Whatcom County Fire Dist. No. 21 v. Whatcom County

No. 83611-6

CHAMBERS, J. (dissenting) — I would affirm the Court of Appeals and hold that the fire district in this case did not have discretion to refuse to issue a concurrency letter.

FACTS

In 2004, four developers sought approval for projects in Whatcom County's Birch Bay, an unincorporated area near Bellingham just south of the Canadian border. The Whatcom County Code (WCC) requires that, prior to project approval, providers of fire protection services must issue a concurrency letter verifying that adequate capacity exists to serve new developments. WCC 20.80.212(1). The fire district serving the Birch Bay area refused to issue the letter but proposed that it would issue the letter if the developers paid the fire district concurrency mitigation fees of $2,500 per unit for residential developments and $384 per vehicle average daily trip for commercial developments in order to ensure adequate services would be provided. The Whatcom County hearing examiner disagreed with the fire district, stating:

> The Fire District cannot unreasonably refuse to issue a concurrency letter. In this case, since the Whatcom County Council has the authority to determine concurrency under the Growth Management Act and since the Whatcom County Council has determined within the

> Birch Bay Comprehensive Plan that Fire District No. 13[1] has adequate current capacity and that arrangements for adequate funding are in place to provide for future growth, Fire District No. 13 cannot stop this development by refusing to issue a concurrency letter.

Clerk's Papers at 348.

The county council adopted the hearing examiner's findings of fact and conclusions of law and approved the development projects. The fire district appealed to the Whatcom County Superior Court, which reversed the county's decision to approve the projects. The county appealed, and the Court of Appeals reversed the trial court's decision. *Whatcom County Fire Dist. No. 21 v. Whatcom County*, 151 Wn. App. 601, 215 P.3d 956 (2009). The fire district appealed to this court, and we accepted review. 168 Wn.2d 1005, 226 P.3d 782 (2010).

ANALYSIS

A. Standard of Review

Judicial review of land use decisions is governed by the Land Use Petition Act (LUPA). RCW 36.70C.030. An appellate court reviewing a LUPA petition is in the same position as the superior court. *Griffin v. Thurston County*, 165 Wn.2d 50, 54, 196 P.3d 141 (2008) (citing *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002)). It applies the LUPA standards directly to the administrative record that was before the deciding body without deference to the findings of any prior tribunal. *Id.* at 54-55. The party seeking relief must establish:

> (a) The body or officer that made the land use decision engaged

[1] As the majority explains, Fire District No. 13 was later subsumed into Fire District No. 21. Majority at 2 n.1. Like the majority, we simply use "the fire district" to refer to the relevant fire service provider.

> in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
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> (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;
>
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
>
> (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

Construction of a statute is a question of law we review de novo. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). The court's duty in statutory interpretation is to discern and implement the legislature's intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Where the plain language of a statute is unambiguous and legislative intent is apparent, we will not construe the statute otherwise. *Id.* However, plain meaning may be gleaned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The same principles apply to interpreting municipal or county ordinances. *City of Spokane v. Fischer*, 110 Wn.2d 541, 542, 754 P.2d 1241 (1988)

(citing *City of Puyallup v. Pac. Nw. Bell Tel. Co.*, 98 Wn.2d 443, 448, 656 P.2d 1035 (1982)).

B. The Fire District Had No Discretion To Deny Issuance of the Letter

Counties regulated under the Growth Management Act must adopt a comprehensive plan and development regulations to implement the plan. RCW 36.70A.040(3)(d). Comprehensive plans serve as guides or blueprints to be used in making land use decisions. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997). "'Development regulations' . . . means the controls placed on development or land use activities by a county or city." RCW 36.70A.030(7).

"Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review." RCW 36.70B.030(1). During a project review, the reviewing body must first determine whether certain specified items "are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations the adopted comprehensive plan." RCW 36.70B.030(2). One of those specified items is the "[a]vailability and adequacy of public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by chapter 36.70A RCW." RCW 36.70B.030(2)(c). In addition to requiring the reviewing body to determine whether the availability and adequacy of facilities is defined in the regulations or plan, the statute states that regulations or plans containing such definitions "shall be determinative" of that

availability and adequacy. RCW 36.70B.030(2).

> WCC 20.80.212 states:
>
> No subdivision, commercial development or conditional uses shall be approved without a written finding that:
>
> (1) All providers of water, sewage disposal, schools, and fire protection serving the development have issued a letter that adequate capacity exists or arrangements have been made to provide adequate services for the development.
>
> (2) No county facilities will be reduced below applicable levels of service as a result of the development.

The fire district contends that this is an "applicable" development regulation that defines the availability and adequacy of public facilities under RCW 36.70B.030. Br. of Resp't at 37-38. In essence, the district is arguing that the requirements of WCC 20.80.212, including issuance of the letter, should be determinative of the availability and adequacy of the fire services at issue here. *See* majority at 7-8. In other words the fire district, not the county, ultimately determines the availability and adequacy of its own services.

This interpretation cannot be correct, because the ordinance does not establish any of the criteria that would be necessary to define or determine the availability and adequacy of firefighting facilities. Those criteria are established instead in the comprehensive plan. The Birch Bay Community Plan identifies the standards for emergency services. Birch Bay Community Plan, *Chapter 17 – Capital Facilities Plan*, at 17-13, *available at* http://www.co.whatcom.wa.us/pds/planning/birchbay_subarea.jsp (last visited May

4, 2011) (BBCP). The plan also identifies improvements necessary to meet those standards and states that funding for those improvements will come from "taxes paid by the growing population." *Chapter 15 – Public Health and Safety*, *supra,* at 15-6. The BBCP, in other words, actually defines the adequacy and availability of fire protection services and provides for funding of those services as required under RCW 36.70B.030. WCC 20.80.212 does neither.

CONCLUSION

In the absence of a defining regulation, the comprehensive plan is determinative of the adequacy and availability of services. RCW 36.70B.030(2). Because adequacy of services had already been determined by the plan adopted by Whatcom County, the fire district lacked discretion to deny issuance of the letter based on its own determination of inadequacy.

I respectfully dissent.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Justice James M. Johnson

Justice Gerry L. Alexander