IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WHATCOM COUNTY FIRE DISTRICT NO. 21,	)	
Petitioner,	)	No. 83611-6
v.	)	En Banc
WHATCOM COUNTY, a municipal corporation,	)	
Defendant,	)	
BIRCH POINT VILLAGE, L.L.C., a Washington corporation; SCHMIDT CONSTRUCTING, INC., a Washington corporation; BRIGHT HAVEN BUILDERS, LLC, a Washington corporation; MAYFLOWER EQUITIES, INC.; LISA SCHENK and MIKE SUMNER,	)	Filed May 5, 2011
Respondents.	)	

OWENS, J. -- In 2006, Whatcom County (the County) approved three land use applications for development in the Birch Bay urban growth area. Whatcom

County Fire District No. 21[1] (the Fire District) filed a Land Use Petition Act (LUPA), ch. 36.70C RCW, petition challenging the approvals. At bottom, this case is a dispute between two independent municipal corporations over whether completion of the proposed developments would reduce fire protection services below an adequate level of service. Because we find that the County assigned responsibility for assessing the adequacy of fire protection services to the Fire District, we grant the Fire District's LUPA petition and reverse the County's approval of the land use applications at issue in this case.

FACTS

In 2006, the County approved the three development applications at issue in this case: Horizons Village at Semiahmoo, Harborview Road, and the Birch Bay Center. Because it believed it would not be able to provide an adequate level of service upon completion of the proposed developments, the Fire District refused to issue to the developers letters stating that adequate capacity to serve the developments existed or would exist. Despite the absence of such letters, the Whatcom County hearing examiner recommended approval of the three development applications, finding

> on a more likely than not basis, that the Fire District will be able to continue to provide an adequate level of fire protection and emergency response services to the district, even with significant new growth, based on the currently authorized funding mechanisms available to the Fire

[1] Whatcom County Fire District No. 21 was created in 2006 as a result of the merger of Whatcom County Fire Districts 3 and 13. As District 21 is the successor to District 13, this opinion uses the term "the Fire District" to refer to both.

District and the increased taxes and fees paid by the new growth.

Clerk's Papers (CP) at 343, 364, 413, 459-60. The hearing examiner also determined that

> Whatcom County addressed fire protection concurrency when it adopted the Birch Bay Comprehensive Plan and concluded that the funding needs of Fire District No. 13 could adequately be met by taxes generated by the new growth.

Id. at 345, 364, 413, 460. The Whatcom County Council adopted the hearing examiner's recommendations and approved all three development applications.

The Fire District then filed LUPA petitions challenging approval of all three developments in the superior court. These petitions were consolidated into a single proceeding. The Whatcom County Superior Court granted the Fire District's LUPA petition. The Court of Appeals reversed the superior court, finding that the County's comprehensive plan definitively established the adequacy and availability of fire protection, and reinstated the County's approval of the development applications. *Whatcom County Fire Dist. No. 21 v. Whatcom County*, 151 Wn. App. 601, 612, 614, 215 P.3d 956 (2009). We granted the Fire District's petition for review. *Whatcom County Fire Dist. No. 21 v. Whatcom County*, 168 Wn.2d 1005, 226 P.3d 782 (2010).

ISSUE

Did the County err by approving the development applications at issue absent a concurrency letter from the Fire District?

ANALYSIS

A. Standard of Review

Judicial review of land use decisions is governed by LUPA. *Griffin v. Thurston County Bd. of Health*, 165 Wn.2d 50, 54, 196 P.3d 141 (2008). Appellate courts sit in the same position as the superior court and apply the standards set forth in RCW 36.70C.130(1) to the administrative record that was before the body responsible for the land use decision. *Id*. at 54-55 (citing *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002)). In order to set aside a land use decision, the party seeking relief must establish one of the following standards:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
>
> (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;
>
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
>
> (d) The land use decision is a clearly erroneous application of the law to the facts;
>
> (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). "Standards (a), (b), (e), and (f) present questions of law, which we review de novo." *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009). An application of law to the facts is """clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976) (internal quotation marks omitted) (quoting *Ancheta v. Daly*, 77 Wn.2d 255, 259-60, 461 P.2d 531 (1969)).

Interpretation of statutes and ordinances is a question of law reviewed de novo. *In re Pers. Restraint of Cruze*, 169 Wn.2d 422, 426, 237 P.3d 274 (2010); *Griffin*, 165 Wn.2d at 55.

B. The County's Approval of the Applications Was a Clearly Erroneous Application of the Law to the Facts

Counties required or choosing to plan under the Growth Management Act (GMA), ch. 36.70A RCW, must adopt a comprehensive plan and development regulations that implement the comprehensive plan. RCW 36.70A.040(3)(d), (4)(d). A county's comprehensive plan serves as "a 'guide' or 'blueprint' to be used when making land use decisions." *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997) (quoting *Barrie v. Kitsap County*, 93 Wn.2d 843, 849, 613 P.2d 1148 (1980)). "'Development regulations'" are "controls placed

on development or land use activities." RCW 36.70A.030(7); *see City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 391, 93 P.3d 176 (2004) (because the proposed ordinance "places controls on development and land use," it was held to be a development regulation). Such regulations necessarily constrain individual land use decisions. *Woods v. Kittitas County*, 162 Wn.2d 597, 613, 174 P.3d 25 (2007). "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).

Whatcom County Code (WCC) 20.80.212 provides:

> 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.

As it applies to the present case, the plain language of WCC 20.80.212 prohibits approval of certain land uses without a letter from the Fire District stating either that capacity to adequately serve the proposed development currently exists or that arrangements have been made to ensure that adequate capacity will exist. This is a control on land use and, consequently, a development regulation. *See Yes for Seattle*,

122 Wn. App. at 391.

WCC 20.80.212 is a particular type of development regulation known as a "concurrency" regulation. "Concurrency" is the concept that an adequate level of service should "be available concurrently with the impacts of the development or within a reasonable time thereafter." Thomas M. Walsh & Roger A. Pearce, *The Concurrency Requirement of the Washington State Growth Management Act*, 16 U. Puget Sound L. Rev. 1025, 1026 (1993); *see* WAC 365-196-210(7), -840(1)(b). Concurrency is one of the enumerated goals of the GMA. RCW 36.70A.020(12). Except for transportation concurrency, whether to adopt concurrency requirements is generally left to the discretion of planning authority.[2] WAC 365-196-840(2); *see* RCW 36.70A.070(6)(b) (mandating adoption of transportation concurrency ordinances). By enacting WCC 20.80.212, the County has plainly decided to require concurrency for, among other public facilities and services, fire protection.

Not only does WCC 20.80.212 make a finding of concurrency a prerequisite to approval of various land uses, it also vests in the relevant providers the authority to determine whether concurrency exists. WCC 20.80.212 does not require a finding by the County that there is concurrency with respect to fire protection; instead it requires a letter from the provider of fire protection services (i.e., the Fire District) stating that

[2] As it is unnecessary to our disposition of the case, we do not address and we express no opinion on the Fire District's argument that RCW 58.17.110 requires a finding of concurrency with respect to fire protection.

concurrency exists. Such an assignment of responsibility is rational; the Fire District may reasonably be thought to be in the best position to determine what level of fire protection service is adequate and whether it is capable of providing that level of service. The decision to adopt concurrency regulations and assign concurrency determinations to the provider of the relevant public service is a fundamental land use planning choice that serves as the basis for project review under RCW 36.70B.030(1).

The County erred in applying WCC 20.80.212 to the land use applications at issue in the present case. It is undisputed that the Fire District declined to issue the required concurrency letters. Under a proper construction of WCC 20.80.212, this ends the inquiry; the applications cannot be approved without the required letters.[3] When the County proceeded to independently determine that adequate capacity existed to serve the developments, it committed clear error. The County cannot, during project review, revisit its decision to assign to the Fire District the authority to determine concurrency. RCW 36.70B.030(1).

Moreover, contrary to the conclusion of the Court of Appeals, the County's comprehensive plan does not "establish[] the availability and adequacy of" fire protection services. *Whatcom County Fire Dist. No. 21*, 151 Wn. App. at 612. We

[3] The Fire District's refusal to issue the letters cannot, of course, be arbitrary or capricious. *Wash. Waste Sys., Inc. v. Clark County*, 115 Wn.2d 74, 80, 794 P.2d 508 (1990). However, there is no allegation in the present case that the Fire District's actions were arbitrary or capricious.

may assume, without deciding, that the County's identification of the "gold standard" for "ambulance services" and "aid services" constitutes adoption of that standard. CP at 243. We may further assume that the chart entitled "Comparison of Level of Service Standards" establishes a five-minute response time as the applicable level of service for fire emergencies. 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). The comprehensive plan identifies three improvements that will be necessary to meet the anticipated population growth in the Birch Bay area: "manning the fire station at Semiahmoo on a 24-hour basis," "[a]dditional equipment" for the Semiahmoo station, and "substantial remodeling" of the Birch Bay station. CP at 243. The comprehensive plan further states that the costs of the changes to the Semiahmoo station "will be born[e] by taxes paid by a growing population," but the plan does not provide for funding of the necessary remodeling of the Birch Bay station. *Id*. Absent provision for necessary funding, the comprehensive plan cannot be considered determinative of the availability of fire protection services. *See* RCW 36.70B.030(2)(c) (regulations and plans are "determinative of 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" (emphasis added)); RCW 36.70A.070(3) (comprehensive

plan must include capital facilities plan specifying plan to finance capital facilities and clearly identifying sources of public money for such funding).

CONCLUSION

WCC 20.80.212 is a development regulation that prohibits approval of certain land use activities without a letter from the provider of fire protection services that adequate capacity does or will exist to maintain an appropriate level of service upon completion of the proposed development. The Fire District, upon determining that such capacity would not exist upon completion of the proposed developments, did not issue such a letter. The County committed clear error by finding that WCC 20.80.212 was satisfied. We therefore reverse the Court of Appeals, grant the Fire District's LUPA petition, and reverse the County's approval of the three land use applications at issue.

AUTHOR:

Justice Susan Owens

WE CONCUR:

Chief Justice Barbara A. Madsen	Justice Mary E. Fairhurst
Justice Charles W. Johnson	
	Justice Debra L. Stephens
	Justice Charles K. Wiggins