

COURT OF APPEALS  
DIVISION II

11 OCT 14 PM 2:24

STATE OF WASHINGTON  
BY SW  
DEPUTY

No. 41851-7-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

---

CITY OF SHELTON, a Municipal corporation; HALL EQUITIES  
GROUP dba HALL EQUITIES GROUP, a California corporation;  
SHELTON HILL INVESTORS LLC,

Appellants,

v.

THE PORT OF SHELTON,

Respondent.

---

**REPLY BRIEF OF PORT OF SHELTON, LUPA PETITIONER**

---

Eric S. Laschever, WSBA No. 19969  
K&L GATES LLP  
925 Fourth Avenue, Suite 2900  
Seattle, WA 98104  
(206) 370-7836  
Attorney for Respondent

**TABLE OF CONTENTS**

	<b>Page</b>
I. SUMMARY OF REPLY .....	1
II. ARGUMENT.....	2
A. The Superior Court Was the Proper Venue for the Port to Challenge the Validity of the Site- Specific Rezone. ....	2
1. The Court Has Jurisdiction Over the Claims in this Petition.....	2
2. The City Did Not Consider the Rezone As a “Package” With the Comprehensive Plan Map Amendment. ....	3
3. The Port’s LUPA Challenge Is Not a “Disguised GMA Appeal.” .....	5
a. <i>Woods</i> involved an explicit challenge under the GMA and the Port Petition does not.....	5
b. The Port’s LUPA Petition is not duplicative. ....	6
c. The Port’s LUPA Petition conforms with legislative intent for superior court jurisdiction. ....	7
d. LUPA does not forgive “harmless” errors of law. ....	8
B. The Superior Court Properly Concluded that the City’s Approval of the Rezone Was an Erroneous Interpretation of the Law.....	9
1. Local and State Law Requires the City to Consider the Rezone’s Consistency With the Transportation and Industrial Policies of the Comprehensive Plan.....	9
2. The Port Properly Demonstrated That the City Failed to Consider the Rezone’s Consistency With Applicable Comprehensive Plan Policies. ....	14

C.	The Appropriate Relief in this Case is Reversal of the Site-Specific Rezone. ....	15
D.	The Superior Court Did Not Abuse Its Discretion in Issuing the First and Second Stay Orders.....	18
1.	The Superior Court’s First Stay Was the Equivalent of a Temporary Restraining Order and the Superior Court Made the Necessary Findings.....	18
2.	The Superior Court Properly Concluded that the Port Met the Stay Requirements of RCW 36.70C.100(2). ....	22
a.	The superior court properly concluded that the Port would prevail on the merits. ....	22
b.	The superior court properly concluded that the Port would suffer irreparable harm in the absence of a LUPA stay.....	23
c.	The superior court properly concluded that the grant of the LUPA stay would not harm Hall. ....	24
III.	CONCLUSION .....	25

**TABLE OF AUTHORITIES**

**Page**

**WASHINGTON STATE CASES**

*Blair v. Wash. State Univ.*,  
108 Wn.2d 558, 740 P.2d 1379 (1987)..... 20

*Brown v. Voss*,  
105 Wn.2d 366, 715 P.2d 514 (1986)..... 20

*Coffey v. City of Walla Walla*,  
145 Wn. App. 435, 187 P.3d 272 (2008)..... 8

*Erickson & Assoc., Inc. v. McLerran*,  
123 Wn.2d 864, 872 P.2d 1090 (1994)..... 25

*Fisher v. Parkview Props., Inc.*,  
71 Wn. App. 468, 859 P.2d 77 (1993)..... 19

*Kittitas County v. Eastern Washington Growth Management  
Hearings Board*,  
172 Wn.2d 144, 256 P.3d 1193 (2011)..... 15

*Millay v. Cam*,  
135 Wn.2d 193, 955 P.2d 791 (1998)..... 8

*Nw. Gas Ass'n v. Wash. Utils. & Transp. Comm'n*,  
141 Wn. App. 98, 168 P.3d 443 (2007)..... 19, 23

*Phoenix Dev., Inc. v. City of Woodinville*,  
171 Wn.2d 820, 256 P.3d 1150 (2011)..... 8, 13

*Phoenix Development v. City of Woodinville*,  
154 Wn. App. 492, 229 P.3d 800 (2009)..... 12

*State ex rel. Carroll v. Junker*,  
79 Wn.2d 12, 482 P.2d 775 (1971)..... 20

*Wenatchee Sportsmen Ass'n v. Chelan Cnty.*,  
141 Wn.2d 169, 4 P.3d 123 (2000)..... 3

*Woods v. Kittitas Cnty.*,  
162 Wn.2d 597, 174 P.3d 25 (2007)..... 3, 6, 8, 12

**WASHINGTON STATUTES**

RCW 36.70A.030(7)..... 3

RCW 36.70A.300 ..... 16

RCW 36.70A.300(4).....	17
RCW 36.70A.302 .....	16
RCW 36.70A.302(1)(b).....	15
RCW 36.70A.304 .....	16
RCW 36.70B.020(4).....	3, 5
RCW 36.70B.030 .....	11
RCW 36.70B.030(1).....	10, 11
RCW 36.70B.030(2).....	10, 11
RCW 36.70B.030(3).....	10, 11
RCW 36.70C.020(2)(a) .....	5
RCW 36.70C.030(1)(a)(ii) .....	3
RCW 36.70C.100 .....	24, 25
RCW 36.70C.100(2).....	18, 20, 21, 22, 23
RCW 36.70C.130(1)(a) .....	8
RCW 36.70C.130(1)(b).....	8, 14, 22
RCW 36.70C.140 .....	16
RCW 4.12.050 .....	20
RCW 58.17.110(2) .....	18
<b>WASHINGTON RULES</b>	
Civil Rule 65(b).....	20
<b>OTHER AUTHORITIES</b>	
SMC 17.04.020.....	10, 11
SMC 20.52.010.....	6, 10

## I. SUMMARY OF REPLY

The City of Shelton and Hall Equities/Shelton Hill Investors (collectively “Hall”) disputes the superior court’s reversal of the City of Shelton’s (“City’s”) passage of Ordinance No. 1771-0910 (the “Rezone”) on three grounds: (1) the Port of Shelton’s (“Port’s”) challenge to the Rezone was subject to the exclusive jurisdiction of the Growth Management Hearings Board (“GMHB”); (2) the City properly limited its review of the Rezone to consistency with just the Comprehensive Plan Map Amendment; and (3) in the absence of affirming the Rezone, remand—not reversal—was the appropriate remedy. This Reply demonstrates that all of Hall’s arguments fail, and the superior court’s reversal of the Rezone should be affirmed by this Court. Shelton also argues that it was wrong for the superior court to stay the Rezone to prevent Shelton Hills from vesting its subdivision application.

Hall’s arguments, taken together, would result in the Court approving a rezone of the Hall Property to Neighborhood Residential when the Comprehensive Plan designation of the property as Neighborhood Residential remains invalid. Put differently, Hall seeks a ruling that limits rezone review to consistency with an invalid Comprehensive Plan Map Amendment. Hall’s argument leads to an

absurd result that would allow Hall to vest a subdivision to uses that the GMHB found could threaten Sanderson Field.

## **II. ARGUMENT**

### **A. The Superior Court Was the Proper Venue for the Port to Challenge the Validity of the Site-Specific Rezone.**

Hall's Response proceeds on the false premise that Hall can reduce the Port's LUPA claims to a "disguised GMA appeal" that should only be heard by the GMHB. Hall Resp. Br. at 14. The Port's LUPA claims cannot so neatly be reduced or dismissed merely by mischaracterization. The superior court and this Court have jurisdiction to consider the claims raised in the Port's LUPA Petition.

#### **1. The Court Has Jurisdiction Over the Claims in this Petition.**

Hall previously strenuously argued that the Rezone is "legislative" and not "site-specific," and therefore, the superior court (and therefore, this Court) do not have jurisdiction under LUPA. CP 1520-22. In the face of a procedural and factual record showing that the Rezone is "site specific" and the City's Proceedings were quasi-judicial, and summary judgment on that issue, Hall now asserts that it does not matter whether the Rezone is "site specific" and "quasi-judicial" in nature, and continues to argue against LUPA jurisdiction. Hall Resp. Br. at 11, 17-18.

The Port has amply set out the law, facts, and procedural arguments demonstrating that the Rezone is “site specific” in its opening brief (Port Opening Br. at 8-15), which will not be repeated here. Because the Rezone is “site specific,” this Court has exclusive subject matter jurisdiction over the Port’s LUPA appeal. “GMHBs do not have jurisdiction to decide challenges to site-specific land use decisions” and “a challenge to a site-specific land use decision should be brought in a LUPA petition at superior court.” *Woods v. Kittitas Cnty.*, 162 Wn.2d 597, 610, 174 P.3d 25 (2007)<sup>1</sup> (citing former RCW 36.70A.030(7); RCW 36.70B.020(4); and *Wenatchee Sportsmen Ass’n v. Chelan Cnty.*, 141 Wn.2d 169, 179, 4 P.3d 123 (2000)<sup>2</sup>).

**2. The City Did Not Consider the Rezone As a “Package” With the Comprehensive Plan Map Amendment.**

Hall asserts that the “Rezone was considered by the City to be a ‘package’ with the Comprehensive Plan Amendment” (Hall Resp. Br. at 5), and therefore, should have been challenged along with the Comprehensive Plan Map Amendment to the GMHB. Nothing in the record supports this assertion. The record confirms the opposite: (1) Hall

---

<sup>1</sup> “LUPA grants the superior court *exclusive jurisdiction* to review a local jurisdiction’s land use decisions, with the exception of decisions subject to review by bodies such as the GMHBs. RCW 36.70C.030(1)(a)(ii).” *Woods*, 162 Wn.2d at 610 (emphasis in original).

<sup>2</sup> “[A] site-specific rezone is not a development regulation under the GMA, and ... a [GMHB] does not have jurisdiction to hear a petition that does not involve a comprehensive plan or development regulation under the GMA.”

separately submitted the Comprehensive Plan Map Amendment and the Site-Specific Rezone, and (2) the City considered the Rezone four months after the Map Amendment (CP 87-88, 216-19, PRP 10), making the Site-Specific Rezone a separate, quasi-judicial project permit decision that must be reviewed through a LUPA petition to superior court. Port Opening Br. at 11-13.

Hall argues that because the Comprehensive Plan Map Amendment was necessary prior to the adoption of the Site-Specific Rezone, the two City decisions were a “package” in substance. Hall Resp. Br. at 16. The GMHB case law, however, does not support this theory of “packaging” decisions. The GMHB has held that such decisions become a legislative package subject to its sole jurisdiction only where they are “enacted concurrently,” “adopted simultaneously,” and “bundled together.”<sup>3</sup> In this case, the Comprehensive Plan Map Amendment made no reference to the Rezone that is the subject of the Port’s LUPA petition (CP 216-19), and the Map Amendment and the Rezone were considered separately, four months apart.

Hall’s argument defies common sense. Any comprehensive plan map amendment is necessary to facilitate later site-specific rezones. A conclusion that such enactments become legislative packages subject

---

<sup>3</sup> See Port Opening Br. at 12 & n.5.

solely to GMHB jurisdiction would nullify the provisions of LUPA that give the superior court jurisdiction over site-specific rezones. *See* RCW 36.70B.020(4), RCW 36.70C.020(2)(a); Port Opening Br. at 10-11.

**3. The Port’s LUPA Challenge Is Not a “Disguised GMA Appeal.”**

Hall argues that the Port’s LUPA Petition is a “disguised GMA appeal” similar to the challenge in *Woods*. Hall Resp. Br. at 12-14. Hall’s argument fails because (1) *Woods* is readily distinguished because the *Woods* LUPA petition explicitly challenged a rezone’s compliance with the GMA, and (2) the Port’s petition is a straightforward challenge of consistency under City code and applicable case law that corresponds with the Legislature’s jurisdictional framework.

**a. *Woods* involved an explicit challenge under the GMA and the Port Petition does not.**

Hall cites no authority to support its contention that a single petitioner is prohibited from appealing a rezone under LUPA well after it has challenged a prior comprehensive plan amendment at the GMHB. The only case cited by Hall—*Woods v. Kittitas County*—provides that petitioners cannot challenge a site-specific rezone in a LUPA petition based on inconsistency with the GMA. In *Woods*, the LUPA petition explicitly claimed the land use decision under review failed to include determinations regarding “consistency with the GMA.” *Woods*, 162

Wn.2d at 605.<sup>4</sup> Hall acknowledges this fact. Hall Resp. Br. at 13. In contrast to the *Woods* petition, however, the Port’s LUPA Petition contains no challenge under the GMA, disguised or otherwise. The Port’s LUPA Petition, particularly as it pertains to the second issue on which the superior court granted summary judgment, is a straightforward appeal of the Rezone’s consistency with the Shelton Comprehensive Plan as required by the City Code (SMC 20.52.010 (*see* Appendix 2 of Port Opening Br.)) and is therefore consistent with the holdings of *Woods* and other cases.

**b. The Port’s LUPA Petition is not duplicative.**

Hall contends that the GMHB proceedings (now on appeal in Thurston County Superior Court) and this LUPA proceeding are “absurd” and “duplicative” because the “heart” of the Port’s arguments in both venues is that the residential development planned by Hall is incompatible with Sanderson Field. Hall Resp. Br. at 11, 13. Hall’s attempt to divine the “true nature” of the Port’s claims is simply a self-serving attempt to squeeze all of the Port’s claims into Hall’s “disguised GMA appeal” box.

---

<sup>4</sup> Hall relies on *King County v. Central Puget Sound Growth Management Hearings Board*, *Caswell v. Pierce County*, and *Somers v. Snohomish County* for this same proposition (Hall Resp. Br. at 13 n.4), but, like *Woods*, each involved explicit appeals under the GMA. This explicit reliance on the GMA distinguishes the Port’s Petition, which makes no GMA claims.

The fact that the Comprehensive Plan Map Amendment and the Site-Specific Rezone are incompatible with Sanderson Field (Hall Resp. Br. at 5) does not prove that the Port could or should have challenged the Site-Specific Rezone to the GMHB. The Port contends that the Comprehensive Plan Map Amendment is incompatible with Sanderson Field by arguing that it is inconsistent with provisions of the GMA. Conversely, the Port's LUPA challenge of the Site-Specific Rezone in this case claims that the Site-Specific Rezone is inconsistent with the City's Comprehensive Plan—an argument that must be addressed in superior court through a LUPA petition.

**c. The Port's LUPA Petition conforms with legislative intent for superior court jurisdiction.**

Hall's arguments also ignore the statutory difference the Legislature created between comprehensive plans and development regulations under the GMA and separate site-specific zoning decisions:

The comprehensive plan and development regulations may be challenged for violations of the GMA before a GMHB .... Subsequent site-specific land use decisions by a local jurisdiction must be generally consistent with the comprehensive plan and development regulations. An adjacent property owner must challenge a local jurisdiction's site-specific decisions by filing a LUPA petition in superior court. But a challenge to a site-specific land use decision can be only for violations of the comprehensive plan and/or development regulations, but not violations of the GMA.

*Woods*, 162 Wn.2d at 615-16 (emphasis added). Even though an opponent of a comprehensive plan amendment and a subsequent site-specific rezone may be motivated by the same underlying concerns, that does not nullify the Legislature's statutory scheme for separate GMHB review of comprehensive plan amendments under the GMA and site-specific rezone decisions under LUPA. *See also Coffey v. City of Walla Walla*, 145 Wn. App. 435, 439, 187 P.3d 272 (2008) ("Two-headed approach" to appeals is required by GMA and LUPA).

**d. LUPA does not forgive "harmless" errors of law.**

Hall argues that to the extent the City erred in characterizing the Rezone as legislative rather than quasi-judicial, that procedural error was harmless under *Phoenix Development*. Hall Resp. Br. at 18. *Phoenix Development* is distinguishable as it pertained to a determination under RCW 36.70C.130(1)(a) that the City's procedure was unlawful. *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 836, 256 P.3d 1150 (2011). The statute provides that procedural errors that are harmless are not grounds for reversal. In this case, the Port alleges that the City has erroneously interpreted the law under RCW 36.70C.130(1)(b). The statute does not include a provision excusing such errors as harmless. *Id.* The legislature is presumed to have intended the difference between the two standards. *Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998)

(where legislature uses certain language in one instance but different language in another, a difference in legislative intent is presumed). As discussed below, the erroneous interpretation of law resulted in the City improperly limiting its review of the Rezone.<sup>5</sup>

**B. The Superior Court Properly Concluded that the City’s Approval of the Rezone Was an Erroneous Interpretation of the Law.**

According to Hall, the City’s approval of the Rezone was not an erroneous interpretation of the law because the City only had to ensure the Rezone’s consistency with the Comprehensive Plan Map Amendment. Hall’s arguments ignore the clear direction in statute and case law that the consistency analysis must extend to the Comprehensive Plan’s transportation and industrial policies. Hall’s arguments also ignore the GMHB’s Order invalidating the Comprehensive Plan Map Amendment—rendering the basis for any consistency determination null and void. *See* Section C below.

**1. Local and State Law Requires the City to Consider the Rezone’s Consistency With the Transportation and Industrial Policies of the Comprehensive Plan.**

According to Hall, Map Amendment consistency was the only analysis required in the context of the Rezone because consistency with

---

<sup>5</sup> Furthermore, to the extent that Hall is conceding that the Rezone was a quasi-judicial action and that the City’s characterization of it as legislative was harmless error, Hall is conceding the superior court’s and this court’s jurisdiction.

the Comprehensive Plan's transportation and industrial policies was resolved when the City adopted the Map Amendment. Hall Resp. Br. at 21-22. Despite the surface appeal of Hall's efficiency arguments, local and state law requires a consistency analysis with the Comprehensive Plan's transportation and industrial policies at both the map amendment and rezone stages.

SMC 20.52.010 specifically requires rezones to be considered "in relationship to a comprehensive plan as required by the laws of Washington." *See* Port Opening Br., Appendix 2. At the time the City considered the Rezone, both the Map Amendment and the transportation and industrial policies were part of the Comprehensive Plan; therefore, consistency with both aspects of the Comprehensive Plan had to be considered under SMC 20.52.010. As demonstrated in the Port's Opening Brief and the next section of this Reply, the City erroneously considered only consistency with the Map Amendment. CP 99 (Conclusion 2 of the Hearing Examiner's Recommendation limited the consideration of the Rezone for consistency with the Comprehensive Plan to review of only the land use map designation of Neighborhood Residential).

Hall's citation to RCW 36.70B.030(1)-(3) and SMC 17.04.020 (Hall Resp. Br. at 19-20) is at this point academic. The GMHB

invalidated the Comprehensive Plan Map Amendment before the superior court ruled on the Rezone (CP 967-1007). At the time the superior court reversed the Rezone, there was no basis for consistency—even under Hall’s cramped reading of the term. Despite Hall’s representations to the contrary (Hall Resp. Br. at 7-8, 26-27), throughout this appeal the Map Amendment has remained invalid.

In any case, the operative law does not show that the City’s review of the proposed Rezone’s consistency with the Comprehensive Plan should be limited to the Map Amendment. The cited state statute and City ordinance (Hall Resp. Br. at 19-20) merely demonstrate that the City should not revisit the type of land use and density of residential development allowed at the site when engaged in a project permit review (such as a site-specific rezone). However, nothing in RCW 36.70B.030(1)-(3) or SMC 17.04.020 suggests that transportation, industrial, or other policies and requirements in a comprehensive plan can be ignored at the project permit stage.

Three Washington court decisions, which post-date the adoption of RCW 36.70B.030 and SMC 17.04.020, demonstrate that the City was obligated to consider the Rezone’s consistency with all relevant aspects of the Comprehensive Plan, not just the Map Amendment. In *Woods*, the Washington Supreme Court emphasized that “[c]omprehensive plans and

development regulations provide the general structure for a local jurisdiction's site-specific decisions ... [s]ubsequent site-specific land use decisions by a local jurisdiction must be generally consistent with the comprehensive plan and development regulations." 162 Wn.2d at 615-16 (emphasis added).

In *Phoenix Development v. City of Woodinville*, the court of appeals held that project level rezones must be generally consistent with the comprehensive plan and that failure to achieve consistency is reviewable in superior court under LUPA. 154 Wn. App. 492, 501-02, 511, 229 P.3d 800 (2009). The court of appeals engaged in just such a review, noting that "[t]he staff report identifies several policies implicated by the proposed rezones within the land use, housing, community design, capital and public facilities, and environmental elements of the plan." *Id.* at 511. The court of appeals' reference to "several policies" in six comprehensive plan elements in *Phoenix* makes clear that the City in this case needs to do more than just look at the Comprehensive Plan Map Amendment.

Just months ago, the Washington Supreme Court reversed the court of appeals in *Phoenix*, but on grounds other than the issue of comprehensive plan consistency. As explained in the Port's Opening Brief, the Supreme Court noted that Woodinville had denied a rezone—

that was consistent with a comprehensive plan map designation—after finding that the rezone was not consistent with a number of the comprehensive plan’s general policies. Port Opening Br. 17-18 (quoting *Phoenix*, 171 Wn.2d at 837).

Furthermore, Hall tries to distinguish *Woods* and the *Phoenix* decisions by contending that a City’s responsibility to engage in an overall consistency analysis with the comprehensive plan is only required when a map amendment designation can be carried out through a variety of zoning options. Hall Resp. Br. at 23-25. However, nothing in the case law, state statutes, or City ordinances supports this distinction. Just months ago, the Washington Supreme Court in *Phoenix* concluded that a city did not err in rejecting a rezone for lack of compliance with a comprehensive plan general policy—even though it was consistent with the plan’s map designations. *Woods* and the *Phoenix* cases require the City and the Hearing Examiner to actually apply the existing Comprehensive Plan policies to the particular facts of this particular Rezone in a quasi-judicial process.

The City and Hearing Examiner, overtly and erroneously, refused to conduct this analysis. CP 87-88, 91-103. The Hearing Examiner’s and City’s failure to do so is an erroneous interpretation of the law. The Court should affirm the superior court’s reversal of the Rezone.

**2. The Port Properly Demonstrated That the City Failed to Consider the Rezone’s Consistency With Applicable Comprehensive Plan Policies.**

Hall attempts to duck the superior court’s conclusion that the City failed to consider the Rezone’s consistency with the Comprehensive Plan’s transportation and industrial policies by arguing the merits of such an analysis—had it been done. In so doing, Hall mischaracterizes pages 19 – 21 of the Port’s opening brief.

Contrary to Hall’s suggestion, the Port did not rely on its own comments and those of WSDOT to argue incompatibility. Hall Resp. Br. at 26-27. Rather, these documents listed and directly quoted all of the sections of the Shelton Comprehensive Plan establishing transportation and industrial policies that the City failed to consider in its adoption of the Rezone. *See* CP 1553-76 (quoting Comprehensive Plan Policies LU 15c, 18a, 19a, 19b, 19c, and 19d). Whether or not the Rezone actually is incompatible with these Comprehensive Plan Policies is not at issue in the Port’s LUPA petition and this appeal. Instead, the Port argues that the City’s “land use decision is an erroneous interpretation of the law” (RCW 36.70C.130(1)(b)) because the City concluded that it only had to review the Rezone for consistency with the Map Amendment and failed even to

consider the Comprehensive Plan’s transportation and industrial policies.<sup>6</sup>

CP 87-88, 91-103. Hall simply misses the point of this LUPA appeal.

**C. The Appropriate Relief in this Case is Reversal of the Site-Specific Rezone.**

The superior court reversed the Rezone based on the Port’s demonstration that the GMHB had invalidated the Comprehensive Plan Map Amendment. Hall contends that the Port “misrepresented” the GMHB’s decision invalidating the Comprehensive Plan Map Amendment to justify reversal of the Site-Specific Rezone in this case. Hall Resp. Br. at 26. Actually, it is Hall that mischaracterizes the GMHB’s actions.

The GMHB did not just remand the Comprehensive Plan Map Amendment. Rather, after finding that the “continued viability of Sanderson Field may very well be threatened” by the Map Amendment, the GMHB imposed “an order of invalidity on the Ordinance in its entirety.” CP 1005. The GMHB imposes such an order when it determines that the noncompliance is so severe that it will substantially interfere with the GMA’s goals. RCW 36.70A.302(1)(b). In this case, the NR Comprehensive Plan designation is invalid until the GMHB finds

---

<sup>6</sup> Because the substance of WSDOT’s comments has nothing to do with the Port’s argument that the City’s failure to consider the Rezone’s compliance with the Comprehensive Plan—beyond just the Map Amendment—is an erroneous interpretation of the law, Hall’s citation to *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 256 P.3d 1193 (2011), is irrelevant. Hall Resp. Br. at 27.

otherwise. *See generally* RCW 36.70A.304. The Port’s statement that the Order of Invalidity removed “any underlying foundation for the Rezone” remains true until the GMHB changes the Order, and it is inaccurate for Hall to contend otherwise. Hall Resp. Br. at 27.<sup>7</sup>

The Port’s Petition requested reversal of the Rezone pursuant to RCW 36.70C.140. Hall argues that the relief requested by the Port “would create an internal inconsistency between the Comprehensive Plan map designation of NR and the zoning, in violation of GMA.” Hall Resp. Br. at 27. As discussed below, the Port’s approach eliminates inconsistent results—in contrast to Hall’s, which immediately creates an inconsistency.

The Port’s requested relief achieves consistency by rendering the Rezone invalid and removing it as a basis for subsequent approvals, such as the subdivision for which Hall applied on September 13, 2010. CP 1031. The relief produces the same practical result for the Rezone as the GMHB’s Order accomplished for the Map Amendment under RCW 36.70A.300. In both instances, the plan and zoning code would not allow Hall to proceed with its proposed subdivision. The GMHB’s remand coupled with an order of invalidity renders the plan amendment inoperative (invalid) during the remand. CP 967, 1005;

---

<sup>7</sup> Hall’s effort to minimize the Board’s continued finding of invalidity, Hall Resp. Br. at 7-8 and 26-27, is unavailing. Until the Board or the superior court lifts the order of invalidity, the Map Amendment is invalid and cannot serve as the basis for a Rezone. RCW 36.70A.302.

RCW 36.70A.300(4). In the context of a LUPA petition, the Court has the additional authority to reverse the Rezone. Reversing the Rezone renders it inoperative. Both actions result in the same on-the-ground result: a cessation of subdivision and other development activities during Hall's appeal of the GMHB's decision.

In contrast to this *de facto* consistency, Hall's theory would result in an immediate and highly detrimental inconsistency. The current Comprehensive Plan does not allow for Neighborhood Residential Uses because the GMHB remanded the Map Amendment with an order of invalidity. RCW 36.70A.300(4). Accepting Hall's theory with respect to the Site-Specific Rezone, however, would retain Neighborhood Residential Zoning and create an inconsistency between the current Comprehensive Plan Land Use Map and the Zoning Map during Hall's appeal of the GMHB decision.

More importantly, accepting Hall's theory without imposing a continuing stay on the Rezone's effectiveness would allow Hall's residential subdivision application to vest. Thus, if the Thurston County Superior Court affirms the GMHB, the Comprehensive Plan would disallow what Hall had vested to. This is precisely the result the superior court found to be unacceptable when it stayed the Rezone's effectiveness.

Finally, Hall's approach would lead to an absurd result if the City were to begin processing the subdivision. Under the State subdivision statute, the City must find that "the public use and interest will be served" by the subdivision. RCW 58.17.110(2). The GMHB's finding that Hall's proposal potentially threatens Sanderson Field's "continued viability" is tantamount to a finding that subdividing the Property as Hall proposes will not serve the "public use and interest." It makes no sense to let the Rezone stand, thereby prompting renewed battle over the subdivision.

**D. The Superior Court Did Not Abuse Its Discretion in Issuing the First and Second Stay Orders.**

**1. The Superior Court's First Stay Was the Equivalent of a Temporary Restraining Order and the Superior Court Made the Necessary Findings.**

Hall contends that the superior court erred when it issued the first temporary stay because it failed to make the four findings required by RCW 36.70C.100(2). Hall Resp. Br. at 27-28. Hall's argument fails because the superior court's first stay was not a LUPA stay to preserve the status quo for the duration of the LUPA appeal. Rather, the first stay was the equivalent of a temporary restraining order for which the court only must find that the applicant will suffer irreparable injury, loss, or damage before an adversary hearing can be convened in open court for the entry of a preliminary injunction. *Fisher v. Parkview Props., Inc.*, 71 Wn. App.

468, 475, 859 P.2d 77 (1993).<sup>8</sup> Here, the superior court engaged in a similar process in deciding to issue a temporary stay in advance of the LUPA stay.

The record shows that the superior court granted the first, temporary stay on Friday, September 10, 2010. CP 1032-39, 1267-68; PRP 1-7. During the hearing on September 10, the Port made a “clear showing” (*Fisher*, 71 Wn. App. at 475) that it would suffer irreparable harm if the temporary stay was not issued before the full hearing on the merits of a LUPA stay:

And the Court will at this time find that there are compelling reasons for a short stay and a hearing on shortened time because in the Port’s explanation, if an application for a permit under this new legislation is filed after the effective date of the legislation, the – it is said that the rights to the applicant would vest. And whether or not this Court at a later stage of a[n] appeal would grant the Port’s claims for relief, or any of them, the rights under the application that would have been filed would have vested and any ruling that the Court would make would not apply to those vested permit applications. And so there is a concern that the moving party would not have the benefit in any way of a successful lawsuit.

PRP 2. The temporary stay only lasted until Thursday, September 16, 2010—less than the 14 days permitted for a temporary restraining order

---

<sup>8</sup> See also *Nw. Gas Ass’n v. Wash. Utils. & Transp. Comm’n*, 141 Wn. App. 98, 115, 168 P.3d 443 (2007) (“The law is well settled that to obtain injunctive relief, a plaintiff must establish (1) he has a clear legal or equitable right; (2) he has a well-grounded fear of immediate invasion of that right by the entity against which he seeks the injunction; and (3) the acts about which he complains are either resulting or will result in actual and substantial injury to him.”).

(Civil Rule 65(b))—when the superior court considered all the factors in RCW 36.70C.100(2) and issued the LUPA stay for the duration of the LUPA appeal. CP 1170-75, 1188-89; PRP 8-20.

Furthermore, the temporary stay was a tool within the superior court’s discretion to manage its own docket and scheduling conflicts. *See Brown v. Voss*, 105 Wn.2d 366, 372, 715 P.2d 514 (1986) (“The trial court is vested with a broad discretionary power to shape and fashion injunctive relief to fit the *particular facts, circumstances, and equities of the case before it.*” (emphasis in original)). This court reviews the granting of injunctive relief for an abuse of the superior court’s discretion. *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 564, 740 P.2d 1379 (1987). Hall did nothing in pages 27-29 of its Response Brief to demonstrate that the first stay was “manifestly unreasonable or based upon untenable grounds.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In fact, as was explained in detail in the Port’s Opening Brief, the temporary stay was issued by the superior court at the insistence of Hall.<sup>9</sup>

---

<sup>9</sup> Superior Court Judge Sheldon explained in her oral ruling on the LUPA stay that the temporary stay was necessitated by (1) Hall’s insistence that it would be prejudiced if the superior court did not spend sufficient time reviewing the briefs on the motion for stay, and (2) a particularly difficult criminal trial that was at risk of ending in mistrial if the superior court went into recess to deal with the Port’s motion for the LUPA stay. PRP 13-15.

This Court should reject Hall’s argument that the need for a temporary stay was caused by the Port’s affidavit of prejudice against one of the two judges in Mason County Superior Court. Hall Resp. Br. at 28-29. The Port had a statutory right (RCW 4.12.050)

Port's Opening Br. at 4-5. Hall's argument on appeal that the temporary stay violated LUPA or was an abuse of discretion is disingenuous given that Hall contended in superior court that more time was needed for the superior court to consider its arguments against a LUPA stay. CP 1278-82, 1032-39, 1267-68; PRP 1-7.

Hall was the party engaged in "tactical move[s]" (Hall Resp. Br. at 28-29) during the superior court's deliberations. Hall sought to defer the hearing on the LUPA stay until after Monday, September 13, when it submitted its application to the City to vest its subdivision. CP 1031, 1250-54, 1269-77; Port's Opening Br. at 4-5. Once Hall had vested, of course, any LUPA stay order issued by the superior court pursuant to RCW 36.70C.100(2) would have been meaningless. When the court granted a temporary stay to preserve the status quo, Hall objected because the temporary stay foiled its plans to vest its subdivision application between the Port's filing of the LUPA petition and the date on which the superior court would grant the LUPA stay.

This Court should conclude that the superior court did not abuse its discretion when it issued the temporary stay.

---

to file the affidavit of prejudice—it was not merely engaged in "tactical decision[s]" or "tactical move[s]." Hall Resp. Br. at 28-29.

**2. The Superior Court Properly Concluded that the Port Met the Stay Requirements of RCW 36.70C.100(2).**

Hall contends that the superior court's second stay was in error because the superior court did not properly analyze the likelihood of success on the merits and balance the harms under RCW 36.70C.100(2). Hall Resp. Br. at 29-36. Each of Hall's arguments fails.

**a. The superior court properly concluded that the Port would prevail on the merits.**

Hall contends that the superior court was required to determine that "residential zoning of the Property is incompatible with the airport" in order to meet the first factor for a LUPA stay. Hall Resp. Br. at 30. This argument completely misstates the merits of the Port's LUPA petition. As explained in Section II.B. above, the Port contends, pursuant to RCW 36.70C.130(1)(b), that the City's "land use decision is an erroneous interpretation of the law" because the City concluded that it only had to review the Rezone for consistency with the Comprehensive Plan Map Amendment. CP 87-88, 91-103. The Port argued, and the superior court agreed, that the City was required to consider the Rezone's consistency with the relevant Comprehensive Plan policies—and not just the Comprehensive Plan Map Amendment. To issue the LUPA stay, the superior court was not required to consider whether the Rezone itself was incompatible with the airport. Hall Resp. Br. at 30-31. The Port was

“likely to prevail on the merits” by showing only that the City failed to consider consistency of the Rezone with the Comprehensive Plan’s transportation and industrial policies. Hall’s argument with respect to the first factor of RCW 36.70C.100(2) fails.

**b. The superior court properly concluded that the Port would suffer irreparable harm in the absence of a LUPA stay.**

Hall again misses the point in arguing that the superior court was required to find that residential zoning would cause irreparable harm to the Port in order to issue the LUPA stay. Hall Resp. Br. at 31-33. The superior court’s job was to consider whether the Port would suffer irreparable harm if any judgment later granted through the LUPA petition would be meaningless in the absence of a stay. *Nw. Gas Ass’n*, 141 Wn. App. at 121-22 (“[In the absence of a preliminary injunction to prevent the release of the documents], prevailing at a trial on the merits would be meaningless for the Pipelines and for the public, whom the Legislature’s [Public Records Act] exemption seeks to protect.”). The superior court properly concluded that the absence of a stay would permit Hall’s property rights to vest under the Rezone, thus nullifying any relief that could be granted by the superior court in response to the Port’s LUPA petition. PRP 11-12.

**c. The superior court properly concluded that the grant of the LUPA stay would not harm Hall.**

Hall argues that the stay amounts to a “judicial nullification of the vested rights doctrine” that “is directly contrary to the intent of the Legislature to permit vesting during appellate review of zoning regulations and 80 years of Washington jurisprudence.” Hall Resp. Br. at 33. In fact, the “intent of the Legislature” is exactly the opposite. RCW 36.70C.100 expressly authorizes “[a] petitioner ... [to] request the court to stay ... an action by the local government or another party to implement the decision under review.” The Rezone is a land use decision and subject to LUPA’s stay provision.

Hall cites no authority that the vesting doctrine extinguishes a superior court’s statutorily-authorized power to issue a stay. Hall relies upon *West Main* and *Adams* (Hall Resp. Br. at 34), cases that reject unilateral actions by local governments to prevent vesting (without court authorization of any kind). Here, the court—not a local government—acted pursuant to specific statutory authorization. *West Main* and *Adams* are inapplicable. Finally, the Washington Supreme Court has rejected Hall’s absolutist approach to the vesting doctrine, observing that “[i]f a vested right is too easily granted, the public interest is subverted.” *Erickson & Assoc., Inc. v. McLerran*, 123 Wn.2d 864, 873-74, 872 P.2d

1090 (1994). Simply put, the court's power under RCW 36.70C.100 serves the public interest by ensuring a vested right is not "too easily granted" where a land use decision could be found to be illegal. Hall is not harmed where the Legislature specifically provided for a stay in lieu of vesting in order to permit the courts to determine whether a zoning ordinance is legal.

### III. CONCLUSION

Hall's appeal is a thinly veiled effort to proceed with a subdivision based on an invalid comprehensive plan amendment and infirm Rezone. The Port respectfully requests that the Court affirm the superior court's decisions, reversing the Rezone Ordinance as an error of law. The Port also requests that the Court conclude that the superior court did not abuse its discretion in granting the temporary stay and LUPA-authorized stay of the Rezone Ordinance.

DATED this 14th day of October, 2011.

Respectfully submitted,

K&L GATES LLP



---

Eric S. Laschever, WSBA No. 19969

*Attorney for Respondent*  
Port of Shelton

COURT OF APPEALS  
DIVISION II

11 OCT 14 PM 2:25

STATE OF WASHINGTON

CERTIFICATE OF SERVICE

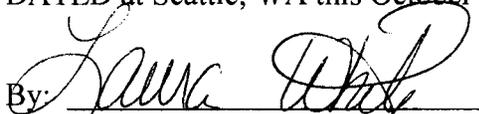
I hereby certify that the foregoing **REPLY BRIEF OF PORT OF**  
**SHELTON, LUPA PETITIONER** is being served on the following  
named person(s), at the addresses indicated by pdf/email and via First  
Class U. S. Mail:

DEPUTY

Courtney Anne Kaylor  
McCullough Hill  
701 Fifth Ave., Ste 7220  
Seattle, WA 98104  
Email: [courtney@mhseattle.com](mailto:courtney@mhseattle.com)

Kathleen J. Haggard  
Dionne & Rorick  
601 Union St., Ste 900  
Seattle, WA 98101  
Email: [kathleen@dionne-rorick.com](mailto:kathleen@dionne-rorick.com)

DATED at Seattle, WA this October 14, 2011.

By: 

Laura White, Secretary  
K&L Gates LLP

K:\2067970\00002\20743\_KLV20743P21BP