

FILED

JUN 24 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 298060

---

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

---

APPLEWOOD ESTATES HOMEOWNERS ASSOCIATION, a Washington Nonprofit Corporation; BRANTINGHAM GREENS HOMEOWNERS ASSOCIATION, a Washington Corporation; ROSS NEELY and MARY JOANNE NEELY, husband and wife; and MICHAEL LAUDISIO and SHEILA LAUDISIO, husband and wife,  
Petitioners [in original action]/Appellees,

v.

BADGER MOUNTAIN APARTMENTS I, LLC, a Washington Limited Liability Company;  
BADGER MOUNTAIN APARTMENTS II, LLC, a Washington Limited Liability Company;  
BADGER MOUNTAIN APARTMENTS III, LLC, a Washington Limited Liability Company;  
and WOLFF ENTERPRISES II, LLC, a Washington Limited Liability Company,  
Respondents [in original action]/Appellants,

and

CITY OF RICHLAND, a political subdivision of the State of Washington,  
Respondents [in Original Action].

---

APPELLANTS' REPLY BRIEF

---

BRYCE J. WILCOX WSBA# 21728  
LAURA J. BLACK WSBA # 35672  
Attorneys for Appellants

**LUKINS & ANNIS, P.S.**  
717 W Sprague Ave, Suite 1600  
Spokane, WA 99201-0466  
Telephone: (509) 455-9555  
Facsimile: (509) 747-2323

**Table of Contents**

	<b>Page</b>
I. INTRODUCTION - SUMMARY OF REPLY ARGUMENT .....	1
II. LEGAL ARGUMENT .....	3
A.    THE TRIAL COURT LACKED JURISDICTION BECAUSE NEIGHBORS FAILED TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES. ....	3
1.    Neighbors Do Not Dispute that Pursuing Administrative Remedies is Jurisdictionally Required. ....	4
2.    Administrative Review of PUD Changes Under the Richland Code.....	5
3.    RMC 19.70 Does Not Limit The Neighbors’ Administrative Appeal Rights.....	6
B.    THE NEIGHBORS’ CLAIM WAS NOT FILED WITHIN THE JURISDICTIONAL 21-DAY LUPA TIME-TO-FILE PERIOD. ....	10
C.    THE TRIAL COURT IMPERMISSIBLY SUBSTITUTED ITS JUDGMENT FOR THE CITY’S IN FINDING A “MAJOR CHANGE” TO THE PUD.....	14
1.    No Change in Use. ....	16
2.    No Change in Vehicular Circulation.....	17
3.    No Increase in Density.....	19
4.    No Relocation of Density <i>Pattern</i> .....	21
D.    CITY COUNCIL APPROVAL OF FINAL PUD PLAN FOR PHASE 2C WAS NOT REQUIRED. ....	23
III. CONCLUSION.....	25

**TABLE OF AUTHORITIES**

Page

**CASES**

Chelan County v. Nykreim, 146 Wn.2d 904, 52 P.3d 1 (2002)..... 13, 14

Cingular Wireless, LLC v. Thurston County, 131 Wn.App. 756, 768, 129 P.3d 300 (2006)..... 15, 18

Habitat Watch v. Skagit County, 155 Wn.2d 397, 405-406, 120 P.3d 56 (2005)..... 11, 12, 13

Hama Hama Co. v. Shorelines Hearings Bd., 85 Wn.2d 441, 448 536 P.2d 157 (1975)..... 14, 18, 22

Miller v. Sybouts, 97 Wn.2d 445, 448, 645 P.2d 1082 (1982)..... 10

Morin v. Johnson, 49 Wn.2d 275, 279, 300 P.2d 569 (1956)..... 15, 22

Samuel's Furniture, Inc. v. State, Dept. of Ecology, 147 Wn.2d 440, 54 P.3d 1194 (2002)..... 12

Schofield v. Spokane County, 96 Wn.App. 581, 586, 980 P.2d 277 (1999)..... 15

Smoke v. City of Seattle, 132 Wn.2d 214, 937 P.2d 186 (1997)..... 9, 10

Vogel v. City of Richland, \_\_\_ Wn.App. \_\_\_ (WL 1797181, May 12, 2011)..... 13

West v. Stahley, 155 Wn.App. 691, 229 P.3d 943 (2010)..... 4

**STATUTES**

RCW § 36.70C.010..... 13

RCW § 36.70C.020(2) ..... 4

RCW § 36.70C130(1)(b) ..... 14

**RICHLAND MUNICIPAL CODE**

RMC Title 23 ..... 1

RMC § 19.070.060..... 9

RMC § 19.20.030..... 9, 10

RMC § 19.60..... 7

RMC § 19.70.....	7, 8
RMC § 19.70.030.....	7, 9
RMC § 22.09.220 (SEPA) .....	6
RMC § 23.18.010.....	16
RMC § 23.50.020.....	16
RMC § 23.50.040(D) .....	24
RMC § 23.50.050(B) .....	24
RMC § 23.50.070.....	16, 18
RMC § 23.50.070(B) .....	5, 14
RMC § 23.50.70.....	1, 5
RMC § 23.70.060(A) .....	6
RMC § 23.70.070.....	1, 6
RMC § 24.13.090 (Plats and Subdivisions).....	6
RMC § 19.20.020.....	8
RMC § 19.60.....	8
RMC § 19.70.....	6, 9
RMC § 23.08.....	16
RMC § 23.50.....	1, 5
RMC § 23.70.....	5
<b><u>SEATTLE MUNICIPAL CODE</u></b>	
Seattle Municipal Code 23.76.004(b) .....	10

## **I. INTRODUCTION - SUMMARY OF REPLY ARGUMENT**

The trial court's decision to invalidate the Developers' building permits was both procedurally and substantively deficient. Its decision must therefore be reversed and the building permits reinstated.

### **Trial Court Lacked Jurisdiction.**

It is undisputed that the Neighbors' LUPA claim must be dismissed for lack of jurisdiction if (1) they failed to exhaust available administrative remedies *or* (2) they failed to file their LUPA petition within 21 days of the issuance of the City of Richland's (City) June 16, 2010, decision. The Neighbors' claim fails on both accounts.

Richland Municipal Code (RMC) Title 23 contains the City's zoning regulations. RMC 23.50 discusses PUDs, including the structure for administrative approval of PUD minor amendments. RMC § 23.50.70.<sup>2</sup> The RMC also grants "any person aggrieved" the right to appeal to the Board of Adjustment a decision relating to PUD amendments. RMC § 23.70.070.<sup>3</sup> "Any person aggrieved" includes the Neighbors. As they admittedly never pursued any available administrative

---

<sup>1</sup> Consistent with Appellants' opening brief, the Appellants shall be referred to herein as the "Developer" and the Appellees as the "Neighbors."

<sup>2</sup> A copy of RMC § 23.50 is located at CP 255-258.

<sup>3</sup> A copy of RMC 23.70 is located at CP 260- 264.

remedy, the trial court lacked jurisdiction. This single issue is jurisdictionally dispositive, making it unnecessary for the Court to resolve any other issue on appeal. However, the trial court made another fatal jurisdictional error.

To confer jurisdiction on the court, the Neighbors not only had to exhaust administrative remedies, but also satisfy LUPA's strict 21-day filing requirement. This strict filing requirement supports LUPA's underlying purpose of finality and prompt judicial review of land use decisions.

The Neighbors' LUPA action was filed on October 4, 2010, almost 4 months after the City's June 16 decision. In reliance on the City's decision, the land was purchased and substantial sums were paid to obtain permits, for construction design and other construction-related costs. Having obtained necessary approval from the City, building permits were issued on September 20, 2010, and construction began.

Distilled to its essence, the Neighbors claim the 21-day LUPA deadline commences when they received actual notice of the June 16 decision. Not only does this contention conflict with Supreme Court precedent, if accepted it would erode the primary underpinning of LUPA – finality of land use decisions. Adopting the Neighbors' view, LUPA decisions could be challenged indefinitely, seriously jeopardizing a land

owner's ability to proceed with development. The Court should decline the Neighbors' invitation to depart from long-standing precedent on this issue.

### **City's Decision was not a Major Change to the PUD**

If the Court has jurisdiction, it should reverse the trial court's ruling that the City's decision was a "major" amendment to the PUD. The Neighbors' primary concern is that the amendment permitted non-age restricted apartments, where the original PUD contemplated age-restricted apartments. This was a change in user, not a change in use. The use – multi-family apartments – remained the same.

Providing "great weight" to the City's construction of the RMC, as required by law, and affording its factual decisions the required deference, this Court should reverse the trial court and affirm the City's decision that the Developers' proposal was a minor change under the RMC.

## **II. LEGAL ARGUMENT**

### **A. The Trial Court Lacked Jurisdiction Because Neighbors Failed To Exhaust Available Administrative Remedies.**

The Neighbors claim no administrative remedy was available to them. However, the City's zoning regulations plainly state that "any person aggrieved" by an administrative determination involving PUD changes may appeal the issue to the City's Board of Adjustment. The

Neighbors' failure to pursue this available administrative remedy is independently fatal to their LUPA claim and this Court need not resolve any other issue raised in this appeal.

**1. Neighbors Do Not Dispute that Pursuing Administrative Remedies is Jurisdictionally Required.**

The court in West v. Stahley, 155 Wn.App. 691, 229 P.3d 943 (2010) confirmed that because of LUPA's express purpose of timely judicial review, "LUPA's 21-day statute of limitations is a strict, uniform deadline for appealing the final decisions of local land use authorities." Id. at 699. The court held that "[j]ust as a LUPA petitioner must bring a petition within 21 days of the final land use decision, a LUPA petitioner must exhaust all administrative remedies before obtaining a final land use decision. Like the 21-day statute of limitation, exhausting administrative remedies is a fundamental tenant under LUPA; failure to do either is an absolute bar to bringing a LUPA petition to superior court." Id.

The Neighbors concede that a final land use decision is required to confer jurisdiction on the Court and that it must be issued by the "highest level of authority to make the determination, including those with authority to hear appeals."<sup>4</sup> There is no allegation that the Neighbors even attempted to file an administrative appeal. Instead, they claim no

---

<sup>4</sup> CP 172 (quoting RCW § 36.70C.020(2)).

administrative appeal was available to them. Neighbors concede that *if* there was an available administrative remedy, the Court would lack jurisdiction over this LUPA action.

The RMC provides that “any person aggrieved” has a right to seek administrative relief via an appeal to the City’s Board of Adjustment regarding zoning decisions, including changes to an existing PUD. RMC § 23.70.070. The Neighbors claim they have been aggrieved by the City’s June 16 decision. As such, the RMC provided them with a right to file an appeal with the Board of Adjustment, which they have never attempted to do. As such, the trial court lacked jurisdiction.

**2. Administrative Review of PUD Changes Under the Richland Code.**

Title 23 of the RMC contains the City’s zoning regulations. RMC § 23.50 describes the regulations that govern PUDs. RMC § 23.50.070 discusses the factors to be evaluated in determining whether a change to a PUD is major or minor and states that the “Administrative Official may approve changes in the development plan which, in his judgment, are minor changes and are consistent with the approved plan.” RMC § 23.50.070(B).

RMC § 23.70 then describes the administrative review procedures for the City’s zoning decisions, including changes to PUDs. The Board of

Adjustment is empowered “to hear and decide appeals when it is alleged that there is an error in any order, requirement, decision or determination made by an administrative official in the enforcement of this title [Title 23 – Zoning Regulations]” RMC § 23.70.060(A) (emphasis added). The next section confirms that an “appeal to the Board of Adjustment concerning interpretation or administration of this title [Title 23 – Zoning Regulations] may be taken by any person aggrieved.” RMC § 23.70.070 (emphasis added).<sup>5</sup>

As shown, the City has specifically laid out an administrative review process for zoning decisions, including administrative decisions relating to minor amendments to PUDs. Because the RMC affords administrative appeal rights to “any person aggrieved,” and the Neighbors contend they have been aggrieved by the City’s decision, they should have first raised the issue to the Board of Adjustment. Because they did not, they are now jurisdictionally barred from asserting their LUPA claim.

**3. RMC 19.70 Does Not Limit The Neighbors’ Administrative Appeal Rights.**

To avoid dismissal of their claim, the Neighbors solely rely on language in RMC § 19.70, which addresses rules for “Closed Record

---

<sup>5</sup> Notably, other provisions of the RMC also permit any aggrieved party to seek administrative appeal relief. See RMC § 22.09.220 (SEPA) and RMC § 24.13.090 (Plats and Subdivisions).

Decisions and Appeals.” RMC § 19.70.030 provides that “parties of record” may initiate a closed record appeal. The Neighbors maintain they are not “parties of record” and, therefore, had no right to file a closed record administrative appeal. The Neighbors focus on the wrong RMC section. As they possessed a right to an open record appeal, RMC § 19.60, rather than RMC § 19.70, applies. Open record appeals are not limited to “parties of record.”

Title 19 sets forth the following matrix for Project Permit Applications and Procedures at section 19.20.030:

<b>ACTION TYPE</b>					
<b>PROJECT PERMIT APPLICATION TYPE AND PROCEDURE</b>					
	TYPE I	TYPE II	TYPE III	TYPE IV	TYPE V
Recommendation made by:	N/A	N/A	Physical Planning Commission (PPC)	N/A	PPC
Final decision made by:	Director	Board of Adjustment (BOA) or PPC	City Council (CC)	CC	CC
Notice of application:	No	Yes	Yes	No	No

Open record public hearing:	Yes, if appealed to BOA or PPC	Yes before BOA or PPC	Yes before PPC	No	Yes before both PPC and CC
Closed record appeal/final decision:	No	Yes before CC on appeal	Yes closed record final decision by CC	No	No
Judicial appeal:	Yes	Yes	Yes	Yes	Yes

It is undisputed that a minor amendment to a PUD is a Type I decision and that final Type I decisions are made by the designated City staff member. RMC § 19.20.020. As reflected in the table, an aggrieved person challenging a Type I decision dealing with a minor amendment to a PUD has a right to an “*open record*” public hearing if appealed to the Board of Adjustment. RMC § 19.60 sets forth the rules for Open Record Public Hearings. Nothing in that chapter limits an aggrieved person’s right to pursue an appeal to the Board of Adjustment. Notably, the table expressly states that a closed record appeal -- governed by RMC § 19.70 and relied upon by the Neighbors -- *is not* available for a Type I decision. That is to say, an aggrieved party who files an open record appeal with the Board of Adjustment challenging the issuance of a minor amendment to a PUD has no right thereafter to then pursue a closed record appeal. The

Board of Adjustment decision becomes the “final” land use decision under LUPA. The inescapable conclusion is that the closed record appeal rules and limitations set forth in RMC § 19.70.030 and exclusively relied upon by the Neighbors are inapplicable.

It is noteworthy that RMC § 19.20.030 provides for closed record appeals after open record appeals of Type II decisions. In these instances, closed record appeals are understandably limited to “parties of record,” defined to include those who participated in the underlying open hearing process. If unsuccessful, “parties of record” after a closed record appeal -- those who have exhausted their administrative remedies by participating in the underlying open record appeal -- may then seek judicial relief: “The City’s final decision on an application may be appealed by *a party of record* with standing to file a land use petition in Benton County Superior Court.” RMC § 19.070.060 (emphasis added). If the Court were to apply RMC 19.70 as advocated by the Neighbors, they would have no right to judicial relief, as they are not “parties of record.” The more reasonable construction of RMC § 19.70 is that the “party of record” limitation has no application when dealing with Type I open record appeals.

The sole case cited by the Neighbors in support of their contention is Smoke v. City of Seattle, 132 Wn.2d 214, 937 P.2d 186 (1997). While Smoke is not a LUPA case, the Supreme Court did examine whether an

administrative remedy was available under the Seattle Municipal Code for a Type I decision. Critically, the Seattle Code expressly excluded administrative appeal rights for all Type I decisions: “Type I decisions ‘are nonappealable decisions made by the Director which require the exercise of little or no discretion.’” Smoke, 132 Wn. 2d at 223 (quoting SMC § 23.76.004(b)). In contrast, the RMC expressly permits appeals of Type I decisions. RMC § 19.20.030 (Table). Thus, Smoke is inapposite.

As the Neighbors never attempted to take advantage of their administrative appeal right, there is no appealable final “land use decision” under LUPA. The Neighbors’ failure to exhaust administrative remedies deprived the trial court of jurisdiction.<sup>6</sup>

**B. The Neighbors’ Claim Was Not Filed Within the Jurisdictional 21-Day LUPA Time-to-File Period.**

The Neighbors maintain they timely filed their LUPA action because the City did not provide direct and personal notice of the decision to them until September 17, 2010 -- 3 months after the City made its

---

<sup>6</sup> Even accepting the Neighbors’ construction of Title 19, they still had an administrative appeal right under Title 23. As Title 23 is more directly applicable to the issues in this case, its specific appeal standing and jurisdictional provisions trump the more general provisions in Title 19. See Miller v. Sybouts, 97 Wn.2d 445, 448, 645 P.2d 1082 (1982) (“Under the rules of statutory construction, a specific provision controls over one that is general in nature.”)

decision.<sup>7</sup> Because they filed suit within 21 days of receiving personal notice, they claim to have complied with LUPA's strict 21-day filing requirement. This position is in direct conflict with Washington Supreme Court precedent, and if adopted would jeopardize one of the key tenants of LUPA – finality of land use decisions.

The Neighbors fail to cite a single case (published or unpublished), where a court excused a party from complying with the 21-day time-of-filing requirement or where the court permitted a LUPA appeal months after the underlying decision. Rather, Neighbors exclusively rely on dicta in a single footnote in Habitat Watch v. Skagit County, 155 Wn.2d 397, 405-406, 120 P.3d 56 (2005), along with a two-justice concurring opinion in the same case.

First, it must be noted that the Supreme Court in Habitat Watch found that the underlying challenge was barred by LUPA's strict time limits. Notwithstanding, in a footnote, the majority speculated that had Habitat Watch filed its LUPA petition when it received notice of the disputed action "things might have been different." Habitat Watch, 155 Wn.2d at 409 fn. 7. The Neighbors rely on this footnote and on a concurring opinion, where two justices advocated overturning precedent

---

<sup>7</sup> The Neighbor's Appeal Response at pages 16-17.

so that an “appealing party has meaningful notice of the action.” Id. at 420. From this, the Neighbors liberally argue that the Court “has kept the door open” to allow lack of actual notice to excuse compliance with LUPA’s 21-day filing requirement. However, neither the dicta in Habitat Watch nor the opinion of two concurring justices alters the high Court’s prior holding regarding notice in Samuel’s Furniture, Inc. v. State, Dept. of Ecology, 147 Wn.2d 440, 54 P.3d 1194 (2002).

In Samuel’s, the Court expressly rejected the notion that actual, individualized notice is required to start the LUPA appeal clock: “LUPA does not require that a party receive individualized notice of a land use decision in order to be subject to the time limits for filing a LUPA petition.” Id. at 462. The concurring opinion in Habitat Watch confirmed the extent of the Supreme Court’s prior holding in Samuel’s: “In Samuel’s Furniture, we effectively approved the practice of giving no notice, even to those entitled to it by law, by nonetheless finding LUPA barred an appeal of a land use decision.” Habitat Watch, 155 Wn.2d at 420 (concurring). Recognizing that Samuel’s reflected the law on notice, the two concurring justices confirmed the present state of the law when they asserted that: “We should **revisit our precedents** with the forest in mind.” Id. (emphasis added). Neither the expression of dicta in Habitat Watch,

nor the opinion of the two concurring justices alter the Court's holding in Samuel's.

What is more, applying the rationale underlying the dicta in Habitat Watch would erode the very purpose of LUPA. Here, the issue is whether the City's decision was a minor change to the PUD. Because the City is not required to provide direct public notice of a minor amendment, under the Habitat Watch dicta statement, such a decision would never become final because it would be perpetually subject to a LUPA attack, or at least would not become truly final until the last "aggrieved party" received personal notice of the challenged decision. If the "issuance" date is extended to the date of actual notice to all who are potentially impacted, Type I decisions might not become final for months or years. This lack of finality would cut directly against the core policy underlying LUPA.

Here, the June 16 decision was either "issued" on June 19, 2010, three days after it was mailed to the Developer under section (a), or on June 16, 2010, when it was entered into the public record under section (c).<sup>8</sup> The Petition was filed in October 2010, almost 4 months after the June 16 decision was issued by the City. To conclude that the Petition

---

<sup>8</sup> Recently, this Court in Vogel v. City of Richland, \_\_\_ Wn.App. \_\_\_ (WL 1797181, May 12, 2011) addressed notice issues under LUPA. While Vogel is distinguishable from this case, an analysis of the issues raised therein may assist the Court here. As such, Developers anticipate seeking leave to file a supplemental brief on the issues raised therein.

was timely filed would be an affront to LUPA's stated purpose -- "timely judicial review." RCW § 36.70C.010. As the Supreme Court held in Chelan County v. Nykreim, 146 Wn.2d 904, 52 P.3d 1 (2002):

To allow Respondents to challenge a land use decision beyond the statutory period of 21 days is inconsistent with the Legislature's declared purpose in enacting LUPA. Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner.

Id. at 933.

**C. The Trial Court Impermissibly Substituted its Judgment for the City's in Finding a "Major Change" to the PUD.**

RMC § 23.50.070(B) provides that "The Administrative Official may approve changes in the development plan which, in his judgment, are minor changes and are consistent with the approved plan." (Emphasis added). Thus, the crux of the decision before this Court is whether the City properly exercised its judgment in determining that the PUD amendment was "minor."

In analyzing this issue, the Court is directed by LUPA to provide the City with "such deference as is due the construction of a law by a local jurisdiction with expertise." RCW § 36.70C130(1)(b). When ambiguity exists in a local ordinance, courts must afford great deference to the local jurisdiction's construction. See Hama Hama Co. v. Shorelines Hearings

Bd., 85 Wn.2d 441, 448 536 P.2d 157 (1975). For this reason, the Washington Supreme Court has held that when construing an ordinance, “in any doubtful case, the court should give great weight to the contemporaneous construction of an ordinance by the officials charged with its enforcement.” Morin v. Johnson, 49 Wn.2d 275, 279, 300 P.2d 569 (1956).

On top of this, as to factual findings, “a reviewing court must be deferential to factual determinations by the highest forum below that exercised fact-finding authority.” Schofield v. Spokane County, 96 Wn.App. 581, 586, 980 P.2d 277 (1999). In affording deference under the substantial evidence standard, this Court is required to consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. Cingular Wireless, LLC v. Thurston County, 131 Wn.App. 756, 768, 129 P.3d 300 (2006) (deferring to the factual findings made by the Thurston County hearing examiner).

The validity of the City’s minor PUD decision must be viewed through this review prism, which justifiably grants the City’s construction of the RMC great weight, and provides deference to its factual findings.

**1. No Change in Use.**

Exercising its judgment, the City found that "change in use" requires a change in the actual use of property rather than a change in the user of the property. It concluded that the proposed minor amendment did not seek a change of use, as the existing PUD already permitted multi-family apartments. In reaching this conclusion, the City had to construe the RMC, including the undefined phrase "change in use," and make factual findings based on its construction. The deference afforded the City on both fronts should have been honored by the trial court. Instead, the trial court impermissibly substituted its judgment for that of the City.

The Neighbors cite to various RMC provisions dealing with permitted PUD uses in support of their change in use argument. The cited code provisions undermine, rather than support, their claim.

RMC § 23.50.020 states that a PUD may be approved for any "use" set forth in the RMC. RMC § 23.08 defines "use districts," including a residential use district. RMC § 23.18.010 defines Residential Zoning District and enumerates "five residential zone classifications." Included in this list is a "multi-family residential use district -- (R3)." The R3 zone classification does not contain an age-restricted use limitation, nor are there age-based use restrictions in any of the other 4 residential use district classifications (R-1-12; R-1-10; R-2, or R-2S).

The Neighbors argue that because the RMC also lists 21 examples of "residential uses," including Senior Housing, each constitute a separate "use" of the property. Inferentially, they claim that a change amongst any of these 21 uses would be a per se major "change of use" under RMC § 23.50.070. But they offer no argument in support of this inference.

At best, the Neighbors' argument *could* render the phrase "change in use" ambiguous. Under LUPA and the rules of ordinance construction, the City's construction of this phrase must be given "great weight" and its factual findings must be given deference. Appropriately applying this review standard, the City's decision should be affirmed.

## **2. No Change in Vehicular Circulation.**

The trial court affirmed the City's finding that the proposed minor amendment did not reflect a major change in the vehicular circulation system.<sup>9</sup> The Neighbors did not file a cross-appeal on this issue, and are therefore barred from raising it now in response to the Developers' appeal. If the Court elects to consider this issue, it should also affirm the City.

Under the original PUD, there were two access points to the property from Gala Way. The proposed change replaced one of these access points with one off of Westcliffe Blvd. The total access points (2) onto the property remained unchanged. After analyzing the issue and

---

<sup>9</sup> CP 835 at para 10.

receiving feedback from other City administrators, the City found that the proposal did not represent a major change in the vehicular circulation system.<sup>10</sup>

The RMC does not define “major change in vehicular circulation system.” If this undefined phrase is found to be ambiguous, the City’s construction must be afforded “great weight.” Hama Hama, 85 Wn.2d at 448. Further, the traffic analysis involved application of law to facts. This Court must construe all evidence and reasonable inferences drawn therefrom in favor of the City’s findings. Cingular Wireless, 131 Wn.App. at 768. With this presumption in mind, the City’s decision must be affirmed, unless it is found to be clearly erroneous.

The Neighbors claim the change was major because one of the two external access points was changed from Gala Way to Westcliffe Blvd. The only support for this proposition is a reference to the 2007 and 2008 approved minor PUD amendments. The 2007 amendment only altered interior street alignments and the 2008 amendment removed one of the two access points to Gala Way. In the City’s approval letters in 2007 and 2008, it observed that since these changes were internal only, the proposed

---

<sup>10</sup> CP 491.

change was not major.<sup>11</sup> From this, the Neighbors “surmise” that all external changes must be “major.”<sup>12</sup> This is faulty reasoning.

First, this construction flies in the face of RMC § 23.50.070, which does not state that *any* change to an external traffic configuration is a “major” change to vehicular circulation. If this was the City’s intent, the section could have been drafted accordingly. Second, it does not stand to reason that just because internal road adjustments are not major changes to the circulation system because they do not impact the surrounding area, all external changes necessarily do.

Viewing the evidence and reasonable inferences in the light most favorable to the City, the trial court correctly ruled that the Neighbors failed to show the City’s decision was clearly erroneous.

### **3. No Increase in Density.**

The trial court also affirmed the City’s decision that the minor amendment did not increase density.<sup>13</sup> The Neighbors now claim the trial court was incorrect. However, they did not file a cross appeal on this issue and are barred from raising it now.

The City’s analysis, should the Court consider the issue, began with a review of the permitted density under the original PUD for Phases

---

<sup>11</sup> CP 462 and 467.

<sup>12</sup> CP 614 (Petitioners’ Trial Brief at page 10).

<sup>13</sup> CP 835, at para 11.

3-6 (Parcels 2C-2F). It found that the original PUD approved a total of 304 persons living in 206 units, resulting in an average of 1.47 person/unit.<sup>14</sup> The City then found that “modification to the PUD must be in [sic] consistent with both estimated population and total unit count in order to meet the criteria for a minor amendment.”<sup>15</sup> Using the Washington State Office of Financial Management figures, multi-family development contains an average of 1.713 person/unit. The City found that allowing up to 177 units would not increase the density of project (177 x 1.713 = 303.2 persons).<sup>16</sup>

In challenging density, the Neighbors do not dispute either the City’s construction of the law or its application of facts. Rather, they claim it was an unlawful procedure.<sup>17</sup> In doing so, they combine the June 16, 2010 proposed minor amendment, with the Developers’ subsequent request to effect a “major” change to the PUD. However, this requested “major” change was later withdrawn by the Developer and is now of no consequence.

The Neighbors suggest it was unlawful for the City to permit the Developer to make requested changes to the PUD in stages. They offer no

---

<sup>14</sup> CP 491.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Neighbors’ Appeal Brief at pages 31-32.

support for this. It appears the allotted density for Parcels 2C-2F was used in constructing the apartments on ½ of the land. The remaining 15 acres were left as open space. If and when the Developer elects to seek permission to construct anything on the remaining 15 acres, it would be considered a “major” change subject to the full panoply of public input and debate. As the City showed by denying the April 2010 requested PUD amendment, it will not permit additional density on the site without the submission of a new plan and public input.<sup>18</sup>

The City acted properly on the Developers’ proposed minor amendment. If and when a request is made to develop the remaining 15 acres, after public input and the required hearings, the City will decide whether anything can be done with the vacant land. The Neighbors offer no support for their claim that the City had to consider future, anticipated requested changes in density when considering the minor amendment before it. Indeed, if it had done so, it would have acted contrary to the law.

**4. No Relocation of Density *Pattern*.**

The issue of whether the proposed minor amendment reflected a relocation in density pattern first requires construction of the phrase “relocation of density pattern,” and then a factual determination as to

---

<sup>18</sup> CP 574-575.

whether such exists. The law affords the City's construction of "relocation of density pattern" under its zoning code great weight because the City is in the best position to construe the RMC. "The primary foundation and rationale for this rule is that considerable judicial deference should be accorded to the special expertise of administrative agencies." Hama, 85 Wn.2d at 448. For this reason, the Washington Supreme Court has held that when construing an ordinance, "in any doubtful case, the court should give great weight to the contemporaneous construction of an ordinance by the officials charged with its enforcement." Morin v. Johnson, 49 Wn.2d 275, 279, 300 P.2d 569 (1956).

The RMC does not characterize the relocation of density itself as a major change. Rather, a major change exists only when the change is sufficient to constitute a change in density **pattern**. It should be left to the City to determine what development changes actually amount to a relocation of a density "pattern."

The City found that because the primary density driver of the development under both the original PUD and the proposed amended PUD – the 3-story apartment complex – would be in the center of the 30 acres, there was no relocation of density pattern. The drawings of both projects

confirm this assessment.<sup>19</sup> While there may well have been some relocation of density in a strict sense, there is no basis to second-guess the City's decision that there was an overall relocation of the density **pattern**. Under both scenarios, the apartment complex was to be located in the center of the 30 acres.

The applicable review standard did not permit the trial court (or this Court) to act as a fact finder in a traditional sense. That is to say, the Court does not ask whether there was a relocation of density pattern, but whether the City erred in finding there was not. In answering this question, the Court construes all facts and reasonable inferences drawn therefrom in a light most favorable to the City. Applying this standard of review, the City did not commit error.

**D. City Council Approval of Final PUD Plan for Phase 2C was not Required.**

The Neighbors argue that the City Council did not approve the final PUD plan for Phase 2C and, therefore, building permits should not have been issued. The only support offered for this argument is the fact that the City Council approved Phases 2A and 2B. The Neighbors, however, ignore the distinction cited in the Developers' opening appeal brief between final Plats and final PUD plans. Final Plats are needed

---

<sup>19</sup> Compare original PUD plan (CP 338) with proposed change (CP 487).

where the property is to be subdivided for the purpose of sale or lease. Unlike Parcels 2A and 2B, Parcel 2C was subject to a PUD plan and not a residential subdivision and, therefore, a final Plat and City Council approval was unnecessary. That the City Council approved the final Plats for Phases 2A and 2B is irrelevant.

As pointed out in the Developers' initial brief, and not contested by the Neighbors, the RMC states that final PUD plans are approved at the administrative level. Specifically, RMC § 23.50.050(B) states that "approval of the final PUD plan shall be in accordance with Section 23.50.040(D)." RMC § 23.50.040(D) provides that an applicant "shall submit to the Administrative Official for review within the provided time limit its final development plan as provided in the final approval section" and the "Administrative Official shall thereupon approve or disapprove the final development plan."

It is the Administrative Official, not the City Council, who approves or disapproves final PUD plans. Since the RMC does not empower the City Council with authority to approve final PUD plans, the Neighbors' challenge to the issuance of the building permits fails.

III. CONCLUSION

For the reasons stated, the Developers' requested relief on appeal should be granted.

RESPECTFULLY SUBMITTED this 24th day of June, 2011.

LUKINS & ANNIS, P.S.

By   
BRYCE J. WILCOX  
WSBA# 21728  
LAURA J. BLACK  
WSBA #35672  
Attorneys for Appellants

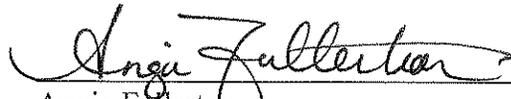
**CERTIFICATE OF SERVICE BY MAIL**

I HEREBY CERTIFY that on the 24<sup>th</sup> day of June, 2011, a true and correct copy of the foregoing document was mailed, postage prepaid in the United States Mail to:

Joel Comfort  
Miller Mertens Comfort Wagar & Kreutz PLLC  
1020 North Center parkway, Suite B  
Kennewick, WA 99336

Kenneth W. Harper  
Menke Jackson Beyer Ehlis & Harper, LLP  
807 N. 39<sup>th</sup> Avenue  
Yakima, WA 98902  
Attorneys for City of Richland

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

  
Angie Fullerton  
Paralegal Bryce Wilcox