SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 47900-1-II)

SCHNITZER WEST, LLC, a Washington limited liability company,

Respondent,

v.

CITY OF PUYALLUP, a Washington municipal corporation,

Appellant,

and

NEIL ARTHUR VAN LIEROP, an individual, and VAN LIEROP INVESTMENT COMPANY, INC., a Washington company, and VAN LIEROP BULB FARMS, INC., a Washington Company,

Additional Parties.

APPELLANT CITY OF PUYALLUP'S ANSWER TO BRIEF OF AMICUS CURIAE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON IN SUPPORT OF RESPONDENT'S PETITION FOR REVIEW

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I. INTRODUCTION

Appellant City of Puyallup hereby answers and opposes the January 13, 2017 brief of amicus curiae Building Industry Association of Washington (BIAW) in the above-captioned matter. BIAW mischaracterizes the local enactment challenged in this appeal as a site-specific rezone subject to judicial review under the Land Use Petition Act (LUPA). This argument disregards both a longstanding body of precedent and the unambiguous language of LUPA itself. No reported Washington case has ever recognized LUPA jurisdiction where the challenged local zoning action was self-initiated by a municipality's legislative body rather than a separate project applicant.

The Court of Appeals correctly followed this well-established body of law in dismissing Schnitzer's LUPA appeal on jurisdictional grounds. BIAW is unable to demonstrate that the Court of Appeals' decision conflicts with any existing Washington precedent or otherwise satisfies the standards for the Supreme Court's acceptance of review under RAP 13.4(b). Schnitzer's petition for review should be denied.

II. ARGUMENT

2.1 Ordinance No. 3067 Is Not a Site-Specific Rezone.

BIAW's primary argument contends that the Court of Appeals erred by refusing to characterize Puyallup Ordinance No. 3067 as a site-specific

rezone. *Amicus Brief at 4-6.* This assertion is wrong. While BIAW cites the correct legal standard in this regard, the Association severely misconstrues it.

"A site-specific rezone is a change in the zone designation of a specific tract at the request of specific parties." *Kittitas County v. Kittitas County Conservation Coalition*, 176 Wn. App. 38, 50, 308 P.3d 745 (2013) (emphasis added) (citation and internal punctuation omitted). The substance of this common law definition has remained unchanged for almost 40 years. *See, e.g., Woods v. Kittitas County*, 162 Wn.2d 597, 611 n.7, 174 P.3d 25 (2007) (citing *Cathcart–Maltby–Clearview Cmty. Council v. Snohomish County,* 96 Wn.2d 201, 212, 634 P.2d 853 (1981)). No reported Washington case has ever recited the site-specific rezone standard without acknowledging the "at the request of specific parties" requirement.

As the Court of Appeals correctly concluded, Ordinance No. 3067 does not—and cannot—meet this definition because the enactment was self-initiated by the Puyallup City Council and thus did not stem from the request of any "specific parties." *Schnitzer West, LLC v. City of Puyallup*, 196 Wn. App. 434, 440-44, 382 P.2d 744 (2016). Like Schnitzer below, BIAW strains credibility by contending that the City Council itself is a "specific party" within the meaning of the site-specific rezone definition. *Amicus Brief at 4-6.* This position is untenable.

It is well-established under Washington law that the decision to rezone land is statutorily reserved to a municipality's local legislative body as a non-delegable function. *See* RCW 35A.63.100; RCW 35A.63.170(2)(c); RCW 35A.11.020; *Teed v. King County,* 36 Wn. App. 635, 642-43, 677 P.2d 179 (1984). As such, every rezone (including all site-specific rezones) must necessarily be approved by the city council. It is axiomatic that a city council acts with plenary authority in this context; nothing in Washington law remotely suggests that the council must "request" a rezone from itself any more than it must "request" its own permission to levy a tax or order a public works improvement. A local legislative body does not engage in the circular and nonsensical exercise of asking approval from itself; it instead simply acts *sua sponte* in accordance with its statutory powers. No Washington precedent conflicts with the Court of Appeals' unremarkable holding in this regard. *Schnitzer*, 196 Wn. App. at 442.

Moreover, if the city council itself was a "specific party" under the caselaw standard for site-specific rezones as BIAW contends, there would be no reason for Washington courts to have deliberately used the term "specific parties" in the first instance. The term has meaning only if the qualifier "specific" is construed as referring to parties other than the municipality to whom the rezoning request is made. If the judiciary had intended for self-

initiated enactments to fall within the scope of the site-specific rezone definition, it could have easily framed the relevant standard accordingly. E.g.:

> A site-specific rezone is a change in the zone designation of a specific tract ~~at the request of specific parties~~.
>
> or
>
> A site-specific rezone is a change in the zone designation of a specific tract at the request of specific parties or at the direction of the local legislative body.

No reported Washington case has ever done so.

A municipality's governing body is the ultimate decision-maker in this context and is the recipient to whom a particular rezone applicant's request is ultimately directed. The city council itself is not a "specific party" in a local rezone proceeding any more than a superior court judge is a "specific party" with respect to a civil lawsuit over which he/she presides. BIAW's contrary argument is without merit.[1]

2.2 A Project-Specific Land Use Development Application Is A Prerequisite To LUPA Jurisdiction.

BIAW complains that the Court of Appeals elevated form over substance in concluding that Ordinance No. 3067 was not a "land use

[1] Ordinance No. 3067 is also not a site-specific rezone for a separate reason: The ordinance is not limited to "a specific tract", *Kittitas County*, 176 Wn. App. at 50 (emphasis added); the geographic reach of the ordinance currently affects multiple parcels, and by its terms will govern all future properties added to the ML-SPO overlay. CP 205-11. BIAW's assertion that the ordinance affects only "one particular property", *Brief of Amicus Curiae at 5-6*, is a misrepresentation.

decision" under LUPA because the zoning code amendments contained in that ordinance did not result from a particular party's application. *Amicus Brief at 1-2,4-6.* Tellingly, however, BIAW does not cite—much less attempt to construe—the codified definition of this term:

> "Land use decision" means a *final determination* by a local jurisdiction's body or officer with the highest level of authority to make the determination. . . *on*:
>
> (a) An *application* for a *project permit* or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used[.]

RCW 36.70C.020(2)(a) (emphasis added).

This definition is controlling. While the statutory term "project permit" includes certain types of site-specific rezones, *see* RCW 36.70B.020(4), reclassifications of this type constitute "land use decisions" under LUPA only if they represent the municipality's "final determination" on a project-specific "application". *Id.*

Neither Chapter 36.70C RCW nor Chapter 36.70B RCW defines the term "site-specific rezone". But by including this phrase within LUPA's statutory framework, the Legislature is presumed to have known and adopted the pre-existing common law definition of that term—including the requirement that site-specific rezones must be "requested" by "specific parties". *See, e.g., Price v. Kitsap Transit,* 125 Wn.2d 456, 463, 886 P.2d 556

(1994) ("The Legislature is presumed to know the existing state of the case law in those areas in which it is legislating"). Both this longstanding judicial definition and the statutory requirement of an "application" as a prerequisite to a "land use decision" underscore the dispositive point in this case: LUPA applies only to rezone requests that are "requested" by parties through a formal "application".[2]

For this reason, BIAW misses the mark by suggesting that a land use application represents a meaningless "piece of paper" in this context. *Amicus Brief at 2, 6.* Chapter 36.70C RCW expressly predicates the superior court's subject matter jurisdiction under LUPA upon the submittal of, and a local government's final determination on, a specific development proposal in precisely this manner. RCW 36.70C.020(2)(a); RCW 36.70C.030. As a basic rule of construction, the Legislature's inclusion of this statutory term was presumptively deliberate; the term must, as a matter of law, be interpreted in a manner that affords it full meaning. *See Ralph v. Dept. of Natural Resources*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014). BIAW cites no authority contradicting the Court of Appeals' holding to this effect.

[2] BIAW's reliance upon Puyallup Municipal Code (PMC) Section 20.11.005 is misplaced. That provision does not even reference site-specific rezones, and certainly does not—and could not—alter the controlling state law standards for that term in any event.

2.3 BIAW's Policy Arguments Are Unavailing.

BIAW contends that the Court of Appeals' decision in *Schnitzer* will "enable arbitrary action against individual landowners by local governments" and will "make developers reluctant to disclose their future plans". *Amicus Brief at 6-7.* The Association likewise suggests that aggrieved parties will be left without an appellate venue for government-initiated zoning actions. *Amicus Brief at 2.* For several reasons, BIAW's various policy arguments are unpersuasive and do not warrant Supreme Court review of this case.

First, and most fundamentally, BIAW's arguments wrongly presume that the *Schnitzer* decision represents a shift in the law in the first instance. This premise is simply incorrect. The requirement that a site-specific rezone must be "requested" by "specific parties" has been a bedrock fixture of Washington land use law for decades. *See, e.g., Woods*, 162 Wn.2d at 611 n.7 (citing *Cathcart–Maltby–Clearview Cmty. Council,* 96 Wn.2d at 212). The express statutory prerequisite of a project-specific "application" in order to invoke LUPA jurisdiction has likewise remained unmodified since the original enactment of Chapter 36.70C RCW in 1995. *See* Wash. Laws 1995 c 347 §703. No reported Washington case has ever characterized a council-initiated land use action as a site-specific rezone, or has otherwise recognized LUPA jurisdiction without the requisite application from a project proponent.

The Court of Appeals' decision in *Schnitzer* reflects, and is facially consistent with, this longstanding body of law.

Second, irrespective of the merits of BIAW's various policy arguments, they are eclipsed by the plain language of Chapter 36.70C RCW itself. LUPA jurisdiction is unequivocally predicated upon an applicant's specific land use application. RCW 36.70C.020(2)(a). Given the statute's clarity in this regard, it is apparent that BIAW's true quarrel is with the underlying legislation rather than the *Schnitzer* Court's interpretation of it. Courts must refrain from amending statutes by judicial construction and do not legislate from the bench. *Millay v. Cam,* 135 Wn.2d 193, 203, 955 P.2d 791 (1998). This rule applies with particular force in the context of LUPA, where judicial expansion of the courts' strictly limited jurisdiction is prohibited. *Durland v. San Juan County*, 175 Wn. App. 316, 324, 305 P.3d 246 (2013). BIAW's policy arguments are subordinate as a matter of law to these basic jurisprudential concepts.

Third, BIAW's contention that the *Schnitzer* decision will "chill[] pre-application communications between developers and local governments" should be dismissed as a red herring. *Amicus Brief at 6-7.* Under BIAW's argument, developers would be reluctant to share their development plans with municipal planning staff if they feared the municipality would

subsequently rush to take legislative action aimed at thwarting unpopular proposals. *Id.* BIAW's theory disregards that local governments are already empowered to adopt immediately-effective moratoria and interim zoning ordinances, with no advance warning or public notice, for precisely this purpose. *See* RCW 36.70A.390; RCW 35A.63.220; *Matson v. Clark County Bd. of Comm'rs*, 79 Wn. App. 641, 644-49, 904 P.2d 317 (1995).[3] Nothing in the Court of Appeals' decision alters this longstanding authority or otherwise changes the dynamic between development applicants and local governments.

Finally, the suggestion that *Schnitzer* will leave affected landowners "without the possibility of appeal" from council-initiated zoning amendments, *Amicus Brief at 2*, is simply incorrect. The Growth Management Hearings Board (GMHB) has exclusive jurisdiction over challenges to local "development regulations" of the type contained in Ordinance No. 3067. *See* RCW 36.70A.030(7); RCW 36.70A.280(1)(a). And where, as here, a local ordinance contains amendments to both the text of a municipality's development code and it's zoning map, *see* CP 205-11, the entire enactment is subject to review by the GMHB as a matter of law. *See, e.g., Bridgeport Way Community Ass'n v. City of Lakewood*, CPSGMHB Case No. 04-3-0003, Final

[3] Developers can preserve their vested rights by filing a complete plat (or building permit) application - just as Schnitzer did in the instant case. RCW 58.17.033; RCW 19.27.095. CP 9.

Decision & Order (July 14, 2004), at 8. Nothing in the Court of Appeals' decision changes this longstanding rule or otherwise prevents affected landowners from challenging local zoning enactments. *Schnitzer* instead merely follows existing precedent by reaffirming the GMHB—*where Respondent Schnitzer West, LLC's challenge to Ordinance No. 3067 is currently pending*—as the exclusive venue for such appeals.

III. CONCLUSION

Local zoning enactments that are legislatively initiated by a municipality's governing body fall beyond the scope of the Land Use Petition Act. The Court of Appeals' dismissal of Schnitzer's LUPA appeal on this ground was compelled by the clear text of Chapter 36.70C RCW and is consistent with all relevant caselaw. Although Amicus BIAW suggests that the Court of Appeals' decision represents a sea change in Washington land use law, it identifies no authority that actually contradicts the *Schnitzer* Court's holding. BIAW has not demonstrated that this case meets the criteria for Supreme Court review under RAP 13.4(b).

RESPECTFULLY SUBMITTED this 2nd day of March, 2017.

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CERTIFICATE OF SERVICE

I certify that on the date below, I e-filed this document with the Supreme Court at Supreme@courts.wa.gov, and provided copies of the foregoing upon the following counsel:

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