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COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

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Brad Chinn, *Petitioner*

v.

West Central Development, LLC; City of Spokane, *Respondents*

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REPLY BRIEF  
OF  
RESPONDENT  
WEST CENTRAL DEVELOPMENT LLC

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Stacy A. Bjordahl, WSBA No. 32217  
Attorneys for Respondent West Central Development LLC

PARSONS/BURNETT/BJORDAHL, LLP  
505 West Riverside Avenue, Suite 500  
Spokane, Washington 99201  
(509) 252-5066

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## I. INTRODUCTION

The key issue before the Court is whether the City's Comprehensive Land Use Policy LU 1.5 restricts *all* new office and retail uses to only those geographic areas of the City that are located in centers, corridors, and higher intensity office areas around downtown Spokane in the North Bank and Medical Districts as shown in the Downtown Plan.

The Spokane City Council, as the legislative body interpreting its own land use policies and Comprehensive Plan, correctly determined that Land Use Policy 1.5 does not prohibit office and retail uses in other areas of the City, including the subject property. The plain language of Land Use Policy LU 1.5 and the Spokane Municipal Code provisions comport with the City Council's interpretation.

## II. ARGUMENT IN REPLY

It is important to emphasize to the Court that the City Council did not reverse the Hearing Examiner and approve the rezone requested by West Central Development LLC ("West Central"), it simply ruled that the Hearing Examiner made an erroneous interpretation of Land Use Policy LU 1.5 and remanded the rezone application for further processing. AR, 25-30.

Under the Land Use Petition Act, a court can only review a “land use decision”-the “final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals.” RCW 36.70C.020(1). Here, the decision that is the subject of the land use petition is the City Council's decision to remand the rezone application to the Hearing Examiner. The court may grant relief only if Mr. Chinn, as the party seeking relief from the land use decision, has carried the burden of establishing that one of the standards for relief under LUPA has been met.

This court's review of any claimed error of law in the City Council's interpretation of city ordinances [Land Use Policy LU 1.5] is *de novo* and must accord deference to the City Council's expertise. *Isla Verde Int'l Holdings Inc. v. City of Camas*, 146 Wash.2d, 740, 751, 49 P.3d 867; RCW 36.70C.130(1)(b). Contrary to Mr. Chinn's assertion, it is the City Council, not the Hearing Examiner, which is entitled to determine all questions of how its own ordinances and procedures should be interpreted and applied. See *Citizens to Preserve Pioneer Park LLC v. City of Mercer*, 106 Wn.App. 461, 474 24 P.3d 1079 (2001); RCW 36.70C.130(1)(b). In this case, deference must be granted not to the Hearing Examiner, but to the City Council.

A. **The City Council Correctly Determined that Land Use Policy LU 1.5 does not prohibit approval of the Office Retail zone on the Subject Property.**

For the Court's reference, Land Use Policy LU 1.5 is set forth herein:

Land Use Policy 1.5

*Direct new office uses to centers and corridors designated on the land use plan map.*

**Discussion:** Office use of various types is an important component of a center. Offices provide necessary services and employment opportunities for residents of a center and the surrounding neighborhood. Office use in centers may be in multi-story structures in the core area of the center and transition to low-rise structures at the edge.

To ensure that the market for office use is directed to centers, future office use is generally limited in other areas. The Office designations located outside centers are confined to the boundaries of existing office designations. Office use within these boundaries is allowed outside of a center.

The Office designation is also located where it continues an existing office development trend and serves as a transitional land use between higher intensity commercial uses on one side of a principal arterial street and a lower density residential area on the opposite side of the street. Arterial frontages that are predominantly developed with single-family residences should not be disrupted with office use. For example, office use is encouraged in areas designated Office along the south side of Francis Avenue between Cannon Street and Market Street to a depth of not more than approximately 140 feet from Francis Avenue.

Drive-through facilities associated with offices such as drive-through banks should be allowed only along a principal arterial street subject to size limitations and design guidelines. Ingress and egress for office use should be from the arterial street. *Uses such as*

*freestanding sit-down restaurants or retail* are appropriate only in the office designation located in higher intensity office areas around downtown Spokane in the North Bank and Medical Districts shown in the Downtown Plan.

Residential uses are permitted in the form of single-family homes on individual lots, upper-floor apartments above office, or other higher density residential uses.

*Comprehensive Plan Land Use Policy 1.5* (Emphasis added).

1. *Land Use Policy LU 1.5 is predominantly about new office use, not retail uses.*

Land Use Policy LU 1.5 is primarily concerned with new office use, not retail. Indeed, the policy states “Direct new office uses to centers and corridors designated on the land use plan map.”

In rendering their decision to reverse the Hearing Examiner’s interpretation of Land Use Policy 1.5 and remand the rezone application to the Hearing Examiner, the City Council stated:

Specifically, the City Council has determined that the Hearing Examiner's decision contained a misinterpretation of the City’s Comprehensive Plan in his analysis of whether the application met the requirements of SMC 17G.060.170. SMC 17G.050.170 C.2 provides that the proposal is to be consistent with the comprehensive plan designation and the goals, objectives and policies for the property. The Hearing Examiner concluded that Land Use Policy 1.5 prevents approval of the application because the proposed rezone from O-35 to OR-150 would not be consistent with the Comprehensive Plan Policy of directing new office use to centers and corridors

designated on the Land Use Plan Map.

The City Council determined that decision misinterprets the Comprehensive Plan. LU 1.5 provides that to ensure that the market for office use is directed to centers, future office use is *generally* limited in other areas. LU 1.5 goes on to state that office designations located outside centers are confined to the boundary of the existing office designations and that office uses within these boundaries are allowed outside of a center.

AR, 26. (Emphasis in original.).

The City Council carefully considered whether Land Use Policy LU 1.5 is intended to restrict certain uses (e.g. office and retail) to centers, corridors and the Downtown area. As the interpreter of its own laws and policy, the City Council has the authority to determine the meaning and intent of Land Use Policy LU 1.5 and find that the Hearing Examiner made a misinterpretation of the law. The City Council is the ultimate arbiter of whether a particular action violates its own enacted ordinances. *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App 461 (2001). In this case, the City Council found that Land Use Policy 1.5 *does not* restrict new office and retail uses to centers, corridors and the Downtown Plan area only. Therefore, the City Council's decision must be affirmed.

2. *Land Use Policy LU 1.5 only seeks to limit freestanding retail uses to certain geographic areas of the City.*

In his Response Brief, Mr. Chinn does not dispute, refute or advance any contrary argument regarding the distinction of *freestanding* retail uses in areas outside of the Downtown Plan. His Response Brief is thunderous in its silence on this issue.

Instead, Mr. Chinn attempts to distract the Court by arguing that the City Council did not make findings of fact regarding the “retail” component of the rezone and the subject property’s proximity to the North Bank and Medical District areas on the Downtown Plan. Response Brief, pg. 8. This is irrelevant because West Central’s rezone proposal does not involve freestanding retail uses.

The relevant language of Land Use Policy 1.5 states:

Drive-through facilities associated with offices such as drive-through banks should be allowed only along a principal arterial street subject to size limitations and design guidelines. Ingress and egress for office use should be from the arterial street. *Uses such as freestanding sit-down restaurants or retail* are appropriate only in the office designation located in higher intensity office areas around downtown Spokane in the North Bank and Medical Districts shown in the Downtown Plan.

*Comprehensive Plan Land Use Policy 1.5 (Emphasis added).*

The express language in Land Use Policy LU 1.5 regarding retail uses in or around the North Bank or Medical District *applies only if the retail use is freestanding*. Because West Central's rezone proposal does not include a freestanding retail use, the language in Land Use Policy 1.5 pertaining to the North Bank or Medical District areas is inapplicable.

a. *The Spokane Municipal Code expressly allows the Office Retail zone and retail uses outside of the Downtown Plan.*

West Central's, as well as the City Council's, interpretation of Land Use Policy LU 1.5 regarding retail uses outside of the Downtown Plan is supported by, and consistent with, the Spokane Municipal Code.

First, the Spokane Municipal Code discusses "characteristics" of the various commercial zones. For the Office Retail zone sought by West Central, the Spokane Municipal Code states:

The office retail zoning category is located in areas designated office on the land use plan map of the comprehensive plan that are within the higher intensity office areas around downtown Spokane in the north bank and medical districts shown in the downtown plan. *The office retail zone is also applied to sites outside of the areas designated for higher intensity office use that are already developed with higher intensity retail and service uses.* It is intended to be a higher intensity office zone that allows for larger scale offices and supporting retail and service uses. *The size of retail uses is limited to reduce the detrimental impacts on nearby residential uses and to assure that the*

*commercial uses are supporting rather than primary uses.*

SMC 17C.120.030(B) (Emphasis added).

In his Response Brief, Mr. Chinn fails to address the language contained in the Office Retail (OR) zone which discusses that the OR zone is also applied to *other sites*. Instead, Mr. Chinn is “putting all of his eggs in one basket,” so to speak, and argues that Office Retail and retail uses are only allowed in areas around downtown Spokane in the North Bank and Medical Districts shown in the Downtown Plan. Response Brief, pg. 10. The express language of the Spokane Municipal Code states otherwise: it is applied to *other sites* outside the Downtown Plan.

Second, the Spokane Municipal Code includes various commercial zoning categories which are allowed in areas designated as Office on the City’s Comprehensive Plan. The Spokane Municipal Code specifically states: “*The [commercial] zones are for areas of the City designated by the comprehensive plan for office and commercial uses.*” SMC 17C.120.010 (“Purpose”) (Emphasis added). These zones include Office and Office Retail<sup>1</sup>. SMC 17C.120.020. The Spokane Municipal Code further states: “The commercial zones listed in this chapter [Chapter

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<sup>1</sup> West Central is seeking a rezone from Office to Office Retail.

17C.120-Commercial Zones] are separate from the downtown “CBD” zones and the center and corridor “CC” zones.” SMC 17C.120.010. (Emphasis added).

Third, the Spokane Municipal Code lists the commercial zones which apply *outside* of the Downtown Central Business District and centers and corridors. They include, among others, both the Office and Office Retail zones. SMC 17C.120.020 (“List of the Commercial Zones”). Stated another way, the Office and Retail Office zones are expressly intended to apply to sites outside of the Central Business District (aka Downtown) and centers and corridors. The Spokane Municipal Code states: “The CBD zoning standards are located in SMC 11.19.194. The CC [centers and corridors] zoning standards are located in chapter 17C.122 SMC.” SMC 17C.120.010 (“Purpose”). This is significant because Mr. Chinn argues that the Office Retail zone and retail uses are limited to those areas within and around the Downtown Plan. The Spokane Municipal Code holds otherwise.

As noted above, the “characteristics” of the Office Retail zone expressly state that retail uses are allowed in areas that are not on the Downtown Plan or located in centers and corridors. Furthermore, the Office Retail zone includes specific limitations on retail uses (e.g. 10%

maximum floor area) to *reduce the detrimental impacts on nearby residential uses and to assure that the commercial uses are supporting rather than primary uses.*

Notably, the Spokane Municipal Code does not contain any limitation on the geographic location of retail sales and service in the OR zone. In other words, the Office Retail zone does not limit retail sales and service to areas around the Downtown Plan, the Medical District or North Bank, as the Hearing Examiner and Mr. Chinn suggest.

Even if it was assumed that Land Use Policy 1.5 operates to restrict retail sales and services to certain geographic areas of the City, the law is very clear that any conflict between a city's Comprehensive Plan and a specific zoning regulation must be resolved in favor of the zoning regulation. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash. 2d. 861, 873, 947 P.2d 1208 (1997). In this case, while Land Use Policy LU 1.5 may seek to “direct” retail uses to certain geographic areas of the City, it must yield to the more specific zoning regulation, which does not restrict location.

**B. The Superior Court erred in reversing the City Council’s decision and finding that West Central Development’s rezone application for office/retail would create a precedent in violation of the City’s Comprehensive Plan.**

West Central Development hereby adopts by reference the reply

brief submitted by the City of Spokane on this issue, as if fully set forth herein.

C. **The Superior Court erred when it found that neither the staff nor the City Council analyzed the impact of new “retail” use.**

In his Response Brief, Mr. Chinn alleges that the City Council’s failure to adopt findings of fact related to the new retail component is a fatal flaw and thus, their decision should be reversed response brief, pg 12. This is incorrect.

The City Council has the authority to affirm, reverse, modify or remand a decision of the hearing examiner. SMC 17G.050.350 (“Council Action on Appeal”). In this case, the City Council *remanded* the matter to the Hearing Examiner on the basis that he erroneously misinterpreted Land Use Policy LU 1.5 and directed the Hearing Examiner to process the application consistent with their decision. AR 25-30.

Under the Spokane Municipal Code procedures for appeals, the City Council *is not* required to adopt findings of fact when it *remands* a decision to the Hearing Examiner. SMC 17G.050.350 (“Council Action on Appeal”). The City Council is only required to set forth in its written remand order its reasons and the issues to be considered by the hearing examiner on remand. *Id.* The City Council is only required to make

written findings and conclusions when it *reverses* the hearing examiner.

*Id.*

As discussed previously in this Reply Brief, the “pivotal” findings of fact that Mr. Chinn relies upon are those that relate to the subject property’s proximity to the Downtown Plan and whether it is in a center or corridor. Response Brief, pgs. 10-12. Because the City Council determined that Land Use Policy LU 1.5 does not require property to be located within the Downtown Plan or a center or corridor in order to be rezoned to Office Retail, the Hearing Examiner’s findings of fact concerning the same are irrelevant.

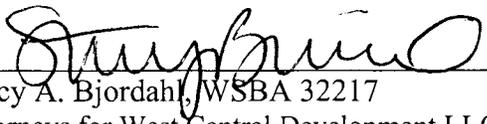
Both the Hearing Examiner and the Superior Court erroneously interpreted the law and committed reversible error. Each erroneously interpreted the law by finding that new retail uses are only allowed in the Downtown Plan area. Therefore, the decision of the City Council must be affirmed.

### III. CONCLUSION

As discussed herein, the City Council's interpretation of Comprehensive Plan Policy 1.5, and its decision to remand the matter to the Hearing Examiner, were not based upon an erroneous interpretation of law; therefore the Superior Court's decision should be reversed and the City Council's decision should be affirmed. Further, the City Council's findings that the rezone application will not have an adverse precedential effect should be affirmed.

Respectfully submitted this 22<sup>nd</sup> day of October, 2009.

*PARSONS/BURNETT/BJORDAHL, LLP*

  
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Stacy A. Bjordahl, WSBA 32217  
Attorneys for West Central Development LLC

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby declare under penalty of perjury and the laws of the State of Washington that on the 22nd day of October, 2009, I caused a true and correct copy of the of the REPLY BRIEF OF RESPONDENT WEST CENTRAL DEVELOPMENT LLC, to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following:

Michael J. Piccolo City of Spokane 808 W. Spokane Falls Blvd Spokane WA 99201	<input type="checkbox"/> US Mail <input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy (Fax)
Lisa Dickinson Dickinson Law Firm PLLC 1320 N. Atlantic St, Suite B Spokane WA 99201	<input type="checkbox"/> US Mail <input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy (Fax)

EXECUTED on the 22nd day of October, 2009 at Spokane, Washington.

By:   
STACY A. BJORDAHL