HON. MARIANE C. SPEARMAN
HEARING DATE: JULY 19, 2013

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

BENCHVIEW NEIGHBORHOOD ASSOCIATION, a Washington unincorporated association,

Petitioner,

v.

CITY OF SEATTLE, a Washington municipal corporation; BLUEPRINT SERVICES, LLC, a Washington limited liability company; DAVID BIDDLE, an individual Washington resident; ALL DAY CONSTRUCTORS, LLC, a Washington limited liability company; and JMS HOMES, INC., a Washington corporation,

Respondents.

No. 13-2-05025-1

BRIEF OF RESPONDENTS BLUEPRINT SERVICES, LLC; DAVID B. BIDDLE; ALL DAY CONSTRUCTORS, LLC; AND JMS HOMES, INC.

INTRODUCTION

In its opening brief, the Benchview Neighborhood Association implores this Court to require the City of Seattle to adopt the after-the-fact interpretation of the City's land use code that Benchview developed to reach its desired outcome—denial of the Lot Boundary Adjustment sought by Gary Biddle.

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To grant Benchview's plea, the Court would have to order the City's Department of Planning and Development, the City agency that administers and enforces the land use code, to abandon its longstanding and consistent interpretation of that code as it applies to Lot Boundary Adjustments—a type of land use approval mandated by revisions to the state subdivision statute enacted over thirty years ago. Since that statute was amended, Washington courts have strictly limited the discretion of local governments reviewing such boundary adjustments.

The City could not do what Benchview requests without violating Biddle's rights to a fair and impartial application of its land use regulations. And this Court cannot grant Benchview's plea without ignoring the caselaw that limits both the substantive and procedural discretion that municipalities have in land use matters and that forbids municipalities from making land use decisions to mollify neighborhood concerns.

A municipality *must* follow the procedures it has adopted for reviewing applications for land use approvals and permits. Failure to follow these procedures requires reversal of a land use decision. Further, applicants for land use approvals are entitled to have their applications reviewed according to clear and defined substantive standards interpreted consistently and applied without regard to neighborhood opposition. This means that a municipality that has a longstanding and consistent interpretation of its regulations cannot abandon that interpretation because of neighborhood opposition to a proposal.

The City carefully and thoroughly reviewed the concerns expressed by the neighbors and the arguments they offered to support denial of Biddle's application. It then considered the regulations relevant to the Biddle application and determined the application complied with those regulations and with the City's longstanding and consistent interpretation of its

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land use code. That is what the City was required to do. That is what the City did. No more. No less. The City's decision was proper and the Court should uphold that decision.

STATEMENT OF FACTS

On December 10, 2012 Dave Biddle applied to the City of Seattle for a Lot Boundary Adjustment (LBA) affecting property in West Seattle comprising four separately platted lots denominated from east to west as lots 8, 9, 10, and 11. Documentary Record at 9 (cited as DR at __). There is a single-family house, built in 1952, on lots 10 and 11, the westernmost two of the four lots. DR at 18.

The City has established five types of land use approvals each of which have different procedural and substantive requirements. Seattle Municipal Code, § 23.76.004(A). The final decision on the various types of approvals ranges from administrative decisions by Department staff to final decisions by the City's Hearing Examiner to legislative decisions by the City Council. *Id.* An LBA is Type I administrative, non-discretionary minor land use approval that does not require public notice. The Department staff makes the final decision on Type I applications with no further administrative review of those decisions. *Id.*

Biddle's LBA sought to create three parcels on the property with different boundaries and areas than those of the original four lots. DR at 1. This required a two-step analysis by the City—first, the City had to determine how many legal building sites existed on the property; and, second, the City had to determine if the reconfigured parcels met its lot area requirements. A site plan showing the existing house, the dimensions and areas of the pre-existing lots, and the dimensions and areas of the three parcels resulting from the LBA is attached to this brief as Appendix A for the Court's convenience. DR at 1002.

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On December 20, David Allen, who identified himself as the Benchview Neighborhood Block Watch Captain, first contacted city officials about the LBA. DR at 53. The record reflects some 73 emails regarding the Biddle LBA from Allen and other residents of the Benchview neighborhood and between various city officials from December 20 through January 18 when the City approved the LBA. Index to DR at 2-7. These emails set forth the neighbor's concerns, ask questions concerning the procedures the City would follow and the regulations the City would apply in its review of the application, and offer reasons why the City should deny the application. DR at 51—272. Sometime before January 18, the Benchview neighbors sought advice of counsel concerning this matter. DR at 261 (email from David Allen to Andy McKim and Diane Sugimura dated January 18, 2013 "Our lawyers believe we are correct about the front yard definition.").

As a result of this outpouring of neighborhood concern, the Department carefully analyzed the issues pertinent to the Biddle LBA and prepared a detailed response to the questions and concerns raised by the neighbors. This response was distributed under a cover letter from Diane Sugimura, the Department's Director, dated January 16, 2013. DR 197—203. A copy of this letter and the accompanying detailed analysis is attached as Appendix B to this brief for the court's convenience. (Although Ms. Sugimura's letter is dated January 16, it appears that it was distributed by email on January 15. DR at 206 (email from Pamela Warren to Diane Sugimura sent on January 15 at 10:09 pm thanking Ms. Sugimura for the response.))

Ms. Sugimura stated that DPD had carefully reviewed the neighborhood's concerns and the regulations and code interpretations relevant to review of the LBA "at multiple management level discussions." DR at 197. She noted that, although a final decision had not

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yet been made, the application "appears to meet the applicable code standards." *Id.* The letter informed the neighbors that DPD was evaluating potential changes to the City's land use code to address the concerns raised by the neighbors and concluded: "I am sorry we are not able to offer a response that would be more satisfactory to you. We are bound by the adopted regulations." DR at 198.

On January 18, the Department staff member responsible for processing the application approved the LBA. DR at 41. Although this decision was entirely consistent with the detailed analysis by senior staff that preceded it, neither senior staff nor the public learned this decision had been issued for several days. DR at 391. Consequently the email exchanges between neighbors and City officials concerning the LBA continued unabated.

For our purposes here, three emails from Cynthia Kennedy to Andy McKim, apparently sent on behalf of some Benchview neighbors, and Mr. McKim's emailed response to Ms. Kennedy are most relevant. Those emails are in the record at DR 336-68 and have been attached to this brief as Appendix C for the convenience of the court.

The first email from Ms. Kennedy, dated January 22, asserts the house was oriented to 55th Avenue because its driveway and main entrance faced that street. This would mean there were only two legal building sites on this property. DR at 340-41. Her second email, dated January 28, notes Manning Street was not yet constructed when the house was built. DR at 339. The last email, dated January 29, provides an illustration showing the streets and sidewalks that existed when the house was built. DR at 338.

Mr. McKim's responded that the factors identified in Ms. Kennedy's emails regarding the orientation of the house are not the factors that the Department considers to determine a permissible orientation of the house for code purposes. Mr. McKim identified the question

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that the Department asks to make that determination: "[C]ould the house have been built to the same configuration, under the Zoning Code standards in effect in 1952, if Lots 8 and 9 were not a part of the property." DR at 336. Mr. McKim then stated the Department's conclusion: "based solely on the dimensions of the house and its distance from the lot lines" the existing house could have been built in its present location by treating Manning Street as the front lot line. DR at 337.

To support his analysis and to demonstrate the decision to approve the LBA followed DPD's longstanding and consistent interpretation of its regulations, Mr. McKim attached copies of:

- documents from an LBA approved in 1999 for the property immediately south of the property that is the subject of this petition where the same analysis was made as here, and
- minutes from four meetings dating from February 2002 to May 2004 where DPD considered how to best determine lot orientation and applied a similar analysis to that applied here.

The Department's decision on the 1999 LBA is particularly relevant here. In that case the existing house shared the same features noted by Ms. Kennedy in her communications with Mr. McKim—the house was deeply set back from and its driveway and its front door faced 55th Avenue. To approve this LBA, the Department had to conclude it was permissible to consider Orleans Street as the front yard of this house, not 55th Avenue. DR at 361, 363. The only significant difference between the 1999 LBA and the Biddle LBA is that the existing

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house in the 1999 LBA extended over three lots. DR at 363. This meant that only two buildable lots existed under the City's historic lot code provisions. DR at 757, ¶ 12.

ARGUMENT

1. *BENCHMARK CANNOT MEET ANY OF THE APPLICABLE STANDARDS FOR REVIEW OF THE CITY'S DECISION TO APPROVE THE LBA.*

As the party seeking relief, Benchview must establish that the City's decision to approve Biddle's LBA was improper for one or more of the reasons set forth in RCW 36.70C.130. There are three possible bases for such a finding: Benchview may assert that approval of the Biddle LBA resulted from an erroneous interpretation of the law, or that it resulted from a clearly erroneous application of the law to the facts, or that the City violated Benchview's constitutional rights. RCW 36.70C.130(1)(b, d, f).

Under the first two of these standards of review, the City's decision must be given deference. The City's interpretation is afforded deference precisely because it is *the City's* land use code that is being interpreted and the Department has expertise in the administration and interpretation of that code. *Timberlake Christian Fellowship v King county,* 114 Wn.App. 174, 180, 61 P.3d 332 (2002). The City's application of its code requirements to the circumstances of this LBA is given even greater deference—the Court can reverse that decision only if it is "clearly erroneous," that is, if the court is left with the definite and firm conviction that the City committed a mistake. *Lakeside Industries v. Thurston County*, 119 Wn. App. 886, 894, 83 P.3d 433 (2004). In applying these standards the Court must review "the evidence and any reasonable inferences in the light most favorable" to Biddle and the City. *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999).

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2. THE CITY'S DISCRETION TO REVIEW THE LBA WAS STRICTLY LIMITED.

Benchview's case is premised on two fundamental arguments: first, that the City should have considered the effect of approval of the Biddle LBA on the character of the Benchview neighborhood, Opening Brief at 2; and, second, that the City should not have followed the procedures prescribed in its land use code for reviewing an LBA because this "closed door" process shielded this LBA "from public review." Opening brief at 24-25. These arguments ignore the caselaw that strictly limits a municipality's discretion in reviewing an LBA.

The City Does Not Have the Discretion to Consider Neighborhood Character or Other Factors When Reviewing an LBA.

There is a triumvirate of cases that set the parameters of municipal discretion in reviewing an application to adjust the boundaries of existing lots. The first of these is *Island County v Dillingham Development Company,* 99 Wn.2d 215, 662 P.2d 32 (1983). *Dillingham* was decided just two years after the legislature amended the subdivision statute and exempted boundary line adjustments that did not create any additional lots from the substantive and procedural requirements of that statute. Island County contended that Dillingham's combination of some 400 parcels created by an 1890 plat into 118 lots that complied with current County zoning and health department requirements—thus rendering these lots buildable—constituted an illegal subdivision. *Dillingham* at 218. The *Dillingham* court held that because these boundary line adjustments "did not result in the creation of any additional lots," they were exempt from the subdivision process and the substantive requirements of the subdivision act. *Dillingham* at 223.

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The second case that is important here is *R/L Associates v Klockars,* 52 Wn.App. 726, 763, P.2d 1244 (1988). R/L Associates proposed to put an existing house, built over the common boundary line of two lots, entirely on one new lot to be created by changing the orientation of the two pre-existing lots. This would create a second building site. The City of Seattle denied this request and R/L Associates sued contending that, because there were to lots already in existence, a boundary line change that resulted in no more than two lots was permitted by the 1981 amendment to the subdivision statute. *Id.* at 730-731. The court upheld the City's denial of "[t]he drastic boundary change proposed by R/L . . . ." *Id.* at 732. The court went on to discuss the intent of the boundary line adjustment exception, noting that it "is a summary procedure that is not subject to the public scrutiny and control required by significant divisions of property," and that, "approval . . . is mandatory when the criteria are met." *Id.* at 733. The *Klockars* court determined that it was necessary to strictly construe this exemption to the statute because if it were not limited to only "minor or insignificant changes in property lines" it would be subject to "considerable abuse." *Id.*

Finally, in *Crispin v. Seattle,* 149 Wn.2d 896, 71 P.3d 208 (2003), the Court resolved the tension between *Dillingham* and *Klockars.* The primary issue in *Crispin* was whether the property "qualified for a boundary line adjustment for purposes of the exemption from the subdivision statutes." *Id.* at 902. The City denied a boundary line adjustment and its action was upheld in an unpublished decision by the Court of Appeals. *Id.* at 897. The *Crispin* court held the exemption applied because no new lots were created. *Id.* 905. In doing so, the Court found it necessary to discus both *Dillingham* and *Klockars* in detail. The unpublished appellate decision the *Crispin* court reversed relied on *Klockars* for the principle that the exemption was intended to apply only to "minor boundary changes, not to changes that result

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in increased development or density." *Id.* at 904. The *Crispin* court stated "*Klockars* directly conflicts with our holding in *Dillingham*;" and "the statute does not support the distinction the Court of Appeals draws between adjustments that are minor compared with substantial." *Id.* at 904-5.

By reaffirming *Dillingham's* holding that the exemption from the platting statute is available for boundary line adjustments that create no new lots and by holding that the analysis in *Klockars* had no support in the statutory language (and that it raised potential constitutional problems), *Crispin* strictly limited the extent of municipal discretion in reviewing boundary line adjustments. *Crispin* makes clear that the result Benchview seeks here—while permissible under Klockars—is no longer available.

> *The City must follow its prescribed procedures when reviewing LBA applications. To do otherwise would be reversible error.*

Benchview's arguments that the City violated Benchview's right to notice of the Biddle LBA and an opportunity to have its comments considered by the City are both factually and legally unsustainable.

To contend that the City's review of the Biddle LBA took place behind closed doors without public review requires this court to turn a blind eye to the record. In some instances it might be possible for the City to complete a Type I land use review without public input. But that was not the case here. The record is replete with comments from the Benchview neighbors and reflects a thorough and complete review of those comments by the Department. Even if the City had the discretion—and it did not—to require Biddle to complete a different process than the process prescribed in its land use code, it is hard to imagine a review process that would have resulted in greater public involvement than what occurred here. There is no

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factual basis to support the contention that Benchview did not have notice or an opportunity to comment on the Biddle LBA.

More importantly, the City has no discretion to vary from its prescribed process. The City's land use code classifies a Lot Boundary Adjustment as a Type I land use approval and all applications for Type I approvals must follow the Type I process prescribed in the City's code. The Land Use Petition Act codifies the longstanding rule in land use cases that municipalities must follow the procedures they have prescribed for review of land use applications or the municipal decision will be overturned on appeal: "The court may grant relief only if the party seeking relief has carried the burden of establishing… (a) The body or officer that made the land use decision . . . *failed to follow a prescribed process*". RCW §36.70C.130(1)(a). (Emphasis added.) If the City had done what Benchview requested below and what Benchview requests this court to order, its decision would have been subject to reversal for a failure to follow the process prescribed in its land use code.

Benchview seeks to avoid this result by arguing the Biddle LBA is not a minor land use decision like the other approvals the City has classified as Type I decisions because the Biddle LBA would cause a substantial change to the character of the neighborhood. Opening Brief at 25. But as discussed at length above, this argument ignores the clear holding in *Crispin.*

The Result Sought by Benchview Would Violate Biddle's Rights to a Decision Based on Clear and Ascertainable Standards.

The *Crispin* court identified a fundamental problem that arises if a municipality is free to determine the procedural and substantive requirements to be applied to review of an application for a land use approval based on a determination by an official of whether the

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approval would be "minor" or "substantial": "Nor would such a rule be workable, and would perhaps be unconstitutional." *Crispin* at 905. The Court went on to restate the general rule thus: "We have recognized that the regulation of land use must proceed under an express written code and not be based on ad hoc unwritten rules so vague that a person of common intelligence must guess at the law's meaning and application." *Id.*

Although *Crispin* involved a boundary line adjustment, our courts have repeatedly emphasized in many other circumstances that municipalities cannot base land use decisions on "whim, caprice, or subjective considerations." *Anderson v. City of Issaquah*, 70 Wn. App. 64, 81, 851 P.2d 744 (1993). Land use regulations must contain ascertainable standards to prevent arbitrary and discretionary enforcement of the law. *Grant County v. Bohne*, 89 Wn.2d 953, 955, 577 P.2d 138 (1978). Citizens "should be able to determine the law by reading the published code." *Burien Bark Supply v. King County*, 106 Wn.2d 868, 871-72, 725 P.2d 994 (1986).

The decision in *Burien Bark* is of particular interest because the court there noted that King County attempted to preserve the validity of its ordinance by arguing that the County's "common practice and understanding" in interpreting the code provision at issue was sufficient to provide fair notice of what the code permitted and prohibited. *Id.* at 872. The *Burien* court rejected that argument because "county employees could not agree among themselves whether the 'process' at Burien Bark Supply was 'limited.'" *Id.* There can be no question here that the City's "common practice and understanding" of how to apply its land use regulations in cases similar to the Biddle LBA provided fair notice of what is permitted and what is prohibited and that the City consistently applied its regulations to similar cases.

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Here, the City had to apply its established LBA procedures, even though Benchview argued for a different result. Biddle's application created no new lots, and under the court's holding in *Crispin*, the City could not apply an "ad hoc unwritten rule" to Biddle's application. Biddle was entitled to an LBA decision based on the City's code and the City's longstanding and consistent interpretation of that code. That is precisely how the City decided this case; and, therefore, the City's decision should be upheld.

3. THE CITY CONSISTENTLY APPLIED ITS LOT AREA EXCEPTION AND THE 75/80 RULE WHEN IT GRANTED THE LBA.

Just as Benchview advances an ad hoc alternative to the City's established LBA procedures, it also advances its own rationale for the proper way to determine the orientation of the lots on the Biddle property and for calculating the mean lot size under the 75/80 rule. The question is not whether this group of neighbors thinks the City should have different rules (or should have ignored its rules to achieve the neighbors' desired outcome); the question is whether the City was clearly erroneous in applying its existing rules.

The City's decisions regarding the front lot line and the 75/80 calculation reflect the City's consistent interpretation of its land use code. When determining the permissible orientation of a lot, the City selects the lot configuration that most complies with code provisions. The City asked whether the house could have been built to the same configuration under the 1952 code if Lots 8 and 9 were not part of the property. The City determined the answer to that question was "yes" if the house were oriented to Manning Street. The City has consistently applied this "code compliant" approach when determining the permissible orientation of a lot because the factors touted by Benchview (such as driveway location, main entrance location, etc.) can all change over time and presuppose a "traditional" home design.

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If a local government wanted to determine where a front yard must be located according to the factors identified by Benchview, it would certainly have the discretion to do so. Local governments can—and typically do—differ greatly in the application of bulk zoning requirements such as setbacks, lot coverage, and how to calculate building height. But the City of Seattle long ago determined that it is better to rely on the factors it considers most important to a consistent and fair application of its zoning regulations than to the factors Benchview would have the Department apply. As the Department recognized, it is not free to disregard its consistent interpretation of its code in order to achieve the result desired by Benchview.

The City's decision to approve an LBA in 1999 for the property immediately south of the Biddle property is the clearest example one could wish for to demonstrate that the city has consistently applied its land use regulations relating to LBAs in the same way it is applying them here. As Benchview notes, the houses built on these properties in 1952 are virtually identical in their relationship 55th Avenue. They both have driveways to their garages and walkways to their front doors from 55th Avenue and they both are setback deeply from 55th Avenue. Yet when the property to the south sought approval of an LBA some 14 years ago, the City applied precisely the same analysis to that LBA as it did here to the Biddle LBA. The City determined that it was permissible to determine that the front yard of that property ran along Orleans Street just as the City determined here that the front yard of the existing house on the Biddle property ran along Manning Street. If the City had adopted a different interpretation here to achieve the result sought by Benchview it would have violated Biddle's right to due process.

The City's calculation under the 75/80 rule also reflects its consistent approach. The

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City applies the 75/80 rule to lots where boundaries are adjusted through LBAs. The code requirements for application of the 75/80 rule are clear and unambiguous: lots that are at least 75% of the minimum required lot area and that are at least 80% of the average area of the other lots on the block face can be created by a lot boundary adjustment. SMC 23.44.0010(B)(1)(a)(2). Once the City determined that it was permissible orient the building site comprised of lots 10 and 11 to Manning Street, it had to use Manning Street as the relevant block face for purposes of application of the 75/80 rule. The lots to be considered in that calculation and their areas are shown on the drawing of the immediate vicinity that is attached to this brief as Appendix D. DR at 1003. The calculations needed to determine the minimums of application of the 75/80 rule are as forth in the record at DR 15. The lots created by the Biddle LBA meet the requirements of the 75/80 rule and the City had no discretion to deny the LBA.

To avoid inconsistent land use interpretations, the City cannot base its decisions on community opinion. Courts have repeatedly rejected decisions based on "community displeasure and not on reasons backed by policies and standards as the law requires." *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 805, 801 P.2d 985 (1990); *see also Indian Trail Prop. Ass'n v. City of Spokane*, 76 Wn. App. 430, 439, 866 P.2d 209 (1994); *Kenart & Associates v. Skagit County,* 37 Wn. App. 295, 303, 680 P.2d 439 (1984). Benchview's fundamental basis for the result it seeks is community concern over damage to the perceived character of its neighborhood. That is not a proper basis for making a land use decision.

The City's interpretation of its lot-area exception and its 75/80 rule was grounded firmly in the text of its code and the City applied these rules in a consistent manner. The City

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cannot ignore established rules and interpretations to address community displeasure. The City's decision to approve the Biddle LBA was proper.

CONCLUSION

The City could not do what Benchview has required without ignoring the clearly established limits on its discretion and without abandoning its consistent and longstanding interpretation and application of its zoning requirements. Had the City done what Benchview asks this court to order it to do, the City would have violated Biddle's rights to a fair and impartial review of his application for approval to the LBA.

Seattle has recognized the concerns expressed by Benchview and is considering changes to the way it handles small lot development to address those concerns. That is the only proper way to proceed.

The City has acted as it must under the law and its decision should be upheld.

DATED this lst day of July, 2013.

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