IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JUST DIRT, INC., a Washington corporation, Respondent, v. CITY OF BONNEY LAKE, a Washington municipal corporation, Appellant.	))))))))))))	NO. 63854-8-I DIVISION ONE UNPUBLISHED OPINION FILED: November 9, 2009

Leach, J. — Just Dirt, Inc., sought approval for a residential subdivision application. It also requested a variance for its proposed access to the property. City council denied the variance request and, therefore, the subdivision application. The superior court reversed the variance denial and remanded for further consideration of the preliminary plat application. Because substantial evidence supports the city's denial of the variance, we reverse the superior court and affirm the denial of the variance without prejudice to the applicant's submittal of alternate access proposals satisfying applicable legal requirements.

Background

In August 2005, Just Dirt, Inc., filed a preliminary plat application for a

residential development it called Shipman Ridge. Just Dirt proposed to build Shipman Ridge on the outskirts of the City of Bonney Lake. The original plan proposed a subdivision of 39 lots on roughly 19 acres. Primary access to the plat would be by way of a new cul-de-sac branching off of SR 410 with a secondary connector for emergency vehicles provided by extending 176th Avenue Court East, a private cul-de-sac serving East Ridge Estates. This existing cul-de-sac exceeds the maximum allowable grade and minimum width requirements of the Bonney Lake Municipal Code (BLMC): it proceeds at a 15 percent grade and passes through a narrow 90-degree bend at its steepest point. Because Just Dirt's proposed access routes also exceeded allowable parameters, it requested a variance from length, grade, and width requirements.

In January 2006, the city issued a determination of environmental significance for the proposal under the State Environmental Policy Act (SEPA).[1] A draft environmental impact statement (DEIS) was circulated in November of that year. In January 2007, the city engineer for Bonney Lake, John Woodcock, recommended denial of the preliminary plat. The engineer's recommendation was based on the following findings:

> 1. Thirty-nine (39) units is too large a development to rely on such means of access. Adequate street width, reasonable grade, and reasonable cul-de-sac length are essential for a residential proposal of this size. The proposed homes would not be sufficiently accessible (including police, medical response, and fire access) during inclement

[1] Ch. 43.21C RCW.

> weather due to steep roads and long cul-de sac. Driving safety, ease of access, traction in snow and ice, and emergency vehicle access would not be acceptable.
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> . . . .
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> 3. Street maintenance would be difficult. Frequent sanding would be required. Steep grades with large cut and fills such as these are known to crack and creep, which the City would then have to repair.
> 4. 176th Ave. Pl. [sic] E. is a private cul-de-sac serving East Ridge Estates. Traffic passing through the plat would pass from public streets to a private street and back to a public street. This seems an unacceptable incursion of public traffic onto a private street and the maintenance responsibilities added to the homeowners.
> 5. . . . The traffic and noise impacts have NOT been mitigated. 176th Ave Pl. [sic] E. itself is well over 14% in slope and well over 600 feet long. The steep connector would further jeopardize traffic flows, especially during inclement weather.

On May 2, 2007, before a final environmental impact statement (FEIS) was circulated, Woodcock sent a letter to Just Dirt reiterating many of these concerns. The letter requested that Just Dirt provide an assessment of the adequacy of 176th Avenue Court East for overall traffic circulation, verification that emergency services would be able to safely maneuver along the route, and documentation of safe school bus access conditioned on planned bus service to the neighborhood. Later that month, an FEIS was circulated.[2]

In response to the concerns raised during the EIS process, Just Dirt sent a “conceptual copy” of a reconfigured plat application to the hearing examiner on June 20, 2007. The letter indicated that Just Dirt was contemplating a number of modifications to its proposal, included reducing the number of lots from 39 to 33 and eliminating access from SR 410. Accordingly, the cul-de-sac extending from

[2] Just Dirt did not appeal from the FEIS.

176th Avenue Court East would be the sole means of access.

Just Dirt submitted a final revised site plan to the associate planner in July 2007. Under this revised plan, Just Dirt reduced the number of lots from 39 to 34, kept the cul-de-sac extension from 176th Avenue Court East as the only access route, and modified the connector road grade and width to comport with applicable ordinances. The grade and width adjustments eliminated the need for grade and width variances, but Just Dirt continued to request a variance from the cul-de-sac length limit.[3]

The hearing examiner conducted a public hearing in September 2007. Testifying witnesses included the planning manager, city engineer, traffic engineer, and various members of the community. One month later, the hearing examiner denied the variance and recommended that the city council deny the Shipment Ridge preliminary plat application. To support his recommendation, the examiner made the following findings of fact:

> 18. 176th Ave. Ct. E. comes off 176th Ave. E. at a left turn down a steep grade of 15% and is a narrow road of 22 feet wide with high rock walls on each side and no pathway or sidewalk and at the base of the steep grade there is a 90 degree sharp turn to the left with two driveways extending onto the road at that point, and then it would take [sic] right turn down through Lot 4 at a grade of 14% to reach the subdivision of 34 lots.
> 19. 176th Ave. Ct. E. is a private road and is not maintained by the City and during inclement weather with snow and ice, the road is not passable and the residents have to park their

[3] BLMC 17.20.040(D) ("The maximum length of a cul-de-sac street shall be 600 feet."). Just Dirt's proposed extension would result in a cul-de-sac that more than quadrupled the maximum length allowed without a variance.

car on 176 Ave. East. There is [sic] no parking areas on 176th Ave. East as there are driveways to homes on both side [sic] of the road, plus two private roads extend off the end of the cul-de-sac.

20. According to several residents, there is [sic] no provisions in the East Ridge Estates covenants for maintenance of 176th Ave. Ct. E.

. . . .

26. The public health, safety and general welfare cannot be protected with the proposed cul-de-sac that is accessed off of the private road, 176th Ave. Ct. E.

27. The steepness and length of the road will prevent adequate public safety, emergency vehicles, police and fire and ambulances [sic] response and bus service to the area and not provide for the protection and convenience of the residents.

Just Dirt appealed the denial of the variance to the Bonney Lake City Council.[4] The city council denied the variance and subdivision application by separate resolutions. In Resolution 1770, denying the variance request, the council stated that "[a] purpose of limiting the length of cul-de-sacs is to protect the public safety by ensuring timely access for emergency vehicles" and found the proposed cul-de-sac to be quadruple the length allowed without a variance. It also found the proposed variance would change the essential nature of the general area in and around the plat. Therefore, the council determined, the variance request did not satisfy BLMC 17.24.100(B), which only authorizes a variance if the fact finder determines that the request will not change the essential nature of the surrounding area.[5]

[4]The recommendation of the hearing examiner on the preliminary plat was not subject to appeal. The city council reviews all the hearing examiner's recommendations on preliminary plats. BLMC 14.60.060.

[5]BLMC 17.24.100 provides the hearing examiner with discretionary authority to grant a length variance provided that the following criteria are

The city council also noted that BLMC 17.24.100(B) states that a variance may be denied if it contravenes the intent of chapters17.08 through 17.24 BLMC. The council found that the request was beyond the intent of BLMC 17.20.040(G), which establishes specific criteria for granting length variance requests for "permanent" cul-de-sacs. The council also determined that Just Dirt failed to consider and mitigate impacts of traffic flows, noise, and other environmental factors as required by BLMC 17.20.040(G). Finally, the city council found that the requested variance would increase, without mitigation, traffic on the existing substandard cul-de-sac, increasing the risk of collisions and other mishaps.

One month after adopting Resolution 1770, the city council adopted Resolution 1777 in which it found that

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

Because RCW 58.17.110 makes "[a]ppropriate provisions . . . for the public

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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.

health, safety, and general welfare and for such open spaces, . . . streets or roads, . . . other public ways, [and] transit stops" a mandatory prerequisite for subdivision approval, and Shipman Ridge lacked such adequate access, the council denied the modified plat application.

Just Dirt timely appealed both resolutions to Pierce County Superior Court, and the appeals were consolidated. In reversing the city council's denial of the cul-de-sac variance, the superior court concluded "that the City Council's characterization of the cul-de-sac at 176th Avenue Court E as 'permanent' rather than 'temporary' was in error, pursuant to RCW 36.70C.130(1)(b) and (d)." But the court also found that Just Dirt had failed to demonstrate that its proposed preliminary plat satisfied the requirements of RCW 58.17.110. Nonetheless, the court remanded the preliminary plat for reconsideration of possible development compliant with city code. Bonney Lake appeals from the superior court decisions.

Standard of Review

The Land Use Petition Act (LUPA)[6] is the exclusive means for judicial review of a land use decision, with few exceptions.[7] Under LUPA, the court of appeals stands in the same position as the superior court and reviews the decision of the "local jurisdiction's body or officer with the highest level of

[6] Ch. 36.70C RCW.

[7] RCW 36.70C.030; Twin Bridge Marine Park, LLC v. Dep't of Ecology, 162 Wn.2d 825, 854, 175 P.3d 1050 (2008).

authority to make the determination"[8] on the basis of the administrative record.[9] Thus, we review the city council's decision to deny Just Dirt's variance application and preliminary plat application according to the record before it.

Under LUPA, relief may be granted only if Just Dirt, the party seeking relief from the land use decision, has met its burden of proving that one of the following standards has been met:

> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
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> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
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> (d) The land use decision is a clearly erroneous application of the law to the facts.[10]

Standard (b) presents a question of law that this court reviews de novo.[11] When reviewing a challenge to the sufficiency of the evidence under subsection (c), this court inquires whether there is "'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'"[12] The clearly

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[8] RCW 36.70C.020(1); Citizens to Preserve Pioneer Park LLC v. City of Mercer Island, 106 Wn. App. 461, 474, 24 P.3d 1079 (2001).

[9] Pavlina v. City of Vancouver, 122 Wn. App. 520, 525, 94 P.3d 366 (2004).

[10] RCW 36.70C.130(1).

[11] Milestone Homes, Inc. v. City of Bonney Lake, 145 Wn. App. 118, 126, 186 P.3d 357 (2008) (citing Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assoc., 151 Wn.2d 279, 290, 87 P.3d 1176 (2004)).

[12] Benchmark Land Co. v. City of Battle Ground, 146 Wn.2d 685, 694, 49 P.3d 860 (2002) (internal quotation marks omitted) (quoting City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)).

erroneous test under (d) allows this court to reverse only if "left with a definite and firm conviction that the city council made a mistake."[13]

Analysis

The Bonney Lake Municipal Code does not permit any cul-de-sac longer than 600 feet without a variance.[14] City council denied Just Dirt's request for a length variance because its proposed road would change the essential nature of the general area in and around its proposed plat. Just Dirt challenges the city council's decision on three grounds: (1) the decision is not supported by substantial evidence, (2) the city council did not correctly interpret the applicable provisions of its code, and (3) the city refused to identify mitigation measures that would facilitate project approval.

With regard to Just Dirt's first argument, a substantial evidence challenge under RCW 36.70C.130(1)(c) requires that we ask whether the record details "'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'"[15] We conduct this inquiry by accepting the "views [of the highest forum exercising fact-finding authority] regarding the credibility of witnesses and the weight to be given reasonable but competing inferences."[16]

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[13] Milestone, 145 Wn. App. at 126.

[14] BLMC 17.20.040(d).

[15] Benchmark Land Co., 146 Wn.2d at 694 (internal quotation marks omitted) (quoting Cent. Puget Sound Growth Mgmt. Hearings Bd., 136 Wn.2d at 46).

[16] State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce, 65 Wn. App. 614, 618, 829 P.2d 217 (1992).

The record in this case includes, among other items, the FEIS, the planning and community development department staff report, and testimony from city and traffic engineers, planning department staff, and residents living near 176th Avenue Court East.

The FEIS clearly articulated concerns with Just Dirt's variance request. The authors of the report stated,

> . . . The steepness of [176th Avenue Court East], and the increase in traffic, will reduce driving safety. Traction in snow and ice will be substandard and could result in accidents. Emergency vehicle access will be substandard.
>
> The impacts from traffic could be partially mitigated by a reduction in the number of homes proposed for the site.

The staff report echoed these concerns. It stated,

> [T]he site is too steep and the possible points of access are too extremely elevated below and above the site to achieve the applicant's development goal without an unreasonable degree of hazard due to steep grades and long dead ends. That is, the site's steepness is exacerbated by the fact that the possible points of access are vertically adjacent rather than horizontally adjacent. Driving safety, ease of access, traction in snow and ice, emergency vehicle access, and ease of street maintenance would not be acceptable. Steep streets are more likely to crack and creep.

The staff report also indicated that the "proposal would . . . increase traffic [and] increase likelihood of inaccessibility during inclement weather."

Steve Ladd, the planning manager, testified that

> [t]he proposed homes would not be sufficiently accessible including police, medical response, fire access during inclement weather due to the street's steep roads and the long cul-de-sac. . . . 176th Avenue Place [sic] East is a private cul-de-sac serving East Ridge

> Estates. It does not meet City standards. At its steepest point where it's 15% slope, it makes a sharp 90° turn which is hazardous. Traffic to the proposed development has to pass through this private street, adding to its traffic load.

Woodcock, the city engineer, testified, "I think our biggest issue here is a private road serving very few homes and then increasing that to the number of homes that we've got increases pedestrian traffic flow and vehicular traffic." He explained 176th Avenue Court East is "a substandard road section. There's no pedestrian path through there that will give them safe passage and then we will increase that to a bigger subdivision, more people using it, more vehicles using it."

Greg Heath, a traffic engineer, testified that if built, Shipman Ridge would result in one car passing through 176th Avenue Court East every two minutes at peak hours. He also testified that the 90-degree bend and steep slopes of 176th Avenue Court East were not normal features of safe road design.

Numerous residents living in or near East Ridge Estates, who rely on 176th Avenue Court East, also testified that the proposed access would place their personal safety in jeopardy. For instance, Robert Hawkins explained that because the "postal service won't go down that private road to deliver the mail," East Ridge Estates residents have had to place their mailboxes at the top of the slope. Because "[t]he traffic is thinking that they're through traffic and just driving through there, it's a dangerous situation in the area where you stop for mailboxes." Thus, Hawkins observed, adding 34 more mailboxes to the stop

would only exacerbate this danger. Christine Walker testified that there have been several near accidents with only seven people living at the end of 176th Avenue Court East. She also explained that due to the high rock walls on either side of the 90-degree bend, visibility is poor, snow piles up and turns to ice, and there is no place for pedestrians to travel safely. On numerous occasions, snow and ice accumulation made the steep section impassible, stranding her at home. Bill Bichsel testified that there are driveways right in the middle of the 90-degree bend making ingress and egress to these residences particularly precarious. Others testified affirming these concerns.

The foregoing record supports the city council's conclusion that the proposed road would jeopardize the public health, safety, and welfare of the area in and around the proposed plat. Such an exponential increase in risk to public health, safety, and welfare constitutes a fundamental change in the essential nature of an area. Therefore, the record in this case provides substantial evidence supporting the city council's finding that the proposed road would change the essential nature of the general area in and around the proposed plat.

Just Dirt contends the city engineer, Woodcock, conceded that its request met the requirements of BLMC 17.24.100, and therefore denial of its variance was improper. Even assuming that this is a fair characterization of Woodcock's testimony, Just Dirt misapprehends the engineer's role in land use decision-

making. Whether a variance alters the essential nature of an area is a factual determination made by the city council based upon the record before it, not the city engineer.[17] Just Dirt cites no authority for the proposition that the city engineer's opinion controls the fact-finding of the council and we are aware of none.[18]

Just Dirt also complains the neighbors' testimony is tainted by a single desire to preserve the relative seclusion of East Ridge Estates. Though many of those who testified did oppose major future development, nearly all of the neighbors testified about hazards presented by the Shipman Ridge development.

Ultimately, Just Dirt's arguments about the sufficiency of evidence fail to address the applicable standard of review. Under the substantial evidence test, we ask whether Just Dirt has shown that the record, as a whole, lacks evidence sufficient to support council's factual findings. We do not ask whether alternative or contradictory interpretations can be drawn from the evidence presented. The record before the city council contains substantial evidence sufficient to persuade a fair-minded person of the correctness of the city council's findings supporting denial of the variance.

We next turn to Just Dirt's second argument, that the city council applied

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[17] BLMC 14.120.040.

[18] Further, even if Just Dirt were correct, it mischaracterizes Woodcock's testimony. The record contains no evidence that Woodcock ever retreated from his original opposition to the proposed access plan.

an incorrect code provision, BLMC 17.20.040(G), when it found that Just Dirt had not sufficiently considered and mitigated the impacts of traffic flows, noise, and other environmental factors. According to Just Dirt, the city council should have used the requirements contained in BLMC 17.24.100 instead. Regardless of whether Just Dirt is arguing an erroneous interpretation of law under RCW 36.70C.130(1)(b) or clearly erroneous application of law to the facts of this case under RCW 36.70C.130(1)(d), this argument fails. As noted earlier, the city council set out verbatim the elements of BLMC 17.24.100 and found that the variance request satisfied the unique topography prong but failed the essential nature prong. Just Dirt does not contest that both prongs of this provision must be satisfied before a variance can be granted. Thus, whether the cul-de-sac is "permanent" under BLMC 17.20.040(G) is immaterial because, as noted above, Just Dirt failed to make the threshold showing required by BLMC 17.24.100 that its variance request would not change the essential nature of the general area.

Finally, Just Dirt claims that the city "had an obligation but failed to identify mitigation measures that, if properly conditioned, would facilitate project approval." It acknowledges that completion of the SEPA process may not result in final project approval.[19] But Just Dirt contends its participation along with the time and expense of the SEPA process obligated the city "to ensure that the process yields a fair discussion of mitigation measures or development

[19] See Quality Rock Prods., Inc. v. Thurston County, 139 Wn. App. 125, 141, 159 P.3d 1 (2007).

alternative that may guide the applicant as he proceeds." Its primary complaint is the city's alleged failure to advise Just Dirt of an acceptable density for the project.

Because denial of the variance determines the outcome of this case, we only address this argument in the context of the variance. Just Dirt, the party seeking the variance, had the burden of proving its request complied with BLMC.[20] Accordingly, it was obliged to identify, conduct, and produce the pertinent studies to show that the variance required for its proposed access would not change the essential nature of the general area in and around its proposed plat. Nothing in SEPA, its implementing regulations, or Washington case law shifts this burden of proof to the city in this context.

Additionally, the record establishes that during the SEPA process Just Dirt was made aware of but did not respond to requests for information required to answer questions Just Dirt claims the city failed to answer. Before the FEIS was circulated, the city directly requested that

> The applicant shall provide an assessment of the 176th Ave. Ct. E. access for overall circulation and adequacy of the geometry to serve general ingress and egress to the project. Verify that emergency services can maneuver around the corner without encroaching on the future curb and sidewalk. The applicant shall submit the assessment of the access to the City for review . . . .
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> . . . .

[20] See, e.g., City of Medina v. T-Mobile USA, Inc., 123 Wn. App. 19, 33, 95 P.3d 377 (2004) (stating "the entity seeking a variance[] bears the burden of proof") (citing Douglass v. City of Spokane, 25 Wn. App. 823, 829, 609 P.2d 979, (1980)).

> The applicant shall provide an evaluation of the adequacy of 176th Ave. Ct. E. . . . (structural integrity of existing roadway, lane widths, shoulders, etc.) to accommodate the increased traffic levels, as well as recommendations for any needed upgrades to local roadways.
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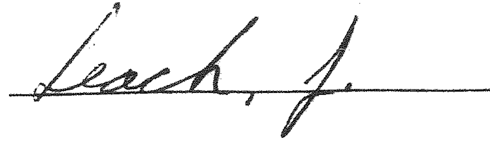
> The applicant shall provide safe walking routes for school children. If school buses plan to enter the subdivision to pick up students, please provide a letter from the School District.

The record contains no response from Just Dirt to any these requests. Instead Just Dirt chose to modify its proposal to make176th Avenue Court East the sole means of access and reduced the density of its proposed plat from 39 lots to 34.

Conclusion

Evidence that is substantial when viewed in the light of the whole record before the city council supports its finding that Just Dirt's requested variance would change the essential nature of the general area in and around its proposed plat. Just Dirt is not entitled to any variance that does so. Bonney Lake had no obligation to develop an alternate access proposal for Just Dirt. We reverse the superior court and affirm the city council's denial of Just Dirt's variance request

without prejudice to its submittal of alternate access proposals satisfying applicable legal requirements.



WE CONCUR: