Petitioner at page 2, CP 291 ("The 5.65 acres is comprised of 4.03 acres of property that Milestone owns or has contracted to own that will be divided into 20 new lots, as well as five existing already developed lots owned by third parties, which lots are located within the subdivision known as Enchanted Estates phase II.") (emphasis added).

⁴ Staff Report to Hearing Examiner at page 1, CP 79.

⁵ Report and Decision of the Hearing Examiner at page 3, CP 19.

would otherwise be allowed in an R-1 zone.⁶ When just the lots Milestone planned to build as part of Orchard Grove II were considered in relation to the overall acreage of Milestone's land, the plat's density was 5.8 dwelling units/acre.⁷

⁶ At the January 16 council meeting, the Council-members discussed how approving Milestone's plat would contravene the BLMC and tolerate a fraudulent land use practice:

Councilmember Jim Rackley: Mr. Leedy, is there fancy footwork going on here with the lot sizes?

Former Planning Director Bob Leedy: All indicators are that there's something creative being attempted. And we had mixed response when staff initially inquired as to what was going on. The bottom line being that other jurisdictions, some other jurisdictions apparently honor this kind of thing, we question whether it should be honored or not.

....

Deputy Mayor Dan Swatman: Because truly I think our code was developed around, you take a piece of land and you X it out and you own it and you're going to subdivide the whole thing.

Mr. Leedy: Exactly.

Deputy Mayor Swatman: [N]ot draw this huge thing around the whole City and say I'm going to do this little corner and calculate it out so the rest of this averages out so I can do this little corner.

Mr. Leedy: You're right.

Councilmember Dave King: Let me ask a question. Somewhere in another plat sometime in the future adjacent to these properties could another developer approach the owner of these particular properties that have already been included in this equation and say "hey, can we get your permission to use your lots to help increase our density computation for our tract?" what record would there be other than the memory of someone who attended such a meeting and approved this plat, that such a thing had taken place?

Mr. Leedy: Staff had asked that same question Mr. King.

Deputy Mayor Swatman: That's not the intent of our code.

Councilmember King: A person living in the right place could have a pretty lucrative business selling the notion of the amount [of] property that he sits on is includable in several different plats.

Transcript of January 16, 2007 meeting of the Bonney Lake City Council, CP 41, 45.

⁷ Resolution 1650, CP 14-15.

Milestone had no possessory or ownership interest in the Enchanted Estates lots, and never intended to reconfigure, subdivide, develop, purchase, sell, transfer, or physically alter them in any manner.⁸ The homeowners of the Enchanted Estates lots would not become members of the Orchard Grove II homeowners' association.⁹ Milestone's representative, Raymond Frey, candidly admitted to the Hearing Examiner that the only reason for including the Enchanted Estates lots was to "meet the density requirements in Bonney Lake."¹⁰

In its Resolution denying the plat, the City Council stated:

Lots 21 through 25 are not proposed to be subdivided for the purpose of development or transfer as part of the proposed Orchard Grove II subdivision. Their inclusion within the Orchard Grove II plat appears to be for the sole purpose of artificially increasing allowed densities upon the portions of the plat actually being subdivided. The applicant has no possessory interest in such lots or any legal authority to limit future development on such lots.¹¹

Despite the City Council's prompt approval of a reconfigured plat with eighteen new lots, Milestone filed a LUPA appeal, as well as an action for damages

⁸ See Staff Report to the Hearing Examiner at page 2, CP 80 ("[The Enchanted Estates lots] currently have single family residences and there is no proposed change to the existing parcel lines of these lots."); Report and Decision of Hearing Examiner at page 4, CP 20 ("The preliminary plat map shows that lots 21-25 will retain their present access onto the roads of Enchanted Estates Phase 2.").

⁹ Staff Report to Hearing Examiner at page 2, CP 80 ("The applicant has indicated that these lots will not take part in the Orchard Grove II Homeowner's Association").

¹⁰ Verbatim Transcript of the Proceedings of the Public Hearing held on November 6, 2006, at page 12 (filed under separate cover from Clerk's Papers).

¹¹ Resolution 1650, CP 14-15.

under RCW 64.04.¹² On June 8, 2007, Pierce County Superior Court judge Thomas Larkin reversed the City Council's decision.¹³ The City appealed.

V. ARGUMENT

A. Standard of review

The Land Use Petition Act (LUPA), Chapter 36.70C RCW, is the “exclusive means” for judicial review of land use decisions. RCW 36.70C.030. Under LUPA, this Court “stands in the shoes of the superior court” and reviews the land use decision on the basis of the administrative record. *Pawlina v. City of Vancouver*, 122 Wn. App. 520, 525, 94 P.3d 366 (2004). The Court reviews the decision made by the decision-maker with the highest level of authority to make the decision, including those with authority to hear appeals. RCW 36.70C.020(1); *Citizens to Preserve Pioneer Park L.L.C. v. City of Mercer Island*, 106 Wn. App. 461, 474, 24 P.3d 1079 (2001). In this case, the decision of the City Council, rather than the recommendations of the planning staff or Hearing Examiner, is the subject of review.

The Court may reverse the City Council's decision only if Milestone proves that one of the following standards is met:

...

¹² The parties stipulated to the damages action being stayed until after resolution of the LUPA appeal. CP 365-68.

¹³ CP 405-08.

(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;

...

(d) The land use decision is a clearly erroneous application of the law to the facts.¹⁴

RCW 36.70C.130(1). Standard (b) presents a question of law that this Court reviews de novo. *Cingular Wireless v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). Standard (d) requires the court to employ the clearly erroneous standard of review. *Id.* Under that standard, the court can reverse the decision only if it “is left with a definite and firm conviction that a mistake has been committed.” *Id.*

To determine whether the City Council misinterpreted its own Code, this Court must give unambiguous ordinances their plain meaning. *City of Pasco v. Public Employment Relations Comm’n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). An unambiguous ordinance is one that is susceptible to only one reasonable interpretation. *Lakeside Indus. v. Thurston County*, 83 P.3d 433, 119 Wn. App. 886 (2004). Ordinances must be applied in a manner such that none of their terms are rendered meaningless. *Greenwood v. Department of Motor Vehicles*, 13 Wn. App. 624, 628, 536 P.2d 644 (1975).

¹⁴ Milestone argued below that the City erroneously interpreted its own ordinances, and that the City improperly applied the law to the facts. Opening Brief of Petitioner at pages 13-14, CP 302-03. The City agrees that these are the only two prongs of LUPA that have any relevance to the dispute. Accordingly, this Brief exclusively focuses on those two prongs.

If, on the other hand, an ordinance is ambiguous, the Court must defer to the City Council's interpretation. RCW 36.70C.130(1)(b) ("allowing for such deference as is due the construction of a law by a local jurisdiction with expertise"); *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004) ("This court's review of any claimed error of law in the City Council's interpretation of city ordinances is de novo and must accord deference to the City Council's expertise."); *Dev. Servs. v. City of Seattle*, 138 Wn.2d 107, 117, 979 P.2d 387, 392 (1999) ("[I]n any doubtful case, the court should give great weight to the contemporaneous construction of an ordinance by the officials charged with its enforcement."); *Lakeside Indus.*, 119 Wn. App. at 896; *Citizens to Preserve Pioneer Park*, 106 Wn. App. at 475 (deferring to City Council's interpretation of an ordinance, when that interpretation was "not unreasonable"); *Quality Rock Prods., Inc. v. Thurston County*, No. 34128-0-II (Div. II, May 30, 2007).

B. The preliminary plat approval process

Per the Bonney Lake Municipal Code, preliminary plat applications are subject to the following procedure: First, the applicant files an application (BLMC § 14.80.020), and the Director of Community Development determines whether the application is complete (BLMC § 14.80.030). Next, after environmental review is concluded, the plat application goes to the Hearing Examiner, who conducts a public hearing, makes factual findings, and submits a

recommendation to the City Council. BLMC §§ 14.80.040 through .080.¹⁵ Then, the City Council considers the plat in an open and public meeting, at which time the Council may revise or reject the findings of the Hearing Examiner and approve or deny the plat. BLMC § 14.80.090; *see also* RCW 58.17.100. The City Council meeting is a closed-record proceeding, at which review is limited to the evidence presented to the Hearing Examiner. BLMC § 14.120.040.

It is consistent with state law for the City Council to have final authority over preliminary plats. RCW 58.17.070 (“A preliminary plat of proposed subdivisions and dedications of land shall be submitted for approval to the legislative body of the city, town, or county within which the plat is situated.”). The role of the City’s planning staff and Hearing Examiner is to make non-binding recommendations to the Council. RCW 58.17.100:

Such recommendation shall be submitted to the legislative body not later than fourteen days following action by the hearing body. Upon receipt of the recommendation on any preliminary plat the legislative body shall at its next public meeting set the date for the public meeting where it shall consider the recommendations of the hearing body and may adopt or reject the recommendations of such hearing body based on the record established at the public hearing. If, after considering the matter at a public meeting, the legislative body deems a change in the planning commission’s or planning agency’s recommendation approving or disapproving any preliminary plat is necessary, the legislative body shall adopt its own recommendations and approve or disapprove the preliminary plat.

¹⁵ The Bonney Lake Municipal Code may be viewed online at www.mrsc.org/codes.aspx.

See also *Buchsieb/Danard, Inc. v. Skagit County*, 31 Wn. App. 489, 643 P.2d 460 (1982), *aff'd*, 99 Wn.2d 577, 663 P.2d 487 (1983) (board of commissioners had power to reject planning commission decision on preliminary plat); *D.E.B.T., Ltd. v. Board of Clallam County Comm'rs*, 24 Wn. App. 136, 600 P.2d 628 (1979) (unless otherwise provided by ordinance, a planning commission functions as a fact-finding tribunal whose recommendations are not necessarily binding upon the municipality's legislative body).

The City Council is specifically required by statute to determine, as a prerequisite to approving the subdivision, that the "public interest would be served by the subdivision." RCW 58.17.110; see also McQuillin on Municipal Corporations, § 25.118.30 (p. 371) ("The decision of the local government to approve or disapprove a subdivision is a discretionary one . . . ,") though the decision must be based upon city codes). Nowhere do the statute or BLMC require that the City Council simply "rubber stamp" the recommendations of its planning staff or Hearing Examiner, especially where such recommendations are based upon errors of law.¹⁶

¹⁶ The trial court seemed to acknowledge this, stating: "If [City] staff gives bad legal advice and interprets a statute that is totally wrong, I don't have to go along with their interpretation. It is irrelevant." Verbatim Transcript of Proceedings, May 17, 2007, at page 44.

C. The Bonney Lake Municipal Code unambiguously dictates rejection of the Milestone plat.

Two key provisions of the BLMC support the City Council's denial of the Milestone plat. First, BLMC § 18.14.060(A) states: "Required density at the conclusion of any short plat or subdivision: four to five dwelling units (rounded down) per net acre." Any reasonable person—that is, one who was not actively looking for a way around the Code—would read this to mean that each stand-alone plat must have a density no greater than 4-5 dwelling units per acre. A reasonable person would also see that double-counting lots from a neighboring subdivision is prohibited because it would frustrate the goal of maintaining an overall density of 4-5 units per acre in the R-1 zone.¹⁷

The ordinary dictionary definition of the term "require" is "to claim or ask for by right and authority; to mandate."¹⁸ The ordinary dictionary definition of "conclusion" is "result or outcome."¹⁹ Read together, these terms demonstrate that 4-5 dwelling units per acre is a bright-line rule for each subdivision, standing alone at the conclusion of its platting. That the density maximum is a bright-line rule is

¹⁷ Raymond Frey's frank admission that padding the plat with extraneous land was an attempt to comply with the density cap indicates that Milestone was never confused about the requirement or considered it to be ambiguous. In fact, Milestone has never contended that the BLMC § 18.14.060(A) could reasonably be interpreted to allow Milestone's approach; only that the BLMC does not expressly disallow the padding of subdivisions with extraneous land.

¹⁸ Merriam-Webster Online, <http://www.merriam-webster.com/dictionary>.

¹⁹ *Id.*

further underscored by BLMC § 14.110.010 (A)(3), which prohibits the City from granting anyone a variance from the maximum densities within particular zones.

Enchanted Estates' lots were already counted toward that plat's overall density at the time Enchanted Estates was platted; counting them again would render either the term "require" or the term "conclusion" meaningless. The density cap for the R-1 zone would no longer be a mandate, but would be rendered ineffectual. Another developer in the future could re-count Milestone's lots toward its own new plat, further eroding the Code's effectiveness, and causing the R-1 zone to grow denser and denser.

Second, the BLMC defines "subdivision" as: "a division of land into 10 or more lots or other divisions of land for the purpose of development or of transfer." BLMC § 17.08.020(T) (emphasis added).²⁰ The ordinary dictionary definition of "division" is "the act, process, or instance of separating or keeping apart."²¹ The ordinary dictionary definition of "development" is "converting raw land into an area suitable for building or residential or business purposes."²² The ordinary

²⁰ State law has a similar definition of "subdivision": the division or redivision of land into five or more lots, tracts, parcels, sites, or divisions for the purpose of sale, lease, or transfer of ownership . . ." RCW 58.17.020(1). McQuillin on Municipal Corporations echoes the definition: "A subdivision is a division of a parcel of land into smaller parcels or lots so that the new lots may be sold or developed individually." § 25.118.10 (p. 365).

²¹ *Id.*

²² *Sleasman v. City of Lacey*, 159 Wn.2d 639, 644, 151 P.3d 990 (2007).

dictionary definition of “transfer” is “to convey from one person, place, or situation to another.”²³

The Milestone plat did not meet the ordinary definition of a “subdivision.” Portions of the land included in the plat—that is, the Enchanted Estates lots—had already been converted from raw land into building sites; in fact, the lots were already occupied by homeowners, who had no intention of allowing Milestone to re-develop or transfer their property. Thus, the City Council correctly found that Orchard Grove II was not a legitimate subdivision. The City Council’s sole recourse to prevent its R-1 density maximum from being rendered meaningless was to deny Milestone’s plat.²⁴

D. Milestone cannot carry its burden of proving that the City Council misinterpreted or misapplied the Code to Milestone’s proposal.

In contending that the City Council erroneously interpreted or applied the law, Milestone has taken on two very high burdens under LUPA. First, as noted, the Court must defer to the City Council’s, not the property owner’s,

²³ Merriam-Webster Online, <http://www.merriam-webster.com/dictionary>.

²⁴ Milestone has suggested that its maverick approach should be allowed because the statute contains a “plat alteration” process, to which the Hearing Examiner made reference in his recommendations. See RCW 58.17.215-.218; Report and Decision of the Hearing Examiner at page 11, CP 27. However, altering the plat to transfer the Enchanted Estates lots to the Orchard Grove II plat would not cure the problem here, because it would not stop Orchard Grove II from contributing to a potential “ratcheting up” of the overall density of the R-1 zone beyond the BLMC’s density maximum. Arguably, Milestone would not even be eligible for a plat alteration because it had no intention of “altering” either the configuration or covenants of Enchanted Estates.

interpretation of the law. See *supra* Section V.A. Second, ordinances must be construed to effectuate their legislative intent, which in this case is to preserve a less dense single family zone with larger lots, not a denser zone with smaller lots. *Lakeside Indus.*, 119 Wn. App. at 896; see also *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 472, 61 P.3d 1141 (2002) (“Courts must reasonably construe ordinances with reference to their purpose.”). Finally, the City Council’s decision cannot be reversed unless Milestone proves the Council clearly erred in applying the law to the facts presented. RCW 36.70C.130(1)(d). The Court may overturn the City Council only if it has a “definite and firm conviction that a mistake has been made.” *Citizens to Preserve Pioneer Park*, 106 Wn. App. at 473.²⁵

In this case, the Court can be especially confident that the City Council made the correct decision because that decision directly furthers the BLMC’s legislative intent: to “establish and preserve low-density single family neighborhoods in a large lots setting at a density of four to five units per acre, to create a stable environment for family life and to prevent intrusion by incompatible land uses.”²⁶ The Bonney Lake Comprehensive Plan, which forms the backbone of the City’s

²⁵ The trial court ignored this standard, stating that the case was a “close call,” but still ruling against the City. Verbatim Transcript of Proceedings, May 25, 2007, at page 6. Finding the case to be a “close call” is not the same thing as having “definite and firm conviction that a mistake has been committed.”

²⁶ Staff Report to Hearing Examiner at page 6, CP 84 (emphasis added).

development regulations, confirms that the way to achieve this goal is to make sure that each plat in the R-1 zones is no denser than 4-5 units per acre.²⁷

As long as a municipality's goals to maintain the character of neighborhoods do not conflict with specific development regulations, those goals may support an agency's denial of a land use application. *Cingular Wireless*, 131 Wn. App. at 766 (upholding County Commissioner's denial of cell tower application, when cell tower would have a "looming presence" over a neighborhood devoted to recreational and community purposes); *see also Pinecrest*, 151 Wn.2d at 291-92. By crowding its homes onto small lots, Milestone's plat frustrated the goal of preserving traditional single-family neighborhoods with large lots. Thus, the City Council properly interpreted the Code to disallow the plat.

Milestone argued to the trial court that the City Council's decision is not entitled to deference because the City cannot show an established "pattern of enforcement." *See, Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828, P.2d 549 (1992). Yet, on its face, LUPA requires deference to the City Council's decision regardless of any a "pattern of enforcement." RCW 36.70C.130(1)(b); *see also supra*

²⁷ *See* Figure 3-5, Future Land Uses, Bonney Lake Comprehensive Plan ("Single Family Neighborhoods. Undeveloped lands will be platted at 4-5 units per net acre."). http://www.ci.bonney-lake.wa.us/administrative/planning_dept/long_range/comp_plan.shtml. The Growth Management Act requires municipalities to develop comprehensive plans to manage

Section V.A. In addition, there is no evidence in the record that the City Council has ever allowed developers to pad plats with extraneous land in order to meet density requirements; the evidence instead suggests that Milestone was the first developer to attempt this. Regardless, requiring the City to prove a pattern of enforcement here would improperly shift the burden of proof to the City, when under LUPA that burden squarely belongs on Milestone. *Nagle v. Snohomish County*, 129 Wn. App. 703, 707-08, 119 P.3d 914 (2005).

Moreover, the courts have never applied the “pattern of enforcement” requirement to subdivision approvals—or, for that matter, any cases outside the code enforcement arena. In *Sleasman* and *Cowiche Canyon*, the public agencies were prosecuting violations of law.²⁸ The agencies had the ability to choose whether and when to impose fines upon violators, or else require that violations be abated, and thus the agencies had the power to develop a “pattern of enforcement.” Here, by contrast, the City must process every completed plat application as that application is filed.²⁹ Filing a complete application vests the development under the then-current land use controls. *Abbey Road Group, LLC v. City of Bonney Lake*, No.

growth, and to enact development regulations that are consistent with those plans. RCW 36.70A.040.

²⁸ In *Sleasman*, the ordinance at issue prohibited cutting down trees, whereas in *Cowiche Canyon*, the Department of Ecology pursued an action against an individual who had built fences along a creek, an alleged violation of the Shoreline Management Act.

²⁹ See Chapter 14.70 BLMC (stating that the Director of Planning and Community development “shall” act upon applications for preliminary plat approval).

35383-1-II (Div. II, October 9, 2007). Thus, a city has no power to revise its code to deal with a surprise like Milestone's "unique" approach. Requiring an established "pattern of enforcement" would grandfather every tactic a residential developer could think of to circumvent Code requirements, as long as that developer was the first one to think of it. This cannot be the law. Rather, city councils must be given the discretion the legislature intended them to have in approving subdivisions. They must be allowed to apply the clear law to each set of facts as it arises, subject to court intervention only in cases of clear error.

Here, Milestone has not met its burden of proving that the City Council clearly erred in denying the plat.³⁰ As noted, the Council's decision was consistent with the plain meaning of the ordinances defining subdivisions and capping residential densities at a maximum of 4-5 dwelling units per acre for each concluded plat. Moreover, the decision was consistent with the planning goal of preserving single family neighborhoods in a larger-lot setting. The decision also directly responds to the City Council's fear that allowing developers to double-

³⁰ Milestone has heavily focused upon the BLMC requirement that developers either own or have permission to use all the land they plan to develop. BLMC § 14.90.010. Milestone did obtain written permission from the Enchanted Estates property owners to name their lots on the Orchard Grove II application. The unambiguous intent of this provision of the BLMC is to ensure that a developer does not seek land use approvals for land he or she does not own or have the legal authority to affect. However, compliance with this provision alone does not mandate approval of a plat that violates Titles 17 and 18 of the BLMC.

count lots toward the density maximum would reward fraudulent land use practices.³¹

E. The trial court reversed the City Council based upon the wrong standard of review.

The transcript of the trial court decision shows that the trial court exclusively relied upon the Washington Supreme Court case of *Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007). The trial court stated:

When I went back and read the *Sleasman* case, I looked at that case, and it influenced me. And I agree, there's some ambiguity in their ordinances there. And I also agree that where there is that ambiguity, we go back to the common law and preference of, a property owner can do what they want with their property. I am going to reverse the City Council's decision in this case for that reason.³²

In *Sleasman*, the Washington Supreme Court found that a City of Lacey ordinance, which prohibited the unauthorized cutting of trees in “undeveloped or partially developed” areas, did not apply to the appellants, who had cut down trees on their “developed” property. In a footnote, the Court cited *Morin v. Johnson*, 49 Wn.2d 275, 300 P.2d 569 (1956)—a case that pre-dates the enactment of LUPA by

³¹ Transcript of January 16, 2007 City Council Meeting, CP 41, 45.

³² Verbatim Transcript of Proceedings, May 25, 2007, at page 5.

four decades—which holds that ambiguous zoning ordinances must be strictly construed against cities and in favor of property owners.³³

The trial court in this case interpreted *Sleasman* to require that land use codes be construed against the municipality and in favor of the property owner. But that is the exact opposite of what LUPA requires. As noted, LUPA requires the City Council’s interpretation to be given deference.³⁴ LUPA has supplanted the common law deference to the property owner upon which the trial court based its decision, and it is beyond dispute that this Court must apply the LUPA standards of review to Milestone’s Petition.³⁵

F. This Court should strike the extra-record evidence the trial court improperly admitted.

Under LUPA, the superior court reviews the same record that the City Council reviewed. RCW 36.70C.120; *Isla Verde Int’l Holdings v. City of Camas*, 146 Wn.2d 740, 755-56, 49 P.3d 867 (2002). The statute states:

When the land use decision being reviewed was made by a quasi-judicial body or officer who made factual determinations in support

³³ Because the *Sleasman* case turned upon the decision that the ordinance was “unambiguously inapplicable” to the Sleasmans, the Court’s discussion of *Morin* was *dicta*.

³⁴ Nowhere in *Sleasman* does the Supreme Court discuss the standards of review mandated by LUPA (RCW 36.70C.130(1)). As a practical matter, the failure to discuss LUPA probably did not alter the outcome of the *Sleasman* case, because the decision ultimately turned on the plain meaning of the term “developed.” Thus, the Supreme Court could have reached the same decision in *Sleasman*, had it cited the standards mandated by LUPA. The Court’s discussion of the common law (i.e., pre-LUPA) requirement of deference to property owners was *dicta*.

³⁵ LUPA was enacted in 1995 to be the “exclusive means of judicial review of land use decisions.” RCW 36.70C.030.

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

RCW 36.70C.120(1). Milestone requested that the trial court supplement the record with three extraneous documents, which the City Council did not review, and which have no bearing on whether the City Council's decision was correct. Milestone argued that the City Council's questioning of its former planning director in the closed record hearing, without allowing Milestone to respond, somehow deprived Milestone of "an opportunity consistent with due process to make a factual record on the issues." Yet, the factual record in this case was developed by the Hearing Examiner, not the City Council. Even if it had been deprived of putting any documents into evidence with the Hearing Examiner, this would not have prevented the Council from questioning its department head during an open and public meeting, or required the City Council to allow testimony from an applicant in a closed record appeal. See *Citizens to Preserve Pioneer Park*, 106 Wn. App. at 476 (holding that it was not reversible error for City Council to introduce limited new evidence at a closed record appeal, when the evidence did not fundamentally change the issues).

Furthermore, implicit in the statute is a requirement that proffered supplemental documents must be relevant to the "factual issues" in the case. RCW

36.70C.120(1). The documents Milestone offered into the record have no bearing on the only relevant issue: whether Milestone's plat complied with the BLMC. Rather, the documents, which consist of correspondence authored by City and Milestone staff, were offered to show that: (1) City staff was inconsistent in its dealings with Milestone; (2) Milestone suffered financial damages through its reliance upon City staff; and (3) City staff believed the Milestone approach was permissible.³⁶

Needless to say, statements by City staff not included in the record are irrelevant to this Court's decision as to whether the City Council properly denied the plat. In addition, the Legislature has specifically stated that a LUPA petition is not an action for damages. RCW 36.70C.030(1)(c). Any damages Milestone contends to have suffered as a result of erroneous recommendations by a planning agency have no bearing on the LUPA appeal.

The trial court agreed to supplement the record under the traditional rules of judicial discretion, stating:

Now, I would agree that some of the information in there is irrelevant based on looking through the whole thing, but to sit there and go through and edit the whole thing, I am not going that route.

³⁶ See Milestone's proffered supplemental documents at CP 358-64. Milestone attached to its Opening Brief an Administrative Determination authored by the City's outgoing Planning Director in March 2007, two months after the City Council denied the Milestone plat. See CP 349-50. The document clearly was not part of the Hearing Examiner's record, and Milestone never moved for admission of this document. Therefore, it is not properly part of the Clerk's Papers and cannot be discussed or addressed on appeal.

I reviewed it all and took a look at it and considered what I was going to consider or not. It is my responsibility to consider, in making a decision, only relevant evidence, and a lot of the materials that are submitted on both sides probably aren't relevant to the direct issue that I'm going to have to decide.³⁷

LUPA does not allow a trial court free reign to supplement a closed record under traditional principles of judicial discretion, but instead contains very specific criteria for when a record may be supplemented.³⁸ Because those criteria were not established here, the trial court erred in supplementing the record, and the documents should be stricken.

VI. CONCLUSION

In denying Milestone's plat, the City Council rationally responded to an attempt to play fast and loose with the Bonney Lake Municipal Code. The BLMC unambiguously sets the maximum density for single-family neighborhoods—and for

³⁷ Verbatim Transcript of Proceedings, May 17, 2007, at pages 12-13.

³⁸ RCW 36.70C.120 allows the record to be supplemented under the following conditions:

(2) For decisions described in subsection (1) of this section, the record may be supplemented by additional evidence only if the additional evidence relates to:

(a) Grounds for disqualification of a member of the body or of the officer that made the land use decision, when such grounds were unknown by the petitioner at the time the record was created;

(b) Matters that were improperly excluded from the record after being offered by a party to the quasi-judicial proceeding; or

(c) Matters that were outside the jurisdiction of the body or officer that made the land use decision.

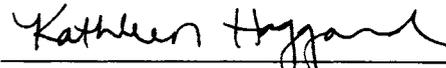
(3) For land use decisions other than those described in subsection (1) of this section, the record for judicial review may be supplemented by evidence of material facts that were not made part of the local jurisdiction's record.

(4) The court may require or permit corrections of ministerial errors or inadvertent omissions in the preparation of the record.

plats within those neighborhoods—at 4-5 dwelling units per acre. This density maximum is set in stone—variances from it are expressly disallowed. Never has the BLMC contemplated that a developer can count lots in a neighboring subdivision toward the density maximum. Under LUPA, Milestone bears the heavy burden of proving that the City Council erred in denying its plat. It has not met this burden. For that reason, the City of Bonney Lake respectfully requests that this Court overturn the trial court decision and reinstate the decision of the Bonney Lake City Council denying the Orchard Grove II preliminary plat.

RESPECTFULLY SUBMITTED this 29th day of October, 2007.

DIONNE & RORICK



By: Kathleen Haggard, WSBA #29305
Attorneys for City of Bonney Lake

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

MILESTONE HOMES, INC. a
Washington limited liability
corporation,

Plaintiff-Respondent,

v.

CITY OF BONNEY LAKE,

Defendant-Appellant.

Pierce Co. Superior Court
Case No. 07-2-05050-2

Court of Appeals
Case No. 36441-7-II

Certificate of Service

I certify under penalty of perjury under the laws of the State of Washington that I sent via legal messenger, the Appellant's Opening Brief, to the following:

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Dated this 29th day of October, 2007.


By: Cynthia Nelson

APPENDIX A

14.120.040 Appeal of a hearing examiner decision (Type 4 or 5 permit).

A. Filing. Every appeal to the city council shall be filed with the planning and community development department within 15 calendar days of the date the recommendation or decision of the matter being appealed.

B. Contents. The notice of appeal shall contain a concise statement identifying:

1. The decision being appealed.

2. The name and address of the appellant and his/her interest(s) in the matter.

3. The specific reasons why the appellant believes the decision to be wrong and all grounds on which error is assigned to the examiner's decision. The appellant shall bear the burden of proving the decision was wrong.

4. The desired outcome or changes to the decision. The appeal fee shall be paid prior to appeal filing.

C. Record. The city council shall consider the matter based upon the written record before the examiner, the examiner's decision, the written appeal, minutes of the hearing and any written comments received by the city before closure of city offices on a date three days prior to the date set for consideration by the city council. The city council will hear the appeal in a closed record meeting as required by RCW 36.70B.120.

D. Action. The city council may accept, modify or reject the examiner's decision, or any findings or conclusions therein, or may remand the decision to the examiner for further hearing. A decision by the city council to modify, reject or remand shall be supported by findings and conclusion. The action of the city council in approving or rejecting a decision of the hearing examiner shall be final and conclusive unless within 21 calendar days from the date of such action an aggrieved party serves a land use petition in Pierce County superior court pursuant to RCW 36.70C.040.

E. Stay of Effective Date. The timely filing of an appeal shall stay the effective date of the examiner's decision until such time as the appeal is adjudicated by the city council or is withdrawn.

F. Determinations of civil violation may be appealed only to superior court. See BLMC 14.130.080(E). (Ord. 988 § 2, 2003).

Chapter 14.70 TYPE 5 PERMITS (SHORELINE PERMITS)

14.70.010 Pre-application conference.

The director(s) may require a potential applicant to participate in a pre-application conference. (Ord. 988 § 2, 2003).

14.70.020 Application.

The applicant shall complete the appropriate application form and submit application, fee, and an environmental checklist to the director(s). The application form shall specify the submittal requirements. (Ord. 988 § 2, 2003).

14.70.030 Determination of completeness.

A. Within 28 days of submittal, the director(s) shall:

1. Send the applicant either a determination of completeness or a notice stating information required to complete the application; and
2. Advise the applicant of other agencies that may have jurisdiction over the proposal.

B. Within 14 days of submittal of additional information as required above, the director(s) shall send the applicant either a determination of completeness or another notice stating information required to complete the application. (Ord. 988 § 2, 2003).

14.70.040 Threshold determination, scheduling of hearing, and notice.

Within 14 days of determination of completeness of an application, the director(s) shall:

A. Perform a threshold determination regarding the proposal in accordance with WAC 197-11 Part Three;

B. Schedule a public hearing before the hearing examiner for a date that conforms to the following notice requirement, except that if a determination of significance (DS) has been issued, the hearing may be scheduled and publicized later to allow time to prepare the draft environmental impact statement (DEIS); and

C. Publish between 15 and 30 days before the hearing (see exception in subsection (C)(4) of this section) a notice of application/hearing/SEPA in accordance with BLMC 14.90.040; provided, that:

1. If a determination of nonsignificance (DNS) has been issued, the notice shall state that if timely comments are received the director(s) will reconsider the DNS.

2. If WAC 197-11-340(2) applies (that is, city cannot take final action until 15 days after issuing a DNS), the director(s) shall also send the notice of application/hearing/DNS and environmental checklist to the agencies listed in WAC 197-11-340(2).

3. If a DS has been issued, the notice of application/hearing shall incorporate the DS and scoping notice. If other agencies share jurisdiction over the proposal, they shall also be sent the notice of application/hearing/DS/scoping.

4. Shoreline permits require a 20-day comment period (for certain improvements to single-family residential lots per RCW 90.58.140(11)(a)) or a 30-day comment period (all other substantial development permits per RCW 90.58.140(4)) before the hearing.

5. For shoreline permits the notice shall also include the information required in RCW 90.58.140(4). (Ord. 988 § 2, 2003).

14.70.050 Reconsideration of DNS.

If a DNS is issued and timely comments are received, the director(s) shall reconsider the DNS in accordance with WAC 197-11-340(2)(f) and (3). (Ord. 988 § 2, 2003).

14.70.055 Design commission.

If the proposal is not exempt from design review (see Chapter 14.95 BLMC), at any time after the determination of completeness the design commission shall review it and issue a finding of conformance (with or without conditions) or non-conformance with the community character element of the comprehensive plan. (Ord. 1025 § 7, 2004).

14.70.060 Director(s) shall forward.

The director(s) shall inform the hearing examiner of the results of the proposal's environmental review and transmit copies of the draft and final EIS, if applicable. (Ord. 988 § 2, 2003).

14.70.070 Hearing.

The hearing examiner shall hold the public hearing, which may be combined with that of another agency with jurisdiction. (Ord. 988 § 2, 2003).

14.70.080 Findings and decision.

After the above, the hearing examiner shall:

A. Adopt written findings referencing the applicable permit criteria, which findings shall include, if applicable, either the design commission's finding of (non)conformance or an alternative finding; and

B. Render a decision consistent with those findings. The decision shall be early enough to allow the director(s) to comply with the following section regarding notice of decision. (Ord. 1025 § 8, 2004; Ord. 988 § 2, 2003).

14.70.090 Notice of decision.

A. Within 120 days of the determination of completion, the director(s) shall issue a notice of decision. See BLMC 14.90.050 for exceptions to this 120-day deadline.

B. The notice of decision shall contain a statement of threshold determination.

C. The notice of decision shall be published in accordance with BLMC 14.90.040 and 14.70.100. (Ord. 988 § 2, 2003).

14.70.100 Shoreline permits – Notice of decision and mandatory wait before construction.

For shoreline permits, notices of decision shall also be sent to the Washington Department of Ecology and Attorney General, per RCW 90.58.140(6), and construction shall not be permitted until 21 days after filing of notice of decision per RCW 90.58.140(5). (Ord. 988 § 2, 2003).

14.70.110 Appeal.

For appeals of shoreline permits see RCW 90.58.180. For other appeals see BLMC 14.120.040. (Ord. 988 § 2, 2003).

14.80.020 Application.

The applicant shall complete the appropriate application form, and submit application, fee, and an environmental checklist to the director(s). The application shall specify the submittal requirements. (Ord. 988 § 2, 2003).

14.80.030 Determination of completeness.

A. Within 28 days of submittal, the director(s) shall:

1. Send the applicant either a determination of completeness or a notice stating information required to complete the application; and
2. Advise the applicant of other agencies that may have jurisdiction over the proposal.

B. Within 14 days of submittal of additional information as required above, the director(s) shall send the applicant either a determination of completeness or another notice stating information required to complete the application. (Ord. 988 § 2, 2003).

14.80.040 Threshold determination, scheduling of hearing, and notice.

Within 14 days of determination of completeness of an application, the director(s) shall:

- A. Perform a threshold determination regarding the proposal in accordance with WAC 197-11 Part Three;
- B. Schedule a public hearing before the hearing examiner for a date that conforms to the following notice requirement, except that if a determination of significance (DS) has been issued, the hearing may be scheduled and publicized later to allow time to prepare the draft environmental impact statement (DEIS); and
- C. Publish between 15 and 30 days before the hearing a notice of application/hearing/SEPA in accordance with BLMC 14.90.040; provided, that:
 1. If a determination of nonsignificance (DNS) has been issued, the notice shall state that if timely comments are received the director(s) will reconsider the DNS.
 2. If WAC 197-11-340(2) applies (that is, city cannot take final action until 15 days after issuing a DNS), the director(s) shall also send the notice of application/hearing/DNS and environmental checklist to the agencies listed in WAC 197-11-340(2).

3. If a DS has been issued, the notice of application/hearing shall incorporate the DS and scoping notice. If other agencies share jurisdiction over the proposal, they shall also be sent the notice of application/hearing/DS/scoping. (Ord. 988 § 2, 2003).

4.80.090 Council decision.

The city council shall revise the hearing examiner's findings if necessary and decide on the proposal accordingly. Its decision shall be early enough to allow the director(s) to comply with the following section regarding notice of decision. Council decision shall be by ordinance for rezones. (Ord. 988 § 2, 2003).

14.90.010 Acknowledgement of owner.

All applications shall be signed by the property owner or an authorized representative. (Ord. 988 § 2, 2003).

17.08.010 Use of language.

"Shall" is mandatory, and "may" and "should" are permissive. All other words, unless otherwise defined in this chapter, shall be given their ordinary and customary meaning. (Ord. 766 § 2, 1998).

17.08.020 Definitions.

As used in Chapters 17.08 through 17.24 BLMC, the following terms and phrases shall have the following meanings:

T. "Subdivision" means a division of land into 10 or more lots or other divisions of land for the purpose of development or of transfer. (Ord. 766 § 2, 1998).

18.14.060 Setback and bulk regulations.

The following bulk regulations shall apply to the uses permitted in this district, subject to the provisions for yard projections included in BLMC 18.22.080:

A. Required density at the conclusion of any short plat or subdivision: four to five dwelling units per net acre. For example, the subdivision of a parcel of three net acres must result in between 12 and 15 dwelling units.

B. Minimum lot width: 55 feet. See also subsection H of this section.

C. Minimum front setback: 20 feet for garages, 10 feet for residences. See also subsection H of this section. In areas where existing right-of-way is insufficient, additional setback shall be required as necessary.

D. Minimum side yard: five feet (not applicable to property lines where single-family residences are attached).

E. Minimum rear setback shall be as follows. See also subsection H of this section.

1. Residence: 20 feet; other than residences on Lake Tapps, which shall have a rear setback of 30 feet.

2. A separate garage or accessory building: within 10 feet.

3. A boathouse, if approved, may be constructed with no rear yard setback.

F. Maximum height: 35 feet above foundations.

G. Maximum lot coverage by impervious surfaces: 60 percent. See also subsection H of this section.

H. In the case of new subdivisions that cluster residences and preserve open space, concurrent with subdivision approval the city may reduce the requirements in subsections B, C, E and G of this section by up to 50 percent if indicated by application of the conditional use permit criteria (see BLMC 18.52.020(C)). See the list of conditional uses at BLMC 18.14.040. (Ord. 1230 § 11, 2007; Ord. 1099 §§ 12, 17, 2005; Ord. 740 § 4, 1997).

APPENDIX B

BONNEYLAKE



Comprehensive Plan

FUTURE LAND USE

The Future Land Use Plan (Figure 3-4) depicts the future land uses. Designations are based largely on existing land use and zoning, former comprehensive plan designation, and physical constraints. The maps in the Natural Environment Element depict areas with physical constraints. Following are Bonney Lake's land use designations together with their intended purposes, densities, implementing zones, and acreages.

Figure 3-5 Future Land Uses				
Designations	Intent and density at build-out	Implementing zone	Acres So Designated on Figure 3-4	% of Area of City
Single-family Residential	Single-family neighborhoods. Undeveloped lands will be platted at 4-5 units per net acre (critical areas, streets, stormwater ponds, etc. netted out).	R-1	2,586	52%
Medium-Density Residential	Neighborhoods of various housing types, with overall single-family character, five to nine units per acre.	R-2	613	12%
High-Density Residential	Apartments or condominiums, up to 20 units per acre.	R-3	86	2%
Commercial	Sales and services, serving a large market area, with optional residential units. Pedestrian-oriented Downtown.	C, Commercial (includes 2.4 acres of Neighborhood Commercial)	260	5%
Commercial & Light Industrial	Highway-oriented commerce, warehousing, and light industry serving a large market area.	C-2/C-3, Combined retail commercial, warehousing and light manufacturing	286	6%
Mixed Use	Mixed commercial, multi-family residential, and office. Pedestrian-oriented.	Yet to be determined	20	.4%
Conservation/ Open Space	Open space, natural resource production lands, and environmentally sensitive areas.	RC-5, residential/ conservation and other zones	729	15%
Fennel Creek Corridor	Preservation of this environmentally sensitive corridor in its natural state.	RC-5, residential/ conservation and other zones	278	6%
Public Facilities	Public and quasi-public facilities that provide educational, governmental, and cultural services.	PF Public Facilities	146	3%

All land uses

The Growth Management Act encourages compact growth in urban areas where services and facilities are or will be available. This type of growth avoids the inefficient, low-density sprawl that characterized suburban development prior to 1990. Compact urban development reduces service costs, creates walkable communities, and promotes environmental stewardship. The GMA also mandates citizen participation.