

No. 38357-8

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.

---

JUST DIRT, INC.'S RESPONSE BRIEF

---

GORDON, THOMAS, HONEYWELL,  
MALANCA, PETERSON & DAHEIM LLP

Margaret Y. Archer  
Attorneys for Just Dirt, Inc.

Suite 2100  
1201 Pacific Avenue  
P.O. Box 1157  
Tacoma, WA 98401-1157  
(253) 620-6500  
WSBA No. 21224

09 APR -9 AM 11:41  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY MAY

PM 4-8-09

## TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF THE CASE	2
	A. The Shipman Ridge Preliminary Plat Applications	3
	B. The Environmental Review for the Shipman Ridge Preliminary Plat	4
	C. Just Dirt Responds To The EIS and Public Comments By Revising The Plat	5
	D. The Proceeding Before The Hearing Examiner	10
	E. The City Council's Decisions	15
	F. Judge Orlando's Decision Pursuant To LUPA	17
III.	STANDARDS OF REVIEW	20
IV.	ARGUMENT	22
	A. The Trial Court Correctly Held That The Council's Decision To Deny The Preliminary Plat Is Inconsistent With The Law And Unsupported By The Evidence In The Record	22
	1. The City had an obligation but failed to identify mitigation measures that, if properly conditioned, would facilitate project approval	22
	2. The Counsel's decision to deny the preliminary plat is inconsistent with the law and unsupported by the evidence in the record	28
	3. The trial court's remand was consistent with the relief authorized by LUPA	33
	B. The Trial Court Properly Ruled That The City's Decision To Deny The Variance Application Is Inconsistent With The Applicable Code And Unsupported By The Substantial Evidence In The Record	34
	1. 176 <sup>th</sup> Avenue Court East is not a permanent cul-de-sac as defined by Bonney Lake code and the City erroneously applied the variance requirements for extending permanent cul-de-sacs	34
	2. The evidence in the record and the applicable law do not support the City's conclusion that Just Dirt failed to mitigate impacts to	

	176 <sup>th</sup> Court Avenue East	39
3.	The proposed extension of the cul-de-sac will not change the essential nature of the area	46
V.	CONCLUSION	49

Appendix A – Preliminary Short Plat Shipman Ridge (CP 105-08)

Appendix B – Mutual Grant of Easement (CP 626-629/ 705-08)

Appendix C – Short Plat (CP 631-32 / 953-94)

**TABLE OF AUTHORITIES**

**CASES**

*Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 49 P.3d 860 (2002).....22

*Burton v. Clark County*, 91 Wn. App. 505, 958 P.2d 343 (1998) .....32

*City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 959 P.2d 1091 (1998).....22

*Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).....22

*Hauser v. Arness*, 44 Wn.2d 358, 367-68, 267 P.2d 691 (1954).....32

*HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 61 P.3d 1141 (2003).....20

*Maranatha Mining vs. Pierce County*, 59 Wn. App. 795, 801 P.2d 985 (1990).....1, 24, 32, 38, 48

*Nagatani Brothers, Inc. v. Skagit County Board of Commissioners*, 108 Wn.2d 477, 739 P.2d 696 (1987).....32

*Peter Schroeder Architects, AIA v. City of Bellevue*, 83 Wn. App. 188, 920 P.2d 1216 (1996).....21

*Quality Rock Products, Inc. v. Thurston County*, 139 Wn. App. 125, 159 P.3d 1 (2007).....24

*Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007) .....21

*Waste Management of Seattle v. Utilities and Transportation Comm’n*, 123 Wn.2d 621, 869 P.2d 1034 (1994) .....22

**STATUTES, REGULATIONS AND CODE**

RCW 36.70C.130.....18, 19, 21

RCW 36.70C.140.....	18, 20, 33
RCW 43.21C.060.....	32
RCW 36.21C.060.....	24
RCW 58.17.110 .....	19, 32, 43
WAC 197-11-030.....	26
WAC 197-11-400.....	23, 24
WAC 197-11-420.....	23
WAC 197-11-455.....	25
WAC 197-11-550.....	23, 45
WAC 197-11-560.....	23
WAC 197-11-660.....	24
BLMC 14.04.080 .....	23
BLMC 16.04.010 .....	23
BLMC 17.08.020 .....	35
BLMC 17.20.040 .....	12, 35, 36
BLMC 17.24.100.....	12, 34, 46

## I. INTRODUCTION

In the *Maranatha Mining vs. Pierce County*, 59 Wn.App. 795, 805, 801 P.2d 985 (1990), this Court admonished:

It is improper to deny the permit to an applicant who, throughout the application process, has demonstrated a willingness to mitigate any and every legitimate problem.

In this case, however, the City of Bonney Lake disregarded this admonition and denied a development project that could have been conditioned to mitigate potential impacts.

The question before this Court is whether the City of Bonney Lake's decision to deny, in total, approval for the Shipman Ridge Preliminary Plat is consistent with the applicable law and supported by the substantial evidence in the record. The answer to this question is no. The City exclusively based its denial of the Plat, and the associated variance, on the City's (and neighbors) objection to petitioner's proposal to access the Shipman Ridge Plat via the existing, previously City-approved private road and cul-de-sac known as 176<sup>th</sup> Avenue Court East. It was expected when the City approved this private road that it would someday be used to serve Just Dirt, Inc.'s property. Though the road presents challenges, they are challenges that can be addressed through the imposition of appropriate conditions on the proposed Shipman Ridge Development. The trial court recognized this reality when it properly reversed the City's denial of the

plat application and remanded it to the City for consideration of appropriate mitigations measures. This Court should affirm.

## II. STATEMENT OF THE CASE<sup>1</sup>

---

<sup>1</sup> The record created by the Hearing Examiner and considered by the City Council is not collected at a single place in the record, but is appended to five different pleadings in the Clerk's Papers ("CP"). (See, CP 651-996; 103-200; 201-302; 357-603; and 625-43.) Accordingly, citations to the record will be to the exhibits attached to those five pleadings, or to the Verbatim Transcript ("VT") of the September 10, 2007 hearing before the Examiner was filed separately on April 8, 2008. An explanation is warranted.

The certified record that the City initially prepared and filed with the Court (CP 651-996) is not indexed or numbered, in some instances is out of order and is missing some of the exhibits in the record. (CP 201-02.) Accordingly, so the record could be readily referenced, Just Dirt indexed and appended to its opening brief to the trial court some of the record exhibits cited, including some of the omitted exhibits. (See, 103-200.) The City stipulated that all of the exhibits attached to Just Dirt's brief are part of the record that was before the Examiner and are properly considered by the court. (CP 202 at ¶ 4.) The City likewise provided excerpts from the record separate from the certified record when it submitted its response brief. (See, CP 201-302.) Though the City advised the trial court below that it "anticipate[d] substituting the Administrative Record submitted to the Court on April 11, 2008 with a more complete and organized version, as soon as it can be obtained from the Hearing Examiner's office (CP 201), the City only filed a "substitute" Staff Report and attachments and a complete record was never substituted. Unfortunately, the substituted Staff Report did not even fully resolve issues with that particular exhibit, since the substituted report was not the same Staff Report that was presented to the Examiner for consideration at the September 2007 hearing.

The Staff Report that the City originally certified with the Administrative Record (CP 689-696) and was likewise attached as Exhibit D to the declaration supporting its response brief (CP 229-37) is dated August 21, 2007. This Staff Report incorporated the Final Environmental Impact Statement ("FEIS") and reviewed the revised plat for 34 single-family lots. (See, 689, 695, 863-888.) The "substituted" Staff Report (CP 357-603), however, is different. Rather, the "substituted" Staff Report, dated January 29, 2007, was prepared eight months earlier when Just Dirt proposed 39 dwelling units (consisting primarily of duplexes) with access from Highway 410 and before the FEIS was completed. (See, CP 359.) Thus, this earlier report attached only the Draft EIS and was intended to be a comment on the Draft EIS and the original 39-unit development proposal in an earlier Examiner proceeding. (See, CP 359, 363, 366, 510-528.) Additionally, since it was prepared prior to the FEIS and the subsequent plat revisions, the "substituted Staff Report did not include Staff Report attachments 14 and 15 or subsequent pre-hearing correspondence with the Examiner discussing the revised project, which Just Dirt noted, and the City acknowledged, were missing from the record. (See, CP 104-112, 156-172.)

Again, the City stipulated that the exhibits that were not included in the certified record, but were attached to Just Dirt's opening brief, are part of the administrative record created by the Examiner and should have been included with the certified record. (CP 202, ¶ 4.) Accordingly, citation to record exhibits attached to briefs in the trial court proceeding below and to the more recent Staff Report and attachments originally certified is appropriate.

**A. The Shipman Ridge Preliminary Plat Applications.**

Just Dirt owns 18.92 acres of vacant land that lies on the western edge of the City of Bonney Lake. (CP 873.) The property is located along the North side of SR 410 and there is currently a gravel road with limited access to SR 410. (*Id.*) At the time Just Dirt submitted its complete applications, the property was zoned R-1, which permits 5 units per net acre and the property is vested under that zoning. (CP 132. *See also*, CP 230; 373-74; VT at p. 47.) The property is surrounded by steep slopes which limit the possibilities available to access the property. (CP 874-75; VT at p. 34.)

In August of 2005, Just Dirt submitted an application for preliminary plat approval to subdivide the property in order to construct 38 single-family attached homes (19 duplexes) and 1 detached single-family home, for a total density of 39 dwelling units. (CP 370-77; 110-12; 359.) The application proposed to access the property through a cul-de-sac off of SR 410. (CP 876; 362-63; 110-12.) In order to construct the cul-de-sac as initially proposed, Just Dirt required a variance from limitations placed on the length of cul-de-sacs, as well as variances from Code provisions governing minimum width and grade for streets. (CP 231-32.) Just Dirt also applied for a Conditional Use Permit (“CUP”) to allow for clustered housing. (CP 370; 375-76.)

**B. The Environmental Review For The Shipman Ridge Preliminary Plat.**

Bonney Lake conducted the requisite environmental review pursuant to the State Environmental Policy Act (“SEPA”), chapter 43.21C RCW. On January 10, 2006, the City issued a Determination of Environmental Significance (“DS”) for the proposal, concluding that it is probable that the proposed plat will have adverse environmental impacts. (CP 459. *See also*, RCW 43.21C.033; .031.) As a result of the DS, an Environmental Impact Statement (“EIS”) analyzing the proposals impacts to traffic, emergency response, geologic stability, erosion, tree cover, and land use compatibility was required. (CP 459; 863-888.) Quite frankly, the City’s decision to require an EIS was surprising, since it is highly unusual for an EIS to be required for a project of this size and nature. (VT at pp. 11-12.) Notably, the City recently did not require an EIS for a neighboring project with similar traffic, slope and access, including the need for a variance for a long cul-de-sac, which variance was approved. (*See*, CP 144-55.) Nonetheless, Just Dirt proceeded with the EIS. (VT at pp. 11-12.)

Of course the purpose of an EIS is to provide relatively objective environmental analyses of the proposal through expert studies, agency comment and citizen comments to analyze significant adverse impacts and

determine alternative courses of actions and/or measures that may be implemented to mitigate those significant environmental impacts. WAC 197-11-400; 550, 560. The EIS process is intended to enable the applicant to respond identified significant impact and revise the project so as to work toward project approval. (See WAC 197-11-550; RCW 43.21C.060.) Consistent with this purpose, a draft EIS (“DEIS”) was prepared and made available to the public for comment in December 2006, and agency and citizen comments were requested and obtained. (CP 359, 365; 461-63; 469-508.) The final EIS (“FEIS”) adopted and approved by the City responsible official was released in May 2007 and no appeal was filed. (CP 132, Finding 4; 863-888.)

**C. Just Dirt Responds To The EIS and Public Comments By Revising The Plat.**

The City focuses on two isolated communications from City Engineer John Woodcock discussing traffic impacts to the private cul-de-sac road 176<sup>th</sup> Avenue Court East<sup>2</sup> (CP 814-15; 808-09)<sup>3</sup> and describes the memos as “repeated requests” to which Just Dirt was unresponsive.

---

<sup>2</sup> This private road is also referred to in the record and 176<sup>th</sup> Avenue Place East; however the correct name in 176<sup>th</sup> Avenue Court East. (See VT at p. 11.)

<sup>3</sup> Notably, while these two memos from John Woodcock, City Engineer, were included with the agency comments in attachment 10 to the August 21, 2007 Staff Report originally certified as part of the record, they were not included in attachment 10 (or other attachments) to the substituted January 29, 2007 Staff Report. (Compare CP 357-66 to CP 807-27.) Just Dirt does not dispute that these memos are part of the record that should be considered by the Court. The omission is called to the Court’s attention to

(City's Brief at pp. 9-10.) The City's myopic focus on and limited description of these two memos creates the misimpression that the private road was the primary issue of concern and topic of communication. Such was not the case. Moreover, Just Dirt was far from unresponsive when the City articulated issues with any specificity.

Just Dirt worked diligently to use the EIS process to better its project, and voluntarily initiated other processes to learn and address agency and public concerns. (*See*, CP 157-172; VT at p. 12.) Just Dirt specially scheduled a meeting for the neighbors to provide comment above and beyond the SEPA process; but unfortunately, the neighbors elected not to attend and participate. Just Dirt also diligently pursued meetings with City staff (often without response from the staff) with the purpose of identifying concerns and modifying the project to address those concerns. (CP 157-172.) In fact, Just Dirt deliberately delayed review of the project so as to afford time to modify the project to respond to concerns. (*Id.*)

The primary issues raised in the FEIS were (1) stability of the steep hill side; (2) loss of tree cover as result of grading necessary to create access from SR 410; (3) unsafe traffic conditions created by access from SR 410 because u-turns might be encouraged by the access; (4) traffic

---

illustrate the need to look beyond the "certified record" as "substituted" to perform a complete review of the record.

impacts to the private road (176<sup>th</sup> Avenue Court East) located south of the Shipman Ridge Plat; and (5) purported concerns regarding the proposed grade and width of the proposed extension road. (CP 863-888.)

Woodcock's first January 30, 2007 memorandum (CP 814-15) appeared to be the sole source of comments leading to the last three stated issues and was addressed through the EIS process. (*See*, CP 866-71.) Woodcock's memo (1) raised issues related to the proposed access for SR 410, including u-turns on SR 410 and additional through traffic that the SR 410 access could create on the private cul-de-sac road; (2) challenged the requested variances from grade and width requirements for the road extension; (3) stated that street maintenance such as sanding would be required for the private road; and (4) stated that a density of 39 units was too great for the private cul-de-sac road. (CP 814-15). Though contemplated in the SEPA / EIS process,<sup>4</sup> Woodcock failed to specify any mitigation measures with his agency comments regarding impacts. (*See, id.*)

The FEIS stated that geologic hazards could be mitigated through careful design and construction. (CP 879-882.) Impacts resulting from the planned access via SR 410 could be resolved by eliminating that access. (CP 878-79.) Finally, the FEIS stated that traffic impacts to the

private road 176<sup>th</sup> Avenue Court East could be mitigated by reducing the density of the project. (*Id.*; *See also*, VT at pp. 43-44.)

With the benefit of only limited additional feedback from citizens and City Staff, Just Dirt relied upon the FEIS and significantly modified the proposal to mitigate its potential impacts, especially with respect to traffic. (CP 105-08; 114; 157-63. *See also*, VT at pp. 11-16; 29-33.) The revised plan addressed the concerns describe above, as well as a number of other objections raised in the review process, as follows:

1. To address concerns about the density, to include traffic impacts created by density, Just Dirt reduced the number of units from 39 to 34. (CP 105-08; 114; VT at p. 11-16.)

2. To address concerns about access to SR 410, resulting earthwork and potential traffic problems, Just Dirt eliminated the proposed access to SR 410 and redirected all access exclusively through the private road 176<sup>th</sup> Avenue Court East. The access, as provided in the revised plat extends and existing public road and cul-de-sac (176<sup>th</sup> Street East) that is 530 feet in length, which in turn connects with the private road cul-de-sac (176<sup>th</sup> Avenue Court East), making the existing cul-de-sac 1,160 feet

---

<sup>4</sup> *See*, WAC 197-11-550(5).

long.<sup>5</sup> The existing cul-de-sac will be extended by 1,600 feet, making the total length 2,760 feet. (CP 231-34; VT at p. 6.) The roads within the new Shipman Ridge Plat will be built to City standards, which will include the installation of sidewalks. (VT at pp. 26-28.)

3. To address concerns about the plat road voiced by the City Public Works Department, Just Dirt changed the alignment of the road to a curve that is in keeping with the City's requirements. Just Dirt also reduced the road grade to 14% and agreed to construct the cul-de-sac to a width of 50 feet versus 40 feet initially proposed. (VT at pp. 11-16.)

4. To address City concerns about a public road in the project connecting to an existing private road (176<sup>th</sup> Avenue Court E.), Just Dirt consented to making the road within the project be a private one. This would require approval of a deviation from the City's road standards. However, Just Dirt was advised that this was preferable to the City than having a public road connecting to a private one. (CP 157-61, VT at pp. 11-16.)

---

<sup>5</sup> Just Dirt has easement rights to access its property via the existing private cul-de-sac. (See, CP 626-32; 953-94.) The short plat that creates the easement (CP 953-94) is a public record, so the individuals who purchased homes in East Ridge Estates (located within the short plat) purchased their homes with notice of the easement created by the short plat.

5. To address concerns about the length of the cul-de-sac, Just Dirt provided for a potential future extension of that road to City of Sumner property lying north of the subject property. (CP 157-61.)

6. To address school district concerns that school buses could not effectively maneuver the new road, the revised plan includes a bus stop and a larger cul-de-sac to allow turn-around by buses. (CP 157-61.)

7. Finally, to address concerns about the attached duplexes that were proposed, and potential incompatibility with nearby single family homes, the proposal is no longer for duplexes, but rather for individual single-family homes on 50-foot wide lots.<sup>6</sup> (CP105-112; 114; and 157-61. *See also*, VT at pp. 11-16; 29-33.)

A map of the revised Shipman Plat is attached to this brief as Appendix A. The existing private road cul-de-sac known as 176<sup>th</sup> Avenue Court East is highlighted in pink and the proposed extension, which will be built to City standards, is highlighted in yellow.

#### **D. The Proceeding Before The Hearing Examiner**

The revised proposal cul-de-sac eliminated the need for variances from road width and grade requirements, but it still required a variance from length limitations imposed on cul-de-sacs. The revised density and

---

<sup>6</sup> Changing the proposal from clustered housing eliminated the original need for a CUP. Nevertheless, a CUP was still required because the proposed lots were 50 feet in width instead of 55 feet in width.

replacement of single family homes for duplexes also eliminated the original requirement for a CUP. The revised project did, however, require a CUP to reduce the minimum width for each lot from 55 feet to 50 feet. Thus, the project proceeded to the Hearing Examiner as an application for a preliminary plat, a variance application for the length of the proposed cul-de-sac and a CUP application addressing only the width of the lots.

Despite the significant project modifications, the City Staff recommended denial of all of the applications and offered no proposed conditions or mitigations to address identified concerns. (CP 236.) The matter then proceeded to a public hearing and the Examiner issued its decision on October 23, 2007. (CP 125-37.)

Relevant to this appeal, a substantial amount of testimony presented at the hearing was dedicated to addressing access and traffic impacts. Significantly, the majority of the testimony came from John Woodcock, who is the City's engineer and the person charged by the City to address traffic impacts and concerns. (VT at pp. 22, 51.) The only other expert who offered testimony on the traffic and road impact issues was Greg Heath, the traffic engineer retained by Just Dirt. (See VT at pp. 57 – 62.)

Woodcock's testimony was extremely favorable to the revised Shipman Ridge plat. With regard to the variance application on the length

of the cul-de-sac, the Bonney Lake Municipal Code (“BLMC”) provides that a cul-de-sac may not exceed 600 feet without an approved variance. (BLMC 17.20.040(D).) However, a variance may be granted if the following conditions are satisfied:

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

BLMC 17.24.100.

The City engineer conceded that Just Dirt satisfied both of the requisite criteria. Woodcock testified that, in light of the steep slopes, it is impossible to comply with the applicable design standards and variance will not change the essential nature of the general area in and around the plat. (VT at pp. 34-36.) In fact, the Woodcock acknowledged that the proposed long cul-de-sac will have less of an impact and better preserve the character of the surrounding area than would have been the case had access been from SR 410 as originally proposed. This is because elimination of the SR 410 access also eliminates substantial tree removal and grading that would have occurred in the immediate vicinity of SR 410, which grading would have negatively impacted the views from SR 410 and changed the character of the area. (VT at pp. 35-38.)

Woodcock also testified that it is not uncommon to see circumstances such as are present here in which a new plat will be utilizing pre-existing roads that are substandard. It is not uncommon for the pre-existing roads to be without sidewalks, or narrow, or have a steep grade or sharp curves. (VT at pp. 23-29.) The City engineer testified further that the City is without authority to require applicants with new development to upgrade and revise pre-existing substandard roads (e.g., pre-existing roads without sidewalks). (*Id.*) Woodcock also testified that the City has approved plats that utilize existing substandard roads in the past. (*Id.* at pp. 25-29.) Woodcock agreed that the proposed new roads, as revised, were consistent with relevant standards in terms of width and grade. (*Id.* at pp. 27-28, 31-33, 40-41, 43. *See also*, CP 982-87.)

Finally, with regard to impacts to the private road 176<sup>th</sup> Avenue Court East from the increased traffic that will be created by the Shipman Ridge Plat (34 trips at peak hours), the City Engineer testified that the impacts to the existing private roads could be mitigated if the plat density was reduced. (VT at pp. 43-44, 58.) At the hearing, Woodcock testified that, if the density was reduced to 15 lots, it would be acceptable to him. (*Id.*) Notably, Woodcock based that standard on water main standards, rather than traffic impacts, so the acceptable density, based upon traffic impacts could easily be greater. (*Id.*) Regardless, the City Engineer's

testimony establishes unequivocally that the Shipman Ridge plat can be conditioned to mitigate significant impacts and denial of the project is not required.<sup>7</sup>

Following the public hearing, the Examiner issued a decision. (CP 125-37.) Remarkably, despite the substantial written documentation advising of the revised project (Appendix CP 105-08; 114; 157-61; 229-36; 968-78), the testimony from the City Planner advising the Examiner of the revisions (VT at pp. 3-7), the presentation and witness examination by Just Dirt's attorney on the issue of the substantial revisions (VT at pp. 11-16, 29-34), the Examiner seemed to be unaware of the primary elements of the proposed project. The Examiner erroneously stated that the project continued to have a density of 39 dwelling units and include 19 duplexes. (CP 132 at Finding 3.) The Examiner failed to even make findings or conclusions on the variance application. Ultimately, the Hearing Examiner denied the variance and recommended that the City Council deny the CUP and preliminary plat applications. (CP 134-56.)

---

<sup>7</sup> Mitigations for maintenance of the private road 176<sup>th</sup> Avenue Court East was also provided. Just Dirt providing for sanding in inclement weather and was will to accept conditions that would obligate future owners to participate in road maintenance. (VT at pp. 60-61.) To relieve the City of responsibility for future maintenance of the Shipman Ridge road, Just Dirt volunteered to make the roads private if that was preferable to the City. (VT at pp. 13, 29-30.)

**E. The City Council's Decisions**

Just Dirt timely appealed the Hearing Examiner's denial of the variance application to the City Council. (CP 138-42.) Thereafter the City Council reviewed the variance appeal and Examiner recommendations on the preliminary plat and CUP applications separately and issued two decisions. (CP 116-18 and CP 120-23.)

With regard to the variance appeal, the Council largely rejected the Examiner's findings and conclusions, but it sustained the denial based upon its own findings and conclusions. Its decision is set forth in Resolution 1770. (CP 116-18.) The Council agreed that the first variance criteria (practicality), was satisfied. (CP 117 at Finding 9.) With regard to the second criteria, the Council concluded that the variance, if granted, would change the character of the neighborhood. Contrary to the direction from the BLMC, however, the Council did not focus on the cul-de-sac itself and its proposed length. Instead, it focused on the density of the development changing the character of the neighborhood. Of course, the density is authorized by the zoning in effect at the time of the application and, is therefore presumed compatible. (*See* CP 884-85.)

The Council also rejected the variance by characterizing it as a permanent cul-de-sac and, concluding that it could not be reopened unless traffic impacts were considered and mitigated. Assuming *arguendo* that

the Council properly characterized the cul-de-sac as permanent,<sup>8</sup> the testimony established that the traffic impacts can be mitigated through a reduction of density. Nonetheless, the Council chose to reject the proposal wholesale rather than condition the project with appropriate mitigations.

The Council addressed the preliminary plat and CUP applications through a separate decision (Resolution 1777). (CP 120-23) Applying its findings and rationale set forth in Resolution 1770, the Council rejected the preliminary plat on the basis that the plat did not appropriately provide for public health and safety and did not adequately provide for traffic. The Council referenced impacts that had already been mitigated (such as providing for school bus turn around) and focused primarily on the traffic that would be created for the existing private road from a plat allowing 34 dwelling units. The Council concluded that the existing road, in its current condition, could not support a plat with that density. Once again, the Council failed to consider conditioning the plat or remanding the application for further proceeding to determine an density that would produce acceptable traffic levels.

Finally, with regard to the CUP application, the Council made favorable findings with regard to each and every one of the applicable

---

<sup>8</sup> The short plat through which the private road cul-de-sac was created leads to a different conclusion. The cul-de-sac, as depicted on the short plan infers that it was anticipated

criteria (CP 120-21 at Findings 7-12.) The Council failed, however, to reach a conclusion as to whether Just Dirt is entitled to approval of the application. Just Dirt suspects that the ultimate conclusion was not affirmatively stated because the Council deemed the issue moot in light of its decision to deny the preliminary plat. In the event this Court reverses the Council's decisions regarding the variance application and the preliminary plat application, Just Dirt requests the Court to remand the CUP application to the Council with instruction to grant the CUP authorizing 50-foot wide lots.

**F. Judge Orlando's Decision Pursuant To LUPA.**

Just Dirt separately appealed both City Council resolutions pursuant to LUPA (CP 3-25; 28-73) and the appeals were consolidated (CP 74-77). Just Dirt requested the trial court to reverse the Council's decisions to deny the requested variance, conditional use permit and preliminary plat. Just Dirt further requested the trial court to remand the matter back to the City for further proceedings pursuant to RCW 36.70C.140 so that project may be conditioned with appropriate mitigation measures such as a reduction in density. (CP 86; 102; 608; 624.)

---

that the road would be extended to serve additional properties. (See CP 631-32; 953-54.) This issues is discussed more fully later in this brief.

The Honorable James Orlando reviewed the record and applicable law and reversed the Council's decisions and, pursuant to RCW 36.70C.140 remanded the matter back to the City for further proceedings to address appropriate mitigation measures for the Shipman Ridge Plat.

With regard to the cul-de-sac variance, Judge Orlando made the following ruling with regard to the City's application of its code to the facts substantiated by the record:

It is clear that the City incorrectly used the permanent cul-de-sac definition as applied to the proposed extension to the Shipman property. I find that the previously contemplated access on the East Ridge Estates plat was in fact a temporary cul-de-sac, where future extension was not only contemplated but of record for subsequent purchasers to observe.

(CP 649.) Thus, trial court provided in its order:

The Court finds that the Petitioner met its burden of proving that the City Council's characterization of the cul-de-sac at 176<sup>th</sup> Avenue Court E as "permanent" rather than "temporary" was in error, pursuant to RCW 36.70C.130(1)(b) and (d). On this basis, the Court finds that the denial of the variance application pursuant to Resolution 1770 was erroneous, and therefore reverses the City Council's denial.

(CP 646.)

Contrary to the City's characterization, Judge Orland ruled that Just Dirt did, in fact, meet its burden to establish that the Council's decision to deny the preliminary plat outright is not support by the substantial evidence in the record and is inconsistent with the applicable

law. Thus, he concluded that reversal of the Council's decision to deny plat approval was appropriate. (CP 645; 649-50.) Judge Orlando also ruled, however, that Just Dirt did not meet its burden to establish that the substantial evidence in the record will support a direction from the court to approval the plat in its current form without further mitigation. (CP 645-46; 649-50.) Thus, Judge Orlando appropriately remanded the matter back to the City for further proceedings. The court's order provides:

With regard to the City Council's decision to deny approval of preliminary plat, the Court finds that substantial evidence in the record supports the conclusion that there is possible development that may occur on the site that would still comply with city ordinances and allow the developer rights to develop his land. Accordingly, the Court finds the matter should be remanded for further review to consider the appropriate density, ingress and egress, traffic flows and usage and mitigation requirements. Possible project options or modifications include, but are not limited to use of highway 410 for exit only from the development and/or reducing the density to 15 to 20 residences.

Though the Court finds that petitioner met its burden under RCW 36.70C.130(1)(b)-(d) to warrant remand of the preliminary plat application for further considerations of the issues described above, petitioner 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 form proposed in this proceeding, subject to further review following remand.

\* \* \*

... Pursuant to RCW 36.70C.140, the Court remands the preliminary plat application to the City of Bonney Lake planning staff for further consideration of appropriate density, ingress and egress, traffic flows and usage and mitigation requirements for the preliminary plat.

(CP 645-46.) The City timely appealed. (CP 997.)

### III. STANDARDS OF REVIEW

Final land use decisions are reviewed by the superior court per the procedures established in LUPA. Ch. 36.70C RCW. When reviewing a land use decision under LUPA the superior court sits in its appellate capacity and reviews the administrative record before the local jurisdiction's body or officer with the highest level of authority to make a final determination. *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003). Relevant to this appeal, the superior court may grant relief when:

- (1) 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;
- (2) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (3) The land use decision is a clearly erroneous application of the law to the facts;... [or]
- (4) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1)(b), (c), (d). In order to obtain relief under LUPA, it is not necessary to prove that the local jurisdiction's action was arbitrary and capricious. RCW 36.70C.130(2).

Questions of law are reviewed de novo. LUPA directs this Court to accord deference to the construction of a law with by a local jurisdiction with expertise, but do so only when the ordinance is ambiguous. *Peter Schroeder Architects, AIA v. City of Bellevue*, 83 Wn. App. 188, 191, 920 P.2d 1216 (1996). Moreover, LUPA's standard of review does not provide for absolute deference to a local jurisdiction interpretation of an ambiguous ordinance, but only "such deference as is due to a local jurisdiction with expertise." RCW 36.70C.130 (c). Thus, our Supreme Court recently directed that deference to the construction of an ambiguous ordinance by a local jurisdiction may not be provided unless there is an established pattern of enforcement. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007). In fact, ordinances that restrict the free use of land should be construed against the municipality and in favor of the landowner. *Id.*, 644, fn 4. Thus, under LUPA deference is not a guarantee. Instead, deference is only given when it is appropriate as set forth by the common law or "as is due," and then, it is only given to the local jurisdiction with expertise. Of course, the Court has the ultimate authority in determining legal issues. Courts will not defer to an agency

determination which conflicts with the applicable statutes or codes. *Waste Management of Seattle v. Utilities and Transportation Comm'n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994). *See also, Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992); *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

With regard to review of factual questions, the Court reviews the local decision under the substantial evidence test. "Substantial evidence is 'a sufficient quantity of evidence 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).

#### IV. ARGUMENT

**A. The Trial Court Correctly Held That The Council's Decision To Deny The Preliminary Plat Is Inconsistent With The Law And Unsupported By The Evidence In The Record.**

**1. The City had an obligation but failed to identify mitigation measures that, if properly conditioned, would facilitate project approval.**

At the City's instruction, and under the City's supervision, an Environmental Impact Statement ("EIS") was prepared for the Shipman Ridge Plat pursuant to the State Environmental Policy Act. (CP 861-935.) The actual EIS is a document that is prepared under the City's supervision and within the City's control. The applicant is required to pay for the

costs associated with its preparation, but the City controls the document to ensure that all potential significant adverse impacts are identified and that the identified impacts are addressed through appropriate study, evaluation of mitigation measures and evaluation of development alternatives. (WAC 197-11-420;<sup>9</sup> BLMC 14.04.080.)

Significantly, the EIS process is not solely for the purpose of identifying significant adverse impacts, but is also intended to be a tool to determine mitigation measures to address the identified impacts. The EIS process is “intended to assist the agencies and applicants to improve their plans and decisions.” WAC 197-11-400. In light of that purpose, when an agency objects to or expresses concerns about a proposal, it is required to “specify the mitigation measures, if any are possible, it considers necessary to allow an agency to grant or approve applicable licenses.” WAC 197-11-550(5). Similarly, SEPA also contemplates that agency comments to an EIS will include comments on how alternatives or the proposed project may be further modified to address identified impacts. WAC 197-11-560.<sup>10</sup>

---

<sup>9</sup> Bonney Lake has incorporated all of the State SEPA regulations into the Bonney Lake Municipal Code. BLMC 16.04.010.

<sup>10</sup> With regard to possible further study, “a consulted agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information is needed.” WAC 197-11-550(4).

Ultimately, SEPA provides that, a project may not be denied based upon identified impacts unless the agency finds: “(1) the proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact.” RCW 43.21C.060; WAC 197-11-660(1)(f). Just Dirt recognizes that the SEPA process does not result in the final approval. *See, Quality Rock Products, Inc. v. Thurston County*, 139 Wn. App. 125, 141, 159 P.3d 1 (2007). Nonetheless, if an applicant is subjected to the significant time and expense associated with the EIS process, it is incumbent upon the City to ensure that the process yields a fair discussion of mitigation measures or development alternative that may guide the applicant as he proceeds. WAC 197-11-400. Similarly, with regard to the general permitting process, Washington Courts have held:

It is improper to deny the permit to an applicant who, throughout the application process, has demonstrated a willingness to mitigate any and every legitimate problem.

*Maranatha Mining vs. Pierce County*, 59 Wn.App. 795, 805, 801 P.2d 985 (1990).

The City never satisfactorily met its obligations in this review process. In fact, to the extent that the City did perform some of the requirements set forth in SEPA, it was the result of the Just Dirt’s pleas for

assistance. (*See*, CP 157-72.) Just Dirt even delayed the hearing on its own project, a request not often heard from developers who are anxious to proceed with their projects. (*See, id.*) The situation was explained in a letter from Just Dirt's attorney to the Examiner through which he opposed the City's attempt to rush the application to hearing without investigation of mitigation measures and possible proposal modifications:

This letter is written on behalf of the Applicant to request a continuance of the hearing that has been set by the City in this matter. The basis of the request is that the Applicant is in the process of revising the proposal to address some of the questions and concerns that have arisen during the environmental review process and public comment process. ... Very frankly, we have been unable to comprehend any reason the City would be pushing to conduct a hearing on a project that the Applicant is attempting to improve.

As you know, an Environmental Impact Statement (EIS) has been required for this project. A Draft EIS, of course, is circulated for public comment. WAC 197-11-455. The purpose of this is to elicit information as to the adequacy of information in the EIS and mitigation measures that should be considered to address impacts of the proposal. In fact, an agency with jurisdiction must specify mitigation measures that would allow the agency to grant the requested approvals. WAC 197-11-55-(5).

The Draft EIS here did elicit comments, some of which included Mr. Ladd's comments in the form of a Staff Report that he specifically requested to be included in the EIS. That Staff Report also encompassed comments from the Public Works Department concerning potential impacts of the requested road variance. Neither the Planning nor Public Works Department specified mitigation measures which might address their respective concerns.

Nonetheless, the Applicant has attempted to gain information from the City as to mitigation measures, or even alternative designs that would address potential impacts. The Applicant requested a meeting with City officials to discuss the concerns and potential mitigation measures and alternatives. Mr. Ladd did not attend. Other City staff members, however, did attend, and those present had a fruitful discussion to expand upon potential impacts, and to discuss modifications that would address those concerns. The result was that the Applicant and its various consultant team members who participated in the meeting are now actively considering modifications to the design. The potential changes would, among other things, eliminate the access to SR-410 except as an emergency access and provide additional explanation as to how the proposed roads are as close to City standards as possible. The Applicant is also reviewing alternatives that would reduce density and could potentially affect housing type.

This step is fully consistent with SEPA as well as the whole land use process which permits public and agency comment for a reason, namely the improvement of projects under review. In fact, this process which the Applicant is undertaking fits better into the City's responsibility: "to the fullest extent possible . . . identify, evaluate and require or implement, where required by the Act and these rules, reasonable alternatives that would mitigate adverse effect of proposed actions on the environment." WAC 197-11-030(2)(g).

(CP 165-66.)

The City in this case did not fulfill its responsibilities, especially with regard to the appropriate density for this project, in light of the fact that the project must be served by existing cul de sac if the impacts to the SR 410 access are to be avoided. Both the City Engineer and the EIS indicated that impacts to 176<sup>th</sup> Court Avenue east could be mitigated if the

project was comprised of fewer homes.<sup>11</sup> Unfortunately, the City would never advise Just Dirt of the density it deemed appropriate. Just Dirt attempted to address the concern by voluntarily reducing the density of the project, even though the proposed density was consistent with the applicable zoning.

Just Dirt was open to further project modification. Just Dirt should not, however, have been put into the position of playing a guessing game. Instead of participating in the SEPA process as required by applicable regulations and proposing mitigations or project modifications with each significant adverse impact identified, the City staff simply took the approach of rejecting solutions proposed. In fact the City planner leading the review ended his testimony to the Hearing Examiner with the comment: “[P]rofessionally and personally I’m very much opposed to this application.” (VT at p. 97.)

The proposed plat should not have been denied. The trial court’s decision to reverse the City’s denial and remand the plat application for further proceedings so that the City may fulfill its responsibilities was wholly appropriate.

---

<sup>11</sup> The EIS provided: “The impacts from traffic could be partially mitigated by a reduction in the number of homes proposed for the site.” (CP 868, response to comment 7.) “The traffic impacts will be significant and cannot be mitigated except to the extent that traffic might be reduced by revising the proposal to generate less traffic.” (CP 870.)

**2. The Council's decision to deny the preliminary plat is inconsistent with the law and unsupported by the evidence in the record.**

The Council denied the preliminary plat on a single basis – traffic and road impacts in light of the proposed access via an extended cul-de-sac connecting to the private road 176<sup>th</sup> Avenue Court East. The Council concluded that the proposed development would create unsafe conditions on 176<sup>th</sup> Avenue Court East and that the private road is inadequate the traffic that will be generated from the proposed 34-lot plat. The safety issues identified by the Council are navigability of the roads for school buses and emergency vehicles. But there was no reference to evidence in the record that issues with regard to school buses and emergency vehicles could not be mitigated. To the contrary, Just Dirt revised its road to add a bus stop and increase the width of the turn around to accommodate the issues raised by the school. (VT at pp. 175-200.) Likewise, emergency vehicle issues could be mitigated through such measures as installation of sprinkler systems. (See CP 144-54.)

The issue of perceived impacts needs to be analyzed in segments. There is no dispute that the roads within the plat will be built to City standards. The only “deviation” was that Just Dirt was proposing to build was the City required physical improvements in a smaller right of way area to minimize the amount of grading. Because the City staff put up

such opposition to that, Just Dirt reluctantly agreed to provide a full 50' right of way notwithstanding the fact that would mean that ultimately more grading and site work. In any event, there is no issue at all about roads meeting City standards within the plat. (VT at pp. 31-33.) Nor can there be an issue about the length of the cul-de-sac. That issue is discussed below, and the City's Engineer, the person responsible for streets, acknowledged that the criteria were met as they clearly are. Finally, the road slopes, with respect to the new road, can also not be an issue. Just Dirt agreed to meet the 14% standard. (*Id.* at 26-27, 40-43.)

That leaves only the offsite roads. The Council cited no provision of the City's code or of State Law that would allow the City to require that every road serving the project meet all current design standards. The City Engineer acknowledged that there are other roads in excess of the maximum cul-de-sac length and the maximum slope around the City. (VT at pp. 23-27.) Just Dirt cannot be held to improve every street serving the project to the most current standards. That is particularly apparent in situations like this one where the City has allowed, over a long period of time, development that does not meet current standards.

In any event, there is nothing inherently un-safe or improper about the roads that serve this development. They are steeper and narrower than roads in some areas but that is common, particularly in areas where there

are steeper slopes. (*See* VT at pp. 58-62.) University Place, Gig Harbor and other areas around the County are full of streets that are less than the current norm because of topography and prior development. People quickly learn that they have to drive more slowly in areas such as this one to accommodate their neighbors, and the people in Shipman Ridge will be no different. As the Just Dirt's traffic engineer testified, the volumes are small and safety is not a concern. (*Id.*) Obviously, the East Ridge Estates homeowners have successfully and safely utilized the existing road. There is not evidence that some level of additional traffic cannot be tolerated on this existing road.

With regard to maintenance of the road itself, Just Dirt volunteered to provide a special assessment for the homeowners within Shipman Ridge so that they can contract with a street maintenance company to sand the roads and clear them of ice and snow as needed. Just Dirt even offered to extend that onto the private portion of the immediately adjacent roads. Notably, there is currently no maintenance covenant for the existing private road. So this mitigation measure would provide road maintenance that is not currently available to the East Ridge Estates residents already using the private cul-de-sac and improve current safety conditions. (CP 133-34 at Findings 20, 25; VT at p. 91.)

Finally, the City failed to consider or advise whether mitigation measures could be imposed that would allow the project to be approved. The City engineer testified that the City looks more favorably at longer cul-de-sacs that serve fewer units. Relevant to this project, he testified that additional traffic on 176<sup>th</sup> Avenue Court East could be tolerated if the development had a lesser density. (VT at pp. 43-44.) In fact, he testified without extensive analysis that he would consider a density of 15 dwelling units acceptable. (*Id.*) Yet, at not time throughout the permit review process did the City give any indication as to an acceptable density level in relation to traffic impacts.

This is especially important in this case because the testimony clearly established that any access to this property would require a long cul-de-sac. The City engineer admitted that it was impossible to meet the standards that the City had established for this property, and that no other access was available that would meet the standard.<sup>12</sup> That effectively means this property cannot be used without some relaxation of standards. Just Dirt's property would effectively be taken without compensation. Because it would be left with no reasonable use of the property, this action would violate the Washington State and United States Constitutions. *See*,

---

<sup>12</sup> One other option remains and that is access to SR-410. That too would result in an overly long cul-de-sac, but it would avoid 176<sup>th</sup> Avenue Court East. If no access to 176<sup>th</sup>

*Burton v. Clark County*, 91 Wn. App. 505, 515-16, 958 P.2d 343 (1998). Of course, a taking will be avoided if the City construes and applies applicable regulatory provisions as commonly directed by the courts, which is to avoid this unconstitutional outcome as directed by the Courts. See, *Hauser v. Arness*, 44 Wn.2d 358, 367-68, 267 P.2d 691 (1954).

As noted earlier, the City must advise as to what modifications or mitigation measures could be imposed that would allow approval. Denial is appropriate only when no mitigation is possible to address the cited impact. RCW 43.21C.060; *Nagatani Brothers, Inc. v. Skagit County Board of Commissioners*, 108 Wn.2d 477, 739 P.2d 696 (1987); *Maranatha, supra*, 59 Wn.App.at 805.<sup>13</sup>

Just Dirt made numerous efforts to mitigate impacts during the review process, and continued to do so all the way through the hearing. It was incumbent upon the City to respond by not just denying, but advising what further mitigation would be sufficient. This is especially true, since the City has evidenced a willingness to approve other similar proposals. Surely some level of traffic is acceptable.

---

Avenue Court East is allowed, Just Dirt should be given an opportunity to present a revision to use SR-410 for access to some number of lots.

<sup>13</sup> RCW 58.17.110 likewise authorizes conditioning approval to ensure that impacts caused by the development are appropriately mitigated.

**3. The trial court's remand was consistent with the relief authorized by LUPA.**

The City argues that the trial court improperly ordered the remand because it concluded that Just Dirt did not establish that it was entitled to plat approval without further mitigations or conditions. The City mischaracterizes the trial court's ruling and fails to recognize the relief authorized by the Land Use Petition Act.

LUPA provides:

The court may affirm, or reverse the land use decision under review or remand it for modification or further proceedings. If the decision is remanded for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction. (Emphasis added.)

RCW 36.70C.140. Thus, LUPA expressly authorizes the court to remand with instructions to modify the original land use decision and further authorizes the court to implement such modifications through additional proceedings.

Though the trial court would not remand with instructions to approve the 34-lot shipman ridge plat as proposed, it held that Just Dirt did meet its burden to establish that the City's decision to deny the plat outright, without further conditions, was not supported by the substantial evidence in the record and was inconsistent with the applicable law. (CP 646-47.) The clear result of this ruling is that the decision on the plat

application must be modified and that further proceedings are required to implement that modification.

The trial court's ruling does not result in a "do over," but provides for an efficient continuation of a review process that requires further modification. The trial court's ruling is consistent with contemplated SEPA and permitting processes and is fully supported by the substantial evidence in the record. The trial court's order was wholly authorized by LUPA.

**B. The Trial Court Properly Ruled That The City's Decision To Deny The Variance Application Is Inconsistent With The Applicable Code And Unsupported By The Substantial Evidence In The Record.**

- 1. 176<sup>th</sup> Avenue Court East is not a permanent cul-de-sac as defined by the Bonney Lake code and the City erroneously applied the variance requirements for extending permanent cul-de-Sacs.**

The Bonney Lake Code provides that a variance may be granted if the following conditions are satisfied:

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.

BLMC 17.24.100. There is no dispute that the first criterion is met.

With regard to the second criterion, the City Council found that the proposed cul-de-sac extension was beyond the intent of Chapter 17.24 of the BLMC because, the Council alleged, Just Dirt did not satisfy the separate code requirements to open or extend a “permanent” cul-de-sac. (CP 117 at Findings 11-13.) Based upon this analysis, the City concluded that the variance was beyond the intent of Chapter 17.20 BLMC. BLMC 17.20.040(G) provides that a “permanent” cul-de-sac may be opened if it is the only practical means of access and the impact of traffic flows, noise and other environmental factors have been considered and mitigated. Ultimately, the Council concluded that Just Dirt failed to mitigate impacts to 176<sup>th</sup> Court Avenue East. Just Dirt does not agree that that the record supports a conclusion that it failed to mitigate impacts to 176<sup>th</sup> Court Avenue East. Separate and distinct from that fact, however, the Council erred in concluding the 176<sup>th</sup> Court Avenue East is a “permanent” cul de sac.

The BLMC 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. BLMC 17.08.020(F). A “temporary” cul-de-sac, on the other hand, is defined as “a dead-end local access road that is expected to be extended in the future.” BLMC 17.08.020(G)(emphasis added). The City argues that the existing private

cul-de-sac is permanent, and applies regulations exclusively applicable to permanent cul-de-sacs, because the City claims 176<sup>th</sup> Avenue Court East was never intended to serve the adjacent property. (*See* CP 117 at Finding 10.) The City argues in its brief to the trial court:

When the East Ridge Estates short plat was built, the full intention was that the cul-de-sac would never be opened to through traffic, except for the addition of a single extra lot on the vacant space through which the Petitioner proposes to punch the new road.... Citizens like those who reside in East Ridge Estates develop an expectation that their street will remain a quiet, dead-end road with limited traffic flow, suitable for neighborhood barbeques and basket-ball hoops. BLMC 17.20.040(g) [regulation governing extension of permanent cul de sacs] ensures that this expectation will not be disrupted without mitigation.

(CP 317-18.) This argument is wholly inconsistent with the recorded documents governing the East Ridge Estates short plat, which includes the private road 176<sup>th</sup> Court Avenue East, and is wholly inconsistent with the easement that encumbers the East Ridge Estates short plat property and benefits the Shipman Ridge Property. (CP 626-32; 954-55.) The neighbors' "expectations" are unjustified and cannot be the basis for denying approval of the Shipman Ridge Plat.

The easement that authorizes Just Dirt to use 176<sup>th</sup> Court Avenue East to access the Shipman Ridge Property was granted and recorded in 1992 under Pierce County Auditor No. 9212100482. The easement is for

ingress, egress and utilities and there are absolutely no restrictions limiting or prohibiting further subdivision of the Shipman Ridge Property, which is an 18-acre parcel that is a likely candidate for subdivision, or the number of homes that may be served by the access easement. (Appendix B, CP 626-29.) The zoning, of course allowed for further subdivision of land.

The East Ridge Estates short plat, which further subdivided that property and provided government approval that allowed construction of the private road 176<sup>th</sup> Court Avenue East and the homes within the short plat, was approved and recorded in 1996. (Appendix C, CP 631-32; 954-55.) There are no restrictions on the short plat that preclude opening or extending the cul de sac identified on the short plat. (*Id.*) To the contrary, the easement that burdens the East Ridge Estates short plat property and benefits the Shipman Ridge Property is expressly noted on the short plat that received Planning Department and Fire Marshall approval. (*Id.*)

The City Engineer, who, again, is the person charged with implementing the Bonney Lake Code provisions that apply to construction and modifications to roads, agreed that, given these public documents, 176<sup>th</sup> Court Avenue must be considered a “temporary” cul de sac under the BLMC. Mr. Woodcock testified to the Hearing Examiner: “[1]76<sup>th</sup> Court, Avenue has a, has an access to Mr. Shipman’s plat... Because they had an access to their property that wasn’t gonna be a permanent cul-de-

sac but it was supposed to be extended some time in the future.”<sup>14</sup> (VT at pp. 46-47.) Thereafter, Woodcock testified that 176<sup>th</sup> Court Avenue East is appropriately characterized as a “temporary” cul de sac.<sup>15</sup> (VT at p. 47.)

Both the easement and the short plat were of public record when the residents of the East Ridge Estates short plat purchased their homes and both were undoubtedly on their title reports. Just Dirt recognizes that “[r]esidents of East Ridge Estates bombarded the Planning Department with opposition to allowing traffic from 34 residential lots to access through their street.” (See, CP 320.) The planning staff and Hearing Examiner were clearly influenced by the displeasure of these neighbors who, contrary to the easement publicly recorded against their own property and noted on their short plat, refused to acknowledge that use of their road for the Shipman Ridge Property has always been contemplated. Community displeasure cannot, however, be the basis to reject a development proposal. *Maranatha Mining, supra*, 59 Wn.App. at 805.

---

<sup>14</sup> Notably, the Examiner did not apply the permanent cul-de-sac code provisions to the application. (See CP 132-35.)

<sup>15</sup> It is expected that the City will attempt to transform 176<sup>th</sup> Court Avenue East into a permanent cul-de-sac so as to subject it to further regulations by pointing to a 1990 staff report that set forth recommendations for the East Ridge Estates short plat and its associated road when the short plat was being considered for government approval. (See CP 317-18; CP 988-96.) Apparently, when the Bonney Lake staff reviewed the short plat application in 1990, they recommended that approval of the short plat be conditioned to preclude other properties from utilizing 176<sup>th</sup> Court Avenue East for access. (CP 988-96.) Of course this was a staff recommendation that did not result in an actual restriction on the short plat. (CP 631-32; 954-55; 981; 643.) If anything, the staff report is evidence that 176<sup>th</sup> Court Avenue East is a temporary cul de sac, since the City staff attempted to limit further use of the private and was not successful in doing so.

The City Council improperly relied on the “permanent” cul-de-sac provisions and general neighborhood displeasures and subjective expectations to deny the Shipman Ridge Plat. The trial court properly reversed the Council’s denial of the variance application.

**2. The evidence in the record and the applicable law do not support the City’s conclusion that Just Dirt failed to mitigate impacts to 176<sup>th</sup> Court Avenue East.**

At the conclusion of the EIS, the following question was posed:

Traffic and Emergency Response – Will the grade and access points of the proposed streets create a hazard to traffic and interfere with emergency response and/or provision of public services?

(CP 886-87.) The following answer was included in the response:

Street grades will be greater than desired, though it may be possible to redesign the street to slightly reduce the grade.<sup>16</sup> Cul de sac separation can be reduced through mitigation or by implementing a reduced density alternative. (Emphasis added.)

(CP 887.) The clear message from the EIS was that Shipman Ridge development proposal could be appropriately conditioned to mitigate and address access concerns. Unfortunately, the City’s only approach to this project has been an approach to facilitate project denial. As noted earlier, the City planner charged with leading the review process for the

---

<sup>16</sup> Of course, after the FEIS was issued, Just Dirt responded to this comments and reduced the grade of the street to be constructed in the Shipman Ridge Plat from 15% to 14%, even though 15% is consistent with nation-wide standards. (See CP 982-871 ; VT at pp. 27-28.)

application testified that he was “professionally and personally ... very much opposed to this application.” (VT at p. 97.)

Notably, the statements in the Staff Report and in the City Council’s decisions are all conclusory and generalized statements of hazard.<sup>17</sup> There is no attempt to quantify or substantiate the generalized concerns.

For example, claims were made that emergency vehicles would not be able to access the development, yet, significantly, neither the Fire

---

<sup>17</sup> Classic examples of the attitude and approach that prevailed in the review process for this project were the City’s positions on the width and grade variances that petitioner originally requested for the roads to be constructed within the Shipman Ridge Plat.

Originally, Just Dirt requested a variance reducing the required right-of-way width from 50 feet to 40 feet. The City regulations only require actual road improvements (including sidewalks) that occupy 40 feet of right-of-way width. Just Dirt did not seek to eliminate or modify any of the improvement requirements – the road would have the requisite two lanes at the requisite width and would have the requisite sidewalks, curbs and gutter. Just Dirt only sought to reduce the right-of-way width that would not be occupied by any improvements. (VT at pp 15-16.) Even though the variance would have absolutely no impact on the actual street improvements, City staff took the position that “a 40-foot wide street would exacerbate the access hazards caused by steep streets and long cul-de-sac.” (CP 232.) City did not explain, nor could it, how the presence or absence of 10 feet of undeveloped right-of-way impacts street safety. Recognizing the City’s strong bias and resistance to his project, however, Just Dirt simply opted to abandon the variance request and simply provide the full 50 feet of right-of-way, even though it did not result in any alteration of the actual improvements.

The other example was Just Dirt’s former request to allow the grade of the Shipman Ridge Plat road to be 15% rather than the regulatory 14%. A 15% grade is considered acceptable for traffic and emergency vehicles by the nation-wide standards, which standards are used by the Bonney Lake Engineer, and is authorized in other local regulations, including Pierce County, Tacoma, University Place and Steilacoom. (CP 982-87; VT 26-28; CP 963 at Finding 12.) Notably, the City approved a similar grade variance request for the neighboring Manke development in January 2007. (CP 955-64; 144-54. *See also* VT at pp. 26-28 – approval of Skyline development) Yet in this case, the City took the position that a 15% grade for the Shipman Ridge Plat road (which will meet all regulatory width requirements) somehow posed unacceptable hazards. (VT at p. 5; CP 229-36.) As with the right-of-way width variance, petitioner opted to modify its proposed road width grade to 14%, even though it will result in more clearing and have a larger impact on the views from the surrounding, rather than attempt to respond to the City’s arbitrary position with regard to the Shipman Ridge application. (VT at p. 15.)

Marshall nor any other representative of the Fire District provided any comments or expressed any concerns in the review process, even though they were given an opportunity to comment. (*See* CP 799-802; 807-27.) Over course the SEPA regulations provide that, if a consulted agency does not respond within the time specified, then the SEPA official may assume that the agency has no information relating to the potential impact of the proposal as it relates to that agency's jurisdiction. WAC 197-11-455. A consulted agency that fails to make comments is barred from subsequently alleging defects. *Id.*

Moreover, no evidence was presented that emergency vehicles are unable to access and serve the East Ridge Estates short plat homes. Notably, the Fire Marshall approved 176<sup>th</sup> Court Avenue East when the East Ridge Short Plat was approved. (CP 631-32; 954-55.) With regard to the new Shipman Ridge Plat road, no evidence was presented that emergency vehicles will not be able to navigate that road, which will be constructed consistent with current road standards. Very recently, the City approved, with Fire Marshall participation, a similar cul-de-sac. (*See* CP 958 at p. 3, ¶ 1; CP 963 ¶ 10, CP 144-53 (Fire Marshall approved 1,300 foot long cul de sac with 15% grade conditioned upon installation of

sprinkler systems in homes.)<sup>18</sup> The City's claim that the public safety is jeopardized based on emergency vehicle access is based on conjecture and is without substantiation.

The same is true with respect to school bus access. The only issue presented by the School District was that the turnaround within the Shipman Ridge Plat needed to be sufficiently wide to allow the school buses to turn around and exit the development. This issue was addressed. (CP 105-08; 157-61.) No evidence was presented that school buses have not been able to access the East Ridge Estates short plat residences, so there is no basis to believe school buses could not pass 176<sup>th</sup> Court Avenue East to access the Shipman Ridge Plat.

The neighbors and the City in its response brief have complained about the lack of sidewalks on the existing private road and cul de sac. Both the City Engineer and the Hearing Examiner agreed that the City has no authority to require the installation of sidewalks on an existing road that serves another development. (VT at p. 28; CP 134 at Finding 22.) In fact, prior to this development, the City Engineer testified that it is a common occurrence for new developments to utilize existing roads without sidewalks and that the City has, on many occasions, approved

---

<sup>18</sup> In that case, unlike here, City planner Stephen Ladd noted in that case that "to permanently landlock the developable upper terrace would create an undue hardship." (CP 958, ¶ 5.)

such developments without any requirement to construct sidewalks on the existing roads. (VT ay pp. 28-29.) The City's reliance on RCW 58.17.110 is misplaced. The statute only requires adequate provisions for sidewalks if children will be walking to school. When children are bussed to school, as would be the case here, there is no statutory requirement, and thus no authority, to require the installation of sidewalks on existing roads. RCW 58.17.110.

Finally, there was discussion about use of 176<sup>th</sup> Court Avenue East during inclement weather. The EIS concluded that 176<sup>th</sup> Court Avenue East "will require frequent sanding in winter." (CP 878.) There is no evidence in the record that the requisite sanding cannot be accomplished. To the contrary, Just Dirt agreed to encumber his property with covenants that would assess and task future lot owners with the responsibility to sand and maintain not only the new road extension within the Shipman Ridge Plat, but also the existing 176<sup>th</sup> Court Avenue East. (CP 134 at Finding 21, VT at p. 91.) In reality, this will provide an improvement to the current situation, since there are no such obligations imposed upon the residents of the East Ridge Estates short plat and, it appears that the requisite inclement weather sanding is not occurring now. (CP 134 at Finding 20.) Inclement weather concerns may adequately be addressed

with appropriate plat conditions. Concern for use of the road during inclement weather was not an appropriate basis for denial.

Ultimately, the City argues that it had an obligation under State and local law to consider and ensure that adequate access is provided for the proposed Shipman Ridge plat. Just Dirt does not disagree. The cases cited, however, address a jurisdiction's authority to condition a project to ensure that adequate access is provided. However, the generalized concerns of hazards and safety were insufficient to deny approval of this plat. The City Council stated in Resolution No 1770: "A purpose of limiting the length of the cul-de-sacs is to protect the public safety by ensuring timely access for emergency vehicles. (CP 116-17 at Finding 7.) This purpose is not stated in the BLMC and the code does not set any length maximum in the variance criteria. Moreover, no evidence was presented to establish the length at which public safety is endangered.

Finally, Just Dirt modified its project to have primary access through 176<sup>th</sup> Court Avenue East only to respond to the City's objections to direct access from SR 410. If the City truly believed that access via the private cul-de-sac would result in impacts that cannot be mitigated, then the City could have conditioned the project to require access via SR 410.

Access issues may be and should have been addressed through appropriate conditions and mitigation measures. The City Council

referenced in its Findings and the City relies in its brief on a May 2, 2007 letter from its Engineer, John Woodcock, to Just Dirt through which the City provided comment on Just Dirt's traffic study that was professionally prepared eight months earlier, in September 2006, and was incorporated into the EIS that had been finalized and approved by the City prior to the Engineer's May 2007 letter. (CP 117 at Finding 12.) The letter belatedly requests certain additional information, though no explanation is provided as to why the City Engineer did not request the additional information during the SEPA process and within the deadlines set forth in the SEPA regulations. *See* WAC 197-11-550(4). The City Council summarily concludes that petitioner did not respond to the information request. (*Id.*) This conclusion is not supported by the record and is speculative at best. Notably, there is no claim in the Staff Report, nor was there any claim by either the City Planner or the City Engineer in their testimony to the Hearing Examiner that this letter went without response from the petitioner through the normal review process. (*See* CP 229-36; VT at pp. 2-10 and 22-57.) Likewise, the Hearing Examiner made no findings with regard to the May 2007 letter.

Just Dirt stood, and continues to stand, ready and willing to modify his project as necessary to obtain an approved development. The City improperly denied the applications.

**3. The proposed extension of the cul-de-sac will not change the essential nature of the area.**

The City argues that petitioner did not satisfy the variance criteria that the requested variance – to have a cul-de-sac in excess of 600 feet in length – will not “change the essential nature of the general area in and around the plat” as required by BLMC 17.24.100(B). The City Engineer, however, testified to the contrary. The City Engineer acknowledged that the proposed long cul-de-sac will have less of an impact and better preserve the character of the surrounding area than would have been the case had access been from SR 410 as originally proposed. This is because elimination of the SR 410 access also eliminates substantial tree removal and grading that would have occurred in the immediate vicinity of SR 410, which grading would have negatively impacted the views from SR 410 and changed the character of the area. (VT at pp. 35-38.)

The City wishes to focus on the neighbors’ complaint regarding the use of the road and the neighbors’ expression that they were “appalled [sic] that someone would try to develop this acreage using a private road which was made for 9 lots.” (CP 320.) The City argues that the City Council found that the variance would fundamentally alter the character of the existing neighborhood because “the cul-de-sac 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.” (City’s Brief at p.21.)

The City Council’s decision and the City ‘s argument with regard to the neighborhood character element of the variance criteria, is clearly drawn from the neighborhood expectations, or more appropriately described, personal desires and wishes, to limit the amount of surrounding development. According to the City: “Citizens like those who reside in East Ridge Estates develop an expectation that their street will remain a quiet, dead-end road with limited traffic flow, suitable for neighborhood barbeques and basket-ball hoops.” (CP 318.) The City’s conclusions in this regard are inappropriate and inconsistent with the law.

As noted earlier, the neighbors are completely without basis or justification to claim that they could reasonably hold an expectation that 176th Court Avenue East would never be extended or serve other development. The private road that serves the East Ridge Estate homes is burdened by an easement that benefits an 18-acre parcel. The road easement was recorded and of public record and then was expressly acknowledged when the East Ridge Estates short plat (which short plat authorization was a prerequisite to the construction of the private road and their homes) was approved and publicly recorded. As noted by the City Engineer, the notation of the easement on the short plat communicated that

the cul-de-sac 176<sup>th</sup> Court Avenue “was supposed to be extended in the future sometime.” (VT at p. 47.) Given the records that were publicly recorded before the neighbors purchased their homes, it was completely predictable and should have been expected that the 18-acre parcel would some day be subdivided and developed, and that the easement befitting the parcel would be utilized for access to the development.

Mere community displeasure cannot be the basis to reject a development proposal. *Maranatha Mining, supra*, 59 Wn.App. at 805. Just Dirt does not argue, as the City suggests, the neighbor comments cannot be considered. Those comments, however, must have some basis in reality and the neighbors are not afforded unfettered veto power.

In this case, the objections with regard to change in character of the surrounding area are tied to the density of the project, rather than the length of the road. The cul-de-sac necessary to access the 18-acre parcel will exceed 600 feet regardless of whether the property is developed with one house, three houses, fifteen houses or thirty-four houses. The claimed change in character has nothing to do with the proposed length of the cul de sac, which is the only issue addressed by the variance request. There is no variance request to increase the density of the project. Of course, this is because the density of the project complies completely with the applicable zoning. (CP 120-123.) As the density complied with the

zoning, the development is presumed to be compatible with the surrounding area. (CP 884-85.)

The City Council's finding that approval of a variance allowing a cul de sac exceeding 600 feet in length will change the essential nature of the area was without legal basis and unsupported by the record. The trial court properly reversed the decision.

#### V. CONCLUSION

The City was presented with a cooperative applicant that is willing to address legitimate concerns. The evidence does not support a conclusion that significant impacts cannot be adequately mitigated. And the City's decision to deny the variance and plat applications was inconsistent with the applicable law. The trial court acted within the authority granted by LUPA and this Court should affirm the trial court's decision.

Dated this 9 day of April, 2009.

Respectfully submitted,

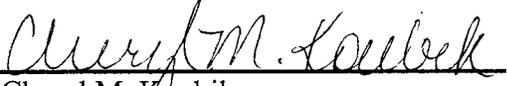
GORDON, THOMAS, HONEYWELL,  
MALANCA, PETERSON & DAHEIM LLP

By 

Margaret Y. Archer  
Attorneys for Just Dirt, Inc.  
WSBA No. 21224



Dated this 8<sup>th</sup> day of April, 2009.

  
Cheryl M. Koubik  
Legal Secretary to Margaret Y. Archer