

NO. 38357-8-II

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

CITY OF BONNEY LAKE, a Washington municipal corporation,

Appellant,

v.

JUST DIRT, INC., a Washington corporation,

Respondent.

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CITY

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This appeal arises under the Land Use Petition Act (LUPA), RCW 36.70C. Just Dirt, Inc. filed a LUPA Petition seeking reversal of two decisions by the Bonney Lake City Council: one to deny its application for preliminary plat approval and one to deny a variance for extension of a cul-de-sac. Just Dirt's proposed development, Shipman Ridge, is a 34-lot residential subdivision on a steep hillside at Bonney Lake's western border, adjacent to State Route 410.

For its sole access road into Shipman Ridge, Just Dirt seeks to extend the existing cul-de-sac at 176th Avenue Court East.¹ This road is too steep and narrow, and turns too sharply, to function as a safe and adequate access road for a new 34-lot subdivision. Yet, Just Dirt has continually failed to propose any plan for upgrading the road or mitigating the effects of the traffic its development will generate, despite the City's repeated requests for this information.

Local governments are statutorily prohibited from approving subdivisions that make inadequate provisions for roads and the public safety, or that propose inadequate or substandard access routes. RCW 58.17.110; *Isla Verde Holdings v. City of Camas*, 146 Wn.2d 740, 766, 49 P.3d 867 (2000).

¹ This will result in the cul-de-sac being approximately 2760 feet long from its origination point at Myers Road, more than quadruple the 600 feet the Bonney Lake Municipal Code allows without a variance.

In addition, the Bonney Lake Municipal Code (BLMC) specifically requires the Council to consider whether an overly-long cul-de-sac would “change the nature of the surrounding area,” and requires developers to “consider and mitigate” the traffic impacts of extending cul-de-sacs. Shipman Ridge having failed all these considerations by not offering any traffic mitigation or road upgrades, the City Council appropriately exercised its only legal option: to deny the plat and variance.

On appeal, the trial court seemed to agree that Just Dirt’s planned access route through 176th Avenue Court East is inadequate to handle the traffic generated by a 34-lot plat. Thus, the trial court denied Just Dirt’s request that the plat be approved as proposed. Instead, the trial court remanded the matter back to the City. In doing so, the trial court suggested that Just Dirt should revise and resubmit its proposal to include a reduced number of homes on the site, some form of traffic mitigation, and a second access route for the subdivision.² The trial court also reversed the Council’s denial of the variance, finding that the existing cul-de-sac was not “permanent,” and so City Code provisions requiring traffic mitigation did not apply.

Because the Petitioner did not meet its burden of proving that the Council’s denial of the plat was based on an erroneous interpretation of the law or unsupported by sufficient evidence, the trial court erred in remanding the plat

² See Final Order on Land Use Petition Act Appeal, CP 644-50.

denial. Finding that Just Dirt did not meet its burden under LUPA, the trial court should have instead upheld the City Council's decision. In addition, the trial court improperly reversed the denial of the variance, when the law and substantial evidence support the Council's decision. The City therefore requests that this Court reverse the trial court decision and reinstate the denials of both the plat and variance.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in remanding the Bonney Lake City Council's decision to deny the preliminary plat proposed by Just Dirt, Inc., when Just Dirt failed to prove that the City Council's decision was contrary to law or unsupported by the record.
2. The trial court erred in reversing the City Council's denial of the variance, when Just Dirt failed to prove that the City Council's decision was contrary to law or unsupported by the record.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Has Just Dirt, Inc. failed to meet its burden of proving that, in denying preliminary plat approval, the Bonney Lake City Council erroneously interpreted or applied the law or based the denial on an insufficient record? If so, is a remand to the City, for consideration of a completely new proposal from Just Dirt, an improper remedy?
2. Has Just Dirt, Inc. failed to meet its burden of proving that, in denying the variance, the Bonney Lake City Council erroneously interpreted or applied the law or based the denial on an insufficient record?

IV. STATEMENT OF THE CASE

Shipman Ridge, Just Dirt's proposed subdivision, consists of thirty-four detached single-family homes on approximately 18 acres of property.³ Just Dirt originally proposed that vehicles would access the subdivision directly from State Route 410, with 176th Avenue Court East as a secondary access for emergency vehicles. But Just Dirt ultimately dropped that proposal in favor of sole access through the existing cul-de-sac at 176th Avenue Court East.⁴

Just Dirt now proposes that the access route extend the existing dead-end and terminate in a new cul-de-sac inside the subdivision—in other words, a cul-de-sac on top of a cul-de-sac.⁵ The total length of the proposed dead-end, measured

³ See CP 12 (plat map showing configuration of Shipman Ridge).

⁴ See CP 158 ¶ 5; *see also* Verbatim Transcript of Proceedings (VTP) before the Hearing Examiner at 36 (“[With access off SR 410] you set yourself up with a U-turn kind of a safety issue at Myers Road that people living there, if they were to access off of 410 [on] their way home would [encourage] U-turns on a very steep highway with high speeds . . . ”); VTP at 13 (citing Hearing Examiner’s concerns regarding direct access off State Route 410).

⁵ CP 213; CP 12 (showing existing cul-de-sac in white and proposed new cul-de-sac in gray).

from its origination point at Myers Road, is 2760 feet—more than quadruple the 600 feet the Bonney Lake Municipal Code allows without a variance.⁶

176th Avenue Court East drops down from 176th Avenue East at a 15% grade⁷ and makes a 90 degree bend at the bottom of the hill before coming to a dead-end. 176th Avenue Court East has no sidewalks and is narrower than a standard road, and because it dead-ends, there is only one way in and one way out.⁸ Combining the steep grade, sight distance and maneuverability restrictions with the narrowness of the street and the lack of sidewalks the road makes for a hazardous access route for a new 34-lot subdivision.

City staff consistently communicated that 176th Avenue Court East would require upgrades to support the new development.⁹ In January 2007, City Engineer John Woodcock¹⁰ wrote a memorandum to the Hearing Examiner, as a comment to the Draft Environmental Impact Statement (DEIS), stating that using

⁶ VTP at 8. BLMC § 17.20.040(d) (“The maximum length of a cul-de-sac shall be 600 feet.”). The Code also requires a variance for extensions of existing cul-de-sacs. BLMC § 17.20.040(g). Both are at issue in this appeal.

⁷ See CP 21 ¶ 14 (outlining City Code and public works standards for road grades).

⁸ VTP at 6, 8, 9; CP 208. City standards require a width of 50 feet for residential streets with two lanes of traffic (with the actual paved improvement taking up at least 40 feet of that width). VTP at 31. But at only 25 feet wide, 176th Avenue Court East is slightly more than half this width.

⁹ See, e.g., VTP at 6-9.

¹⁰ Whose testimony Just Dirt has characterized as “very candid and honest.” CP 97 lines 12-13.

176th Avenue Court East as an access route for Shipman Ridge was not acceptable without mitigation and upgrades.¹¹ This memorandum states:

Thirty-nine (39) units is too large a development to rely on such a means of access. Adequate street width, reasonable grade, and reasonable cul-de-sac length are essential for a residential proposal of this size. The proposed homes would not be sufficiently accessible (including police, medical response, and fire access) during inclement weather due to steep roads and long cul-de-sac. Driving safety, ease of access, traction in snow and ice, and emergency vehicle access would not be acceptable.¹²

In this same memorandum, Mr. Woodcock also pointed out that the traffic impacts of opening the cul-de-sac “have NOT been mitigated.”¹³

In May 2007, Mr. Woodcock wrote a letter to Just Dirt, requesting that it provide:

[A]n assessment of the 176th Ave. Ct. E. access for overall circulation and adequacy of the geometry to serve general ingress and egress to the project. Verify that emergency services can maneuver around the corner without encroaching on the future curb and sidewalk.

and

[A]n evaluation of the adequacy of 176th Avenue Court E and 176th Avenue E (structural integrity of existing roadway, lane widths, shoulders, etc.) to accommodate the increased traffic levels, as well as recommendations for any needed upgrades to local roadways.¹⁴

¹¹ CP 275-76.

¹² CP 275. The original Shipman Ridge proposal had 39 attached units instead of 34 detached units.

¹³ *Id.* (emphasis in original).

¹⁴ CP 278-79.

At the public hearing before the Hearing Examiner on September 10, Mr.

Woodcock testified:

I think our biggest concern now is we have a substandard road section. There's no pedestrian path through there that will give them safe passage and then we will increase that to a bigger subdivision, more people using it more vehicles using it. You've got a road that's steeper than standard.¹⁵

Despite these repeated requests, Just Dirt has never proposed any upgrades for 176th Avenue Court East, and has never endeavored to show how this street is adequate to carry additional traffic from Shipman Ridge.¹⁶ In part because of the access problems associated with 176th Avenue Court East, the Hearing Examiner recommended denial of preliminary plat approval and denied the variance.¹⁷

Citing Just Dirt's failure to propose traffic mitigation or upgrades for 176th Avenue Court East, the City Council denied preliminary plat approval, and also denied Just Dirt's application for a cul-de-sac variance. The Council stated:

¹⁵ VTP at 24; *see also* VTP at 42 ("The road that goes through the 25 foot easement is a substandard road without pedestrian safety and that's really the crux of it.").

¹⁶ Mr. Woodcock's testimony before the Hearing Examiner is extensive about the problems with 176th Avenue Court East, and the record clearly establishes that Mr. Woodcock's earlier warnings about the lack of mitigation on 176th Avenue Court East went unanswered. If it had any intention of answering Mr. Woodcock's requests for information and proposed mitigation, Just Dirt could have requested that the Hearing Examiner hold open the record while it obtained traffic studies and formulated a plan to upgrade 176th Avenue Court East. But Just Dirt failed to do so.

¹⁷ CP 22-23. The Hearing Examiner's decision mischaracterizes the project as 39 attached homes, erroneously states that the applicant needed a conditional use permit for "density," and fails to make any findings regarding cul-de-sac extension under BLMC § 17.20.040(g). The City Council corrected all these problems in Resolution 1770 and 1777 by rejecting the Hearing Examiner's erroneous and inconsistent findings and substituting its own findings. CP 9-11, 34-36.

176th Avenue Court E is inadequate to handle the traffic coming to and from the Shipman plat. 176th Avenue Court E was not built to city standards because it was constructed as a private road to serve the East Ridge Estates short plat and perhaps one additional lot. It is narrow, has a grade steeper than 15% in spots, bends 90 degrees at its steepest point, and has no sidewalks. The Applicant has not proposed adequate mitigation for 176th Avenue Court E. Short of 176th Avenue Court E being improved to city standards, allowing traffic to access this plat would compromise the public welfare and safety.¹⁸

Just Dirt filed a petition for review under the Land Use Petition Act (LUPA), RCW 36.70C. Pierce County Superior Court Judge James Orlando reversed the City Council's denial of the variance, finding that the code provisions requiring traffic mitigation applied only to extensions of "permanent" rather than "temporary" cul-de-sacs.¹⁹ However, the Court merely remanded the denial of the plat. In ordering a remand, the trial court correctly recognized Just Dirt's responsibility for ensuring that the access road into its subdivision is adequate to support the development. The Court stated:

[P]etitioner did not meet its burden under RCW 36.70C.130(1) to demonstrate that the preliminary plat, in the form proposed in this proceeding, satisfies all the requirements of RCW 58.17.110 such that it should have been approved. Thus the Court denies petitioner's request to reverse the City Council's denial of the preliminary plat and direct approval of the preliminary plat in the

¹⁸ CP 11 (internal citation omitted).

¹⁹ CP 649.

form proposed in this proceeding, subject to further review following remand.²⁰

On both bases, the City appeals.

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. *Paulina 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 decisions of the City Council to deny the variance and preliminary plat approval are the subject of review.

Under LUPA, the Court may reverse the City Council’s decision only if Just Dirt proves that one of the following standards is met:

...

(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;

²⁰ CP 646.

(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.²¹

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 (c) requires consideration of whether the evidence in the record “is of a sufficient quantity to persuade a fair-minded person of the truth or correctness of the order.” *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002). 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.*

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.

²¹ The City omits discussion of subsections (a), (e), and (f) because they are not at issue in this appeal. Just Dirt never raised arguments under subsections (a) or (e), and while Just Dirt did originally challenge the City Council’s decisions under subsection (f), the trial court did not address this prong in its decision. See CP 644-46. Given that traffic safety is a fundamental police power of a municipality, the City does not expect Just Dirt to raise the constitutional argument any further. See *Markham Advertising Inc. v. State*, 73 Wn.2d 405, 439 P.2d 248 (1968); see also *Guimont v. City of Seattle*, 77 Wn. App. 74, 86, 896 P.2d 70 (1995).

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). If 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"); *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118 (2008).

B. The Bonney Lake Municipal Code and state law required the City Council to deny the proposed subdivision for lack of an adequate access route.

1. State law requires developers to supply adequate access roads for subdivisions.²²

State law prohibits the city from approving a subdivision that fails to make adequate provision for roads and streets. RCW 58.17.110 states as follows:

A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds and all other relevant facts, including sidewalks

²² 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. 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.

and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) the public use and interest will be served by the platting of such subdivision and dedication.

Case law has interpreted this statute to mean that a municipality can require a developer to supply an adequate access road into a planned subdivision. See *Isla Verde Holdings v. City of Camas*, 146 Wn.2d 740, 766, 49 P.3d 867 (2000); *Lechelt v. City of Seattle*, 32 Wn. App. 831, 834, 835 P.2d 240 (1982) (“Agencies reviewing plat applications must consider the adequacy of access to and within the proposed subdivision, and may condition approval of the plat upon the provision of adequate access.”); see also *Kahuna Land Co. v. Spokane County*, 94 Wn. App. 836, 843, 974 P.2d 1249 (1999) (“The conditions placed on Kahuna’s development serve the legitimate public purpose of insuring adequate access to the property. . . .”).

As noted, Just Dirt failed to provide the City with any traffic studies or information demonstrating how 176th Avenue Court East could support traffic from a 34-lot subdivision, despite the City’s repeated requests. Just Dirt also failed to propose any upgrades to the road—such as widening, sidewalks, and structural upgrades. Thus, the City could not make the finding required by statute as a prerequisite to plat approval—that “Appropriate provisions are made for the public health, safety, and general welfare and for such . . . streets or roads, alleys, [or] other public ways.” RCW 58.17.110. Moreover, the City Council could not find

that the “public interest would be served by such subdivision” when Just Dirt had entirely failed to heed staff’s warnings regarding traffic safety. Being unable to make the statutory findings, the City Council appropriately denied preliminary plat approval.

2. **Because Just Dirt failed to meet its burden of proof under LUPA, the trial court should have upheld denial of the plat, rather than remanding it to the City for further consideration.**

The trial court agreed with the City that Just Dirt had failed to meet its LUPA burden of proving that the plat “satisfies all requirements of RCW 58.17.110, such that it should have been approved.”²³ However, having found that Just Dirt failed in its burden, the trial court should have sustained the City Council’s denial rather than remanding the matter back to the City for consideration of an entirely new proposal.

Pursuant to RCW 36.70C.140, the Court does have the power to remand for further action. However, under LUPA, a remand is a remedy, only to be offered if the Court finds that the Petitioner has sustained the burden of proof under RCW 36.70C.130(1). *Tugwell v. Kittitas County*, 90 Wn. App. 1, 14 n.8, 951 P.2d 272 (1997) (remedies under RCW 36.70C.140 are only warranted if substantial evidence does not support the decision at issue). Thus, it was improper for the trial Court to remand the case merely to see if a remand “might” produce a

²³ CP 646.

different result; it can only remand if the Petitioner proves that the decisions at issue are clearly erroneous or not supported by substantial evidence. Because Just Dirt did not sustain the burden of proof in this case, LUPA does not allow for a remand.

The effect of the remand was essentially to give Just Dirt a “do over”—a chance to propose a reconfigured subdivision that makes adequate provision for roads and public ways. But in the ordinary course of plat processing, City staff had already given Just Dirt multiple chances to propose traffic mitigation, and Just Dirt had failed to do so.

Moreover, LUPA requires all decision-makers, including the City Council and the Courts, to base their decisions on the existing administrative record. RCW 36.70C.120 (“[J]udicial 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.”); *Pavlina*, 122 Wn. App. at 525. Nothing in LUPA, or the case law interpreting it, supports remanding a case to give a land use applicant a chance to create an entirely new administrative record. See *Maranatha Mining Inc. v. Pierce County*, 59 Wn. App. 795, 806, 801 P.2d 985 (1990) (rejecting request for remand when existing record supported only approval of land use application). Rather, the sole question before the Court is: Based on the existing administrative record, did the Petitioner meet its burden of proof under one of the prongs of RCW

36.70C.130? If the answer to this question is no, the decision of the local government must stand.

Finally, the trial court based the remand on a fundamental misunderstanding of the City's position in this case. In its letter ruling of August 25, 2008, the Court stated, "Substantial evidence does not support the City's conclusion that no development can occur on the site, and the matter is remanded for further review to consider appropriate density, ingress and egress, traffic flows and usage and mitigation requirements."²⁴ But at no time did the City Council ever conclude that "no development can occur on the site."²⁵ Thus, the trial court's stated basis for ordering a remand is deeply flawed. The issue is not whether any development can occur on site, but whether Just Dirt established that the subdivision "makes adequate provision for roads, streets, and public ways." RCW 58.17.110. On the basis of the administrative record, the answer to this question is clearly no, and the remand must therefore be overturned.

²⁴ CP 650.

²⁵ See Resolution 1777, CP 224-26 (basing denial of plat approval solely on lack of traffic mitigation).

C. The trial court erred in reversing the City Council’s denial of the variance.²⁶

1. Two variances are at issue here—one for cul-de-sac length and one for cul-de-sac extension.

According to the BLMC, “The purpose of variances is, under certain circumstances as set forth in the variance criteria, to grant flexibility in the administration of any of the provisions of the development code.” BLMC § 14.110.010. In other words, a variance gives a land use applicant permission to bend the rules.²⁷ A variance from the Code requirement that cul-de-sacs be no longer than 600 feet²⁸ can only be granted upon a showing of the following:

A. That the land in the plat has unique topographical or physical features rendering compliance with the design standards impractical; or

B. That the variance will not change the essential nature of the general area in and around the plat or be beyond the intent of Chapters 17.08 through 17.24 BLMC .

²⁶ As explained above, regardless of the variance, Just Dirt has an obligation to ensure that the access road into its subdivision is adequate to support the traffic its development will generate, and must make this showing as a prerequisite to preliminary plat approval. Thus, the debate over the cul-de-sac variance should have been granted—and over whether the existing cul-de-sac is “temporary” or “permanent”—has no bearing on whether the plat should be approved or denied.

²⁷ Pursuant to the BLMC, an applicant seeking a variance for public improvements (such as street grades and cul-de-sac lengths) files a variance application with the Department of Planning and Community Development. BLMC § 14.60.010. After determining that the application is complete, the Planning Director schedules a public hearing in front of the Hearing Examiner. BLMC § 14.60.030. After the public hearing, the Hearing Examiner issues findings and a decision, which can then be appealed to the City Council. BLMC § 14.60.40 - .80. The City Council decides the appeal on the basis of the Hearing Examiner’s record, and the applicant bears the burden of persuading the Council that the Hearing Examiner was wrong. BLMC § 14.120.040.

²⁸ BLMC § 17.20.040(d) (“The maximum length of a cul-de-sac shall be 600 feet.”).

BLMC § 17.24.100.²⁹

The Petitioner also needs a variance to punch the access road through the existing dead-end on 176th Avenue Court East, regardless of its length. BLMC § 17.20.040(f) through (h) provide as follows:

F. A permanent cul-de-sac may not be opened for extension without granting of a variance (see Chapter 14.110 BLMC), provided that the sole approval criterion shall be subsection G of this section.

G. A permanent cul-de-sac may be opened for extension if it is the only practical means of road access to the adjoining property, and if the impact of traffic flows, noise and other environmental facts have been considered and mitigated. A SEPA checklist shall be provided.³⁰

H. If a temporary or permanent cul-de-sac is extended, the street shall be paved to city standards over its entire length.

Thus, in this case, the essential questions concern whether the proposed variance(s) would alter the character of the surrounding neighborhood or be beyond the intent of the public works standards, including the requirement that traffic flows, noise and other environmental factors be “considered and mitigated.”

²⁹ BLMC § 17.24.100 substitutes these three criteria for the multi-part test contained in BLMC § 14.110.010, pertaining to other types of variances.

³⁰ BLMC § 17.24.100 (applicable to the cul-de-sac’s length) incorporates BLMC § 17.20.040(f) through (h) by reference in its third prong—that a public improvement variance must not be “beyond the intent” of BLMC Chapters 17.08 through 17.20. Thus, the traffic mitigation requirement contained in BLMC § 17.20.040 applies not only to the cul-de-sac extension, but also the cul-de-sac length.

2. **The City Council properly denied the variance.**

- (a) *The variance for cul-de-sac length would change the nature of the surrounding area.*

The City Council expressly found that it could not grant the variance for cul-de-sac length under BLMC § 17.24.100 because granting such a long extension would change the character of the surrounding area. According to the Council, the cul-de-sac's proposed length was directly tied to the fact that the access road would be serving 34 new homes, and the amount of traffic those homes would generate.³¹

The Council stated:

The Council finds, however, that granting the variance would change the essential nature of the general area in and around the plat. Numerous homeowners from the East Ridge Estates short plat, whose homes access the 176th Avenue Court East cul-de-sac, submitted letters to City staff and the Hearing Examiner, complaining that extending a long cul-de-sac through 176th Avenue Court E would fundamentally alter the quiet nature of their neighborhood by funneling traffic from the thirty-four lots in the new subdivision directly onto their street³²

Just Dirt has depicted the neighbors' concerns as "homeowner hysteria" that the City Council should not have considered when deciding whether granting a variance for an overly-long cul-de-sac would "change the essential nature of the general area in and around the plat." Just Dirt's argument to this effect seems to

³¹ CP 221.

³² CP 221.

have resonated with the trial court.³³ But, disregarding the neighbors' comments as unfounded "hysteria" ignores the fact that such comments are directly relevant to the Code provision at issue: whether the variance would change the nature of the surrounding area. BLMC § 17.24.100. Nothing prohibits the City Council from considering neighborhood comments when those comments directly assist the Council in determining whether a relevant Code provision has been met. In this case, the neighbors' comments, as a part of the administrative record, support the Council's conclusion that granting the variance for the overly-long cul-de-sac, so that Just Dirt could have an access road for 34-new homes, would fundamentally alter the nature of the surrounding area. This conclusion, and the resultant denial of the variance, should not be disturbed on appeal.

(b) *Granting the variance for cul-de-sac length would "be beyond the intent of Chapters 17.08 through 17.24 BLMC ,*

A variance for cul-de-sac length cannot be granted if such a variance would "be beyond the intent" of BLMC 17.08 through 17.24. BLMC § 17.24.100. Title 17 of the Code consists of highly-detailed public works design standards for residential subdivisions. On their face, these standards address traffic safety in the broader context of the public health and welfare, in line with the requirements of RCW 58.17.110. Implicit within these standards, as within RCW 58.17.110, is the

³³ CP 649 ("Clearly the neighbors do not want the development . . .").

requirement that new subdivisions mitigate their impacts so that new development does not have an ill effect on the public interest. See RCW 58.17.010 (“The purpose of this chapter is to regulate the subdivision of land and to promote the public health, safety and general welfare in accordance with standards established by the state to . . . lessen congestion in the streets and highways . . . to promote safe and convenient travel by the public on streets and highways to provide for proper ingress and egress”). Thus, strong public policy supports requiring developers to make adequate provision for traffic safety on their subdivision access routes, and the public works development standards contained within BLMC Title 17 are intended to effectuate this policy. Without any proposals for traffic mitigation, the variance application violated the intent of BLMC Title 17, and thus the City Council properly denied the variance.

(c) *Just Dirt did not “consider and mitigate” the traffic impacts of extending the cul-de-sac.*

A variance for cul-de-sac length or extension (regardless of length) cannot be granted unless the applicant has “considered and mitigated” the effects of extending the existing cul-de-sac. BLMC § 17.20.040. As noted, Just Dirt offered no response to the City’s repeated requests for a traffic plan and proposed upgrades to 176th Avenue Court E. Just Dirt has never even argued that it has “considered and mitigated” the traffic impacts of converting 176th Avenue Court East into a through-street for 34 additional homes.

Rather, Just Dirt's argument is that the City cannot require traffic mitigation because the cul-de-sac is "temporary" rather than "permanent."³⁴ Because the variance request must be viewed in light of the "intent" behind BLMC Chapters 17.20 through 17.24, it is irrelevant whether the existing cul-de-sac at 176th Avenue Court E is "temporary" or "permanent." The fact remains that Just Dirt failed to establish that its planned access road adequately promoted traffic safety and the general public welfare.

Yet, the record supports a finding that the existing cul-de-sac at 176th Avenue Court East was intended to be permanent. BLMC § 17.08.020 defines a permanent cul-de-sac as "a short street having one end open to traffic and the other end being permanently terminated by a vehicle turnaround." It further defines a temporary cul-de-sac as "a dead-end local access road that is expected to be extended in the future." This is not a case where a developer installed a temporary dead-end while waiting to complete the next phase of the same development. Rather, 176th Avenue Court was meant to serve the neighbors of East Ridge Estates and perhaps one additional lot.³⁵

³⁴ See BLMC § 17.20.040(g) ("A permanent cul-de-sac may be opened for extension if it is the only practical means of road access to the adjoining property, and if the impact of traffic flows, noise, and other environmental factors have been considered and mitigated.")

³⁵ See VTP at 63-64. The letters sent to Planning Staff by residents in the area also demonstrated that the residents certainly regarded their cul-de-sac as permanent and not suitable for a future through-fare. CP 252-73.

Regardless, the trial court should not have overturned denial based solely on a finding that cul-de-sac was temporary rather than permanent. Granting a variance for an overly-long cul-de-sac also requires a consideration of whether the variance would “change the nature of the surrounding area.” BLMC § 17.20.100. Moreover, a decision must be made as to whether the variance would “be beyond the intent” of the public works standards. As noted, the City Council appropriately determined that the variance would alter the nature of the surrounding area, and the inescapable conclusion from this record is that the variance violates the intent of the public works standards for subdivisions—to provide for reasonably safe public ways. The trial court made no findings whatsoever as to whether substantial evidence supported either of these criteria.

VI. CONCLUSION

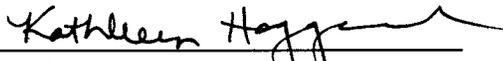
Just Dirt has failed in its burden of proving that the City Council’s denial of the preliminary plat application lacked support in the facts and law. The trial court should not have remanded the matter to the City for Just Dirt to propose and entirely new plat and create an entirely new administrative record. Similarly, Just Dirt has failed to establish that denial of the variance was improper, and the denial of the variance should have been upheld.

For months prior to the September 2007 hearing before the Hearing Examiner, City staff had been trying to convince Just Dirt that—as a developer

seeking to build a subdivision of 34 new homes—it has a responsibility to mitigate the effects of the traffic its development would generate. Because Just Dirt planned to access the development through a steep and narrow roadway with no sidewalks and a 90 degree bend, Just Dirt clearly needs to propose upgrades before the City Council can make the requisite finding that the subdivision “makes appropriate provision for streets and public ways.” Yet, Just Dirt has never even taken the first steps in this process: providing the City with the information requested by City Engineer John Woodcock. Just Dirt is clearly frustrated that the process has taken as long as it has, but this does not change either Just Dirt’s or the City’s legal obligations.

RESPECTFULLY SUBMITTED this 6th day of February, 2009.

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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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By: Brittany Tornquist

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