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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

NO. 277950
40104-5-II
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BRAD CHINN,

Respondent,

v.

CITY OF SPOKANE, Et al,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES ON APPEAL

- 1) Was the Superior Court correct in finding that the City Council made an error in law when approving West Central Development's rezone application from Office-35 to Office Retail-150?
- 2) Was the Superior Court correct in reinstating the Hearing Examiner's findings regarding whether the West Central rezone would create a precedent for future rezones?
- 3) Was the Superior Court correct in giving deference to the Hearing Examiner's factual findings on retail use when it found the City did not analyze the impact of new retail use?

II. STATEMENT OF THE CASE

West Central Development, LLC (hereinafter referred to as "West Central") filed an application for a rezone of property located at: 1301, 1309, 1315, 1321 & 1325 W. Mallon Ave., 817 N. Adams St., and 1324 and 1328 W. Broadway from O-35 (Office up to 35 feet in height) to OR-150 (Office Retail up to 150 feet in height). AR Sec.1, pg 46-60.

During the comment period, one entity, the West Central Neighborhood Council sent a letter approving plans for this project at its

meeting. AR Sec. 1 pg. 179. However, many other persons, entities and offices in the neighborhood, (namely, Frank Hoover, attorney, Salem Congregation, Mark E. Vovos, attorney, Patrick Copeland Malone, Brad Chinn, Spokane Preservation Advocates, Phillip J. Wetzel, attorney, and Frank Hoover, attorney), filed comments expressing concern about the project. AR Sec. 1, pgs. 143, 144, 145, 150, 163, 164, 166, 168.

A hearing was held on November 15, 2007, and testimony in opposition to the rezone was given during that hearing. AR Sec. 1 p. 16-37. Opponents discussed concerns in regard to: the rezone not preserving important view corridors and views to landmarks such as the Courthouse, in violation of the Comprehensive Plan; the precedent setting effects of this rezone; the Comprehensive Plan does not allow random inclusions of tall buildings; there should be gradual transitions between more intensive commercial zones and residential zones; this would not keep the historical character of the neighborhood of mostly buildings of 3 stories or less; and the rezone is not of a type, scale, orientation and design that maintains or improves the character, aesthetic quality, and livability of the neighborhood in violation of the Comprehensive Plan. AR Sec. 1 p.29, 30, 32, 33, 34.

The surrounding conditions of the property seeking rezone include the Courthouse complex zoned CB-150 (Community Business) designated

“Institutional” in the Comprehensive Plan. AR, Sec. 1, pg. 9. To the south, west, and north, the properties are zoned O-35, and are developed with small scale offices, many of which are in former residences. There are also some residential uses of varying densities. AR Sec. 1, pg. 9.

The Hearing Examiner denied the rezone request on November 30, 2007. CP 21-27. The Hearing Examiner could not find that the application was consistent with the City’s Comprehensive Plan pursuant to SMC 17G.060.170. CP 21-27. He concluded that the intent of the Plan is to have more intense uses located at the core of centers rather than outside those centers, even if they are located on a site with an existing office designation. CP 25. This area is not within the areas shown in the Downtown Plan, and is not within a neighborhood center or within the Downtown Planning Area as the Comprehensive Plan envisions. CP 26.

The Hearing Examiner further found that even if the center were expanded to include this site, it would still be difficult to approve a 150 foot building without some other change in the regulations. CP 26. The Hearing Examiner found that **“this zone change clearly sets a precedent for other zone changes in the area to O-150 or OR-150”**. CP 26. If this zone change is granted outside a center and outside of the downtown planning area and the core area, despite the language in the

Comprehensive Plan, there are many more areas of the City where the same rezone request would have to be approved. CP 26.

On December 13, 2007, West Central appealed the Hearing Examiner's decision to the City Council. AR Sec. 1 p. 1-7. After a closed record appeal hearing on April 7, 2008, the City Council reversed the Hearing Examiner's decision and remanded the application back to the Hearing Examiner to process the application consistent with their decision of May 5, 2008. CP 17-20. The City stated that it "does not consider this decision as setting precedent for all future rezone applications from O-35 to O-150 given that each application has its own set of circumstances and surrounding environments". CP 18. Specific findings regarding the retail aspect were not made in the decision, or during the City's proceedings on April 28, 2008. CP 17-20, AR Sec. 3, Transcript p. 71-86.

The Superior Court reviewed the matter and reversed the City Council's decision, reinstating the Hearing Examiner's decision. CP 125. Specifically, the Court found that the Hearing Examiner's "reasoning is approved to the effect he determined the new retail component inherent in a reclassification from O-35 to OR-150 is a marked departure from the existing zone classification". CP 124. Therefore, the conclusion is that new retail use in this area would be inconsistent with the Comprehensive Plan and Land Use Policy 1.5. CP 124.

Further, as the City provided no analysis as to the effect of the addition of “retail” use to the “office” use entailed in a rezone from “O” to “OR”, the hearing examiner’s decision is entitled to deference. CP 124. In view of Spokane’s policy in regard to amending the comprehensive plan through amendment and traditional land use planning and policy in general which discourages “spot” zoning and piecemeal development, the Court found that the hearing examiner’s findings are sound. CP 123, 124.¹

III. SUMMARY OF ARGUMENT

The Superior Court was correct in holding that the City Council’s decision reversing the Hearing Examiner’s Decision was an erroneous interpretation of the law. The City did not make findings in regard to the retail portion of the rezone. Therefore, the Hearing Examiner’s findings of fact as to retail, and to the impact on surrounding properties are the only findings in this case. No new evidence was introduced in front of the City Council, as they did not allow the record to be supplemented. The

¹ While Appellants cite the Superior Court as saying that the height change, in itself, is not inconsistent with the Comprehensive Plan, CP 117, (in regard to “Office” only), the Court did not find that a rezone from O-35 to O-150 should be automatically approved under the Comprehensive Plan and Code, but rather that it would still need to be examined under SMC 17G.060.010(5), “The proposal will not have a significant adverse impact on the environment or the surrounding properties...”. SMC 17G.060.010(5). West Central’s Opening Brief p.6, City’s Opening Brief p.7.

Superior Court was correct that the City Council also failed to address in a meaningful way the precedent-setting effect the grant of this rezone would have on future applications outside of areas contemplated by the Comprehensive Plan. Accordingly, the Hearing Examiner's conclusion that the grant of the rezone from O-35 to OR-150 would violate SMC 17G.060.170(C)(5) should stand.

IV. ARGUMENT

A. Standard of Review

Under LUPA, this Court stands in the shoes of the Superior Court and limits its review to the record before the City Council. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002). The standard of review in this case is set forth in RCW 36.70C.130(1) which authorizes invalidation of the City Council's decision if that decision is (1) is an erroneous interpretation of the law; (2) is not supported by substantial evidence; (3) is a clearly erroneous application of the law to the facts; or (4) violates the constitutional rights of the party seeking relief. *Id.*, RCW 36.70.130(1).

Proponents of a rezone have the burden of proof in showing (1) that conditions have changed since the original zoning, or that the proposed rezone implements policies of the comprehensive plan; and (2)

that the rezone bears a substantial relationship to the public health, safety, morals, or welfare. *Woods v. Kittitas County*, 130 Wn. App. 573, 584, 123 P.3d 883, 888 (2005), *affirmed*, 162 Wn.2d 597; 174 P.3d 25 (2007). Additionally, Spokane County requires that the applicant must present sufficient evidence relevant to the appropriate criteria and the decision maker must make affirmative findings of fact relevant to each criterion or the application must be denied. SMC 17G.060.170. The criteria at issue are:

1) The proposal is allowed under the provision of the land use codes; 2) The proposal is consistent with the comprehensive plan designation and goals, objectives and policies for the property; and 5) The proposal will not have a significant adverse impact on the environment or the surrounding properties, and if necessary conditions can be placed on the proposal to avoid significant effects or interference with the use of neighboring property or the surrounding area, considering the design and intensity of the proposed use.

SMC 17G.060.170(C)(1),(2) and (5).

B. The Superior Court was correct in finding that the City Council made an error in law when approving West Central Development's rezone application from Office-35 to Office Retail-150.

The Superior Court was correct in finding the City Council made an error in law in regard to the rezone request. A rezone is not presumed to be valid, and a proponent of a rezone must show either a change in

circumstances which would allow the zone change or that the proposed rezone implements the policies of the Comprehensive Plan. *Woods v. Kittitas County*, 130 Wn. App. 584 (2005).

The pertinent portion of Comprehensive Plan Land Use Policy 1.5 titled “Office Uses” is:

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, CP 96, 118, (Emphasis added).

This section applies to “Office Retail”, and to this rezone request, as there is a separate section in the Comprehensive Plan for Neighborhood Retail Use (Land Use Policy 1.6). CP 95. The hearing examiner’s fact finding is correct when he found:

This site is not within the areas shown in the Downtown Plan. The Downtown Plan does not include the County Courthouse to the east except as an influence area. It does not include this particular site at all. While the site is close to downtown and a half a block away from a neighborhood center, it is not within a neighborhood center or within the Downtown Planning Area as the Comprehensive Plan envisions.

AR Sec. 1 p. 13, CP 26, 118.

The Superior Court found that the factual findings inherent in the above statement by the Hearing Examiner must be accepted by the court, and that those facts were not in dispute. CP 118. *Cingular Wireless, LLC, v. Thurston County*, 131 Wn. App. 756, 768 (2006). Only ambiguous

language calls for interpretation, and then, deference is due the construction of law by a local jurisdiction with expertise, in this case the Hearing Examiner. RCW 36.70C.130. The Hearing Examiner in this case was the only one who examined the language in terms of retail use, so the Hearing Examiner's interpretation of LU 1.5 and the Comprehensive Plan must stand. CP 114, 115, *see also*, SMC 19G.050.070.

The law and facts of this case mandated that the retail aspect must be considered when determining whether or not to approve this rezone from O-35 to OR 150. They are different categories of use as defined by SMC 17C.120.030:

A. Office (O).

The office zoning category is located in areas designated office on the land use plan map of the comprehensive plan. The Office (O) zone is used on small sites in or near residential areas or between residential and commercial areas. It is intended to be a low intensity office zone that allows for small-scale offices in or adjacent to residential neighborhoods. The allowed uses are intended to serve nearby neighborhoods and/or have few detrimental impacts on the neighborhood. Development is intended to be of a scale and character similar to nearby residential development to promote compatibility with the surrounding area.

B. Office Retail (OR).

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 retail and services uses. It is

intended to be a higher intensity office zone that allows for larger scale offices and supporting retail and services uses. The size of retail uses is limited to reduce detrimental impacts on nearby residential uses and to assure that the commercial uses are supporting rather than primary uses. (Emphasis added). SMC 17C.120.030.

The OR classification adds a retail component to this requested rezone, and is a higher intensity use. This definition limits OR to 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”. It is indisputably not in these areas. AR Sec. 1 p.13. Therefore, the next question in this classification is whether it is a site “designated for higher intensity retail and services uses”. The answer is no. The City Council made an error in law when approving this rezone. The decision of the Superior Court should stand.

C. The Superior Court was correct in reinstating the Hearing Examiner’s findings regarding whether the West Central rezone would create a precedent for future rezones.

To approve this rezone to OR-150 outside of a center, North Bank, or Medical District in the Downtown Plan would be precedent setting. This site was not previously designated for higher intensity retail and service use. *See* SMC 17C.120.030.

The Hearing Examiner found that:

If this zone change is granted outside a center and outside of the downtown planning area and the core area, despite the language in the Comprehensive Plan then there are many more areas of the City where the same rezone request would have to be approved... the granting of this application will surely result in more such requests. CP 26, 27.

The proposal is not allowed under the provisions of the land use codes, and is also inconsistent with the comprehensive plan designation and goals, objectives and policies for the property. SMC 17G.060.170(C)(1) and (2). Further, the proposal should not have a significant adverse impact on the environment or surrounding properties, and should avoid significant effects or interference with the use of neighboring property or the surrounding area, considering the design and intensity of the proposed use. SMC 17G.060.170(C)(5).

The City's only analysis of the zone change was that they did not think that this decision set precedent for future rezone applications from O-35 to OR-150. R. Sec. 2 p.14. Further, the City was only discussing the matter in relation to height, not in regard to the additional retail aspect. AR Sec 3, p.71-86.

Of course this decision would set precedent for any other property zoned O-35 that wanted to request a change to OR-150. By disregarding the Comprehensive Plan, and its goals, objectives and policies, it makes

such a rezone decision not legislative, but instead subject to the whim of City Council to determine who does or does not have a significant adverse effect on surrounding properties. To also disregard the Hearing Examiner's findings has the effect of eliminating any meaningful decisions and negating any testimony before the Hearing Examiner. Surely this is not the intent of the Comprehensive Plan, or the Spokane Municipal Code which provides for a hearing examiner. Again, the Hearing Examiner's analysis in regard to the precedent setting effects of this rezone request is correct.

D. The Superior Court was correct in giving deference to the Hearing Examiner's factual findings on retail use when it found the City did not analyze the impact of new retail use.

The Superior Court was correct in giving deference to the Hearing Examiner as he was the only body who made findings in regard to the retail use in regard to Land Use Policy 1.5. "More significantly to this court's decision, however, was the fact that neither the City nor the staff discussed the provisions of LU 1.5 pertaining to "retail uses"; only the hearing examiner discussed this issue..." CP 113, AR Sec 3, p.71-86.

This lack of analysis of retail is further shown by reviewing the transcript of the City's debate on April 28, 2008, during voting on this rezone where

Councilman French states, “All you’re dealing with a change of condition and that change of condition is the building height.” AR Sec. 3. p. 74 l. 13-15. Councilman Apple states, “First and foremost is there is no request for a zone change here. The big request here is for height and the matter of how high this building will be.” AR Sec.3 p. 81 l. 14-17.

Factual findings of a lower official or quasi-judicial body may not be disturbed by the City Council. A reviewing court must be deferential to factual determinations by the highest forum below that exercised fact-finding authority. *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 474, 24 P.3d 1079, 1086 (2001). While the Council may determine within the bounds of the law whether a particular action violates its enacted ordinances, it may not disturb the factual findings of the Hearing Examiner in this case. *Id.* Spokane Municipal Code Chapter 19G.050 set up the hearing examiner system and made the hearing examiner the official before whom the open record hearing would occur and by whom the findings of fact would be made. CP 111, SMC 19G.050.070. SMC 19G.050.070 states in pertinent part:

- A. The office of hearing examiner exercises all quasi-judicial powers and functions authorized by the city council.
- B. Specifically, the hearing examiner conducts public hearings and renders decisions on:
 1. Type III project permit applications including plats, planned unit developments, variances, certificates of compliance, rezones and conditional use permits;

SMC 19G.050.070.

Pursuant to RCW 36.70C.130(1) which authorizes invalidation of the City Council's decision if that decision is an erroneous interpretation of the law or is not supported by substantial evidence, the City Council not only wrongfully interpreted the law by not considering the retail aspect, they failed to make findings of fact pursuant to SMC 17G.060.170 by discussing the adverse impact of the retail on the surrounding properties. RCW 36.70C.130(1), SMC 17G.060.170, CP 17-20.

As the City Council did not analyze the question of the impact of the new "retail" classification if the rezone application were granted, this court must give deference to the hearing examiner, who is the only decision-maker who analyzed that question in light of the provisions of the Comprehensive Plan. CP 114. Further the Hearing Examiner is authorized by the City to be the quasi-judicial body for fact finding. SMC 19G.050.070. The decision of the Hearing Examiner in regard to this request to move from Office 35 to Office Retail 150 should stand, as the Hearing Examiner is the only person or entity who examined the retail aspect of this rezone request.

V. CONCLUSION

The decision of the Superior Court reinstating the decision of the Hearing Examiner in denying this rezone request from O-35 to OR-150 is

sound. The Hearing Examiner, sitting in a quasi-judicial capacity, is the only person or entity that considered the retail aspect in his analysis. Further, the Hearing Examiner's analysis of the law is correct in denying this rezone as it does not comply with the land use codes, comprehensive plan, designation and goals, objectives and policies, and that it will have a significant adverse impact on the surrounding properties. The Superior Court's decision reinstating the initial decision of the Hearing Examiner is correct and should be affirmed.

RESPECTFULLY SUBMITTED this 22nd day of September, 2009.

DICKINSON LAW FIRM, PLLC


Lisa J. Dickinson WSBA #29402
Attorney for Brad Chinn

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 22nd day of September, 2009,
I caused a true and correct copy of the foregoing BRIEF OF
RESPONDENT to be forwarded, with all required charges prepaid, by the
methods indicated below to the following persons:

Michael Piccolo	<input type="checkbox"/> VIA U.S. MAIL
Assistant City Attorney	<input type="checkbox"/> VIA FACSIMILE
5 th Floor Municipal Building	<input checked="" type="checkbox"/> VIA MESSENGER
Spokane WA 99201-3326	<input type="checkbox"/> VIA PERSONAL DELIVERY

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Lisa J. Dickinson