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DIVISION II

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STATE OF WASHINGTON
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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 REPLY BRIEF

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I. SUMMARY OF REPLY

Under the Land Use Petition Act (LUPA), Chapter 36.70C RCW, Respondent Milestone Homes, Inc. bears the burden of proving that the Bonney Lake City Council either erroneously interpreted its own municipal code or erroneously applied the code to the facts presented. RCW 36.70C.130(1)(b), (d). Milestone has not met either burden, and therefore the trial court's decision to grant Milestone's Petition must be reversed.

Milestone never directly confronts the primary basis¹ for the City Council's decision: BLMC § 18.14.060(A), which unambiguously sets the maximum density of all R-1 plats at 4-5 dwelling units per acre.² Milestone's plat complied with neither the plain meaning of BLMC § 18.14.060(A) nor its unambiguous intent—to preserve single family neighborhoods by ensuring that the R-1 zone, and all plats within it, are no denser than five units per acre. Milestone argues that the BLMC tacitly allows developers to circumvent the density cap by padding their plats with land they do not own and have no intention of developing. The code neither expressly nor tacitly allows any such thing.

¹ See Resolution 1650, CP 14-15 (citing BLMC § 18.14.060 in the first paragraph).

² Milestone relegates discussion of BLMC § 18.14.060(A) to a footnote on page 25 of its Response Brief, contending, quite incredibly, that the City has never explained how BLMC § 18.14.060(A) gives the City "the authority to exclude lots from Milestone's plat application." For an explanation of why BLMC § 18.14.060(A), read in conjunction with BLMC § 17.08.020(T),

That the City's former planning director and Hearing Examiner based their recommendations on an error of law put the City Council in the awkward position of having to overrule its own staff. But, the City Council has the right and duty to reject erroneous recommendations when the municipal code dictates rejection.³ The five extraneous lots were never a legitimate part of Milestone's plat because Milestone had no intention of purchasing, selling, redeveloping, or reconfiguring them, or in any way making them a meaningful part of Orchard Grove II.⁴ Approving the plat would have been a violation of the density cap and a fraud on the Bonney Lake public, and the City Council was therefore correct in denying it.

II. ARGUMENT

A. The density cap is an unambiguous mandate to control residential densities in the R-1 zone.

Milestone has never contended that BLMC § 18.14.060(A) is ambiguous on its face—only that “nothing in the code” prevents Milestone from counting lots from a neighboring subdivision toward its density calculation. Double-counting

mandates the exclusion of the extraneous lots from Milestone's plat, *see* pages 14 through 16 of the Appellant's Opening Brief.

³ *See* BLMC § 14.80.090; RCW 58.17.100 (“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.”)

⁴ *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.”).

already developed lots is clearly prohibited because it would render the density cap meaningless. If double-counting were allowed, developers would have an excuse to crowd homes onto their plats, causing the R-1 zone to exceed five dwelling units per acre in density.

Milestone cannot have it both ways. It cannot ignore the stated purpose of the density cap while steadfastly professing that “nothing in the Code” prohibits double-counting. City planning policies and the Comprehensive Plan set forth the purpose of the R-1 density cap: 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.”⁵ While the planning policies require a less dense single family zone, Milestone’s tactic made its plat more dense. While the planning policies require for large lots, Milestone’s approach created smaller lots. Milestone’s approach contravened the letter and intent of BLMC § 18.14.060(A) and the City Council’s denial of the plat was proper.

⁵ Staff Report to Hearing Examiner at page 6, CP 84 (emphasis added).

B. The BLMC specifically disallows all exceptions to the density maximums.⁶

The BLMC's density maximum is set in stone; the code expressly disallows all exemptions. See BLMC § 14.110.010(A)(3) ("a variance cannot be granted from . . . the maximum residential density pertaining to zoning districts"); BLMC § 18.14.060(H) (leaving overall plat density off the list of bulk regulations eligible for conditional use permits). Approving Milestone's plat would have effectively granted an exception when the City Council went to great lengths to prohibit any exceptions. This was yet another reason why the plat was properly denied.

C. Milestone's irrelevant arguments do not suffice to meet its burden of proof.

Rather than directly confronting the question of whether its plat furthered the objective of maintaining single family neighborhoods at a density of four to five dwelling units per acre, Milestone approaches the issues obliquely. First, Milestone contends that getting "permission slips" from the property owners in Enchanted Estates renders the plat code-compliant.⁷ However, no authority supports the proposition that permission slips immunize Milestone from the density maximum, when Milestone had no intention of making the Enchanted Estates lots a meaningful part of Orchard Grove II.

⁶ BLMC § 18.14.060(A) also establishes a density "minimum" of four dwelling units per acre for each plat, pursuant to the Growth Management Act mandate for compact urban development. However, the density minimum is not at issue here.

Second, Milestone repeatedly reminds the Court that city staff and the Hearing Examiner both recommended the plat be approved. As explained *ad nauseum* in the City's Opening Brief, this is irrelevant because the City Council is ultimately in charge of approving preliminary plats, and the decision being reviewed here is the City Council's, not the staffs'.⁸ Milestone's claims that it detrimentally relied upon misrepresentations by city staff are not relevant to the LUPA Petition.⁹

Finally, Milestone contends—despite ample legal authority to the contrary¹⁰—that the City Council's interpretation of its own code is not entitled to

⁷ See BLMC § 14.90.010 (“All applications shall be signed by the property owner or an authorized representative.”).

⁸ See pages 11-13 of Appellant's Opening Brief.

⁹ LUPA is not an action for damages. RCW 36.70C.030(1)(c). Milestone also sued the City under RCW 64.40, which does allow damages, but this cause of action has been stayed pending the outcome of the LUPA appeal. CP 365-68.

¹⁰ 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 Industries v. Thurston County*, 119 Wn. App. 886, 896, 119 P.3d 433 (1992); *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).

Milestone ignores the clear language of LUPA and this line of cases, instead citing *dicta* from *Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007). Notably, all the cases holding that land use ordinances are construed against a municipality, including those cited in the *Sleasman dicta*, pre-date the 1995 enactment of LUPA. In expressly stating that a municipality's interpretation of an ordinance is entitled to deference, LUPA shows the legislature's intent to “overrule the common law.”

any deference. First, this Court need not determine whether to give deference because the code provisions at issue are not ambiguous.¹¹ The code itself and the planning policies demonstrate that the intent of the density cap is to preserve less-dense single family neighborhoods with larger lots.¹² Second, even if the code were ambiguous, the City Council's construction of the code, and its application of the code to the plat, were reasonable and are therefore entitled to deference.¹³

III. CONCLUSION

In denying the Milestone plat, the members of the Bonney Lake City Council did what any conscientious elected officials would do. The plat was, quite simply, an artificial creation designed to avoid the density maximum so that the developer could earn profits from the sale of two extra lots. No one—not the former planning director, Hearing Examiner, or any member of the Council—had seen a developer try this before.¹⁴ No legal authority requires a municipality to anticipate and head off every “creative” tactic a developer could possibly think of to

¹¹ Applying the actual holding of *Sleasman* mandates a win for the City in this appeal. The *Sleasman* Court simply applied the traditional rule that unambiguous ordinances are given their plain meaning.

¹² See *Cingular Wireless v. Thurston County*, 131 Wn. App. 756, 766, 129 P.3d 300 (2006) (planning objectives may assist in the interpretation of development regulations, as long as the planning objectives are consistent); RCW 58.17.100 (local governments must assure conformance of proposed subdivisions to the “general purposes of the comprehensive plan and to planning standards and specifications as adopted by the city.”) (emphasis added).

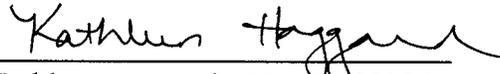
¹³ See *supra* note 11.

¹⁴ Verbatim Transcript of Proceedings of Public Hearing held on November 6, 2006 (sent under separate cover from Clerk's Papers) at pages 8-9.

get around the code. Bonney Lake had already gone to great lengths to ensure that maximum densities are never exceeded. The City should not be punished for assuming that most developers will plan their developments within the confines of the code, rather than trying to create loopholes. Milestone has utterly failed to prove that the Council misinterpreted or misapplied the BLMC, and its LUPA Petition must therefore be denied.

RESPECTFULLY SUBMITTED this 28th day of December, 2007.

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DIVISION TWO

MILESTONE HOMES, INC. a
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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

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Dated this 20th day of December, 2007.

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