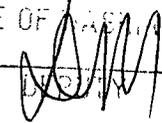


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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY 

No. 42029-5

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Brad Chinn, *Respondent*

v.

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

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OPENING BRIEF  
OF  
APPELLANT  
WEST CENTRAL DEVELOPMENT LLC

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## I. INTRODUCTION

This matter comes before the Court on an appeal of a decision by the Spokane County Superior Court reversing a decision of the City Council for the City of Spokane to approve an application by Appellant West Central Development LLC (hereinafter “West Central Development”) to rezone approximately 48,000 square feet of land from Office-35 (O-35) to Office -150 (O-150). A rezone to Office-150 does not allow any different land uses: the only allowance is an increase in the maximum building height.

The subject property is located directly west of the Spokane County Courthouse complex, along the north side of Broadway Avenue (an arterial), within the City of Spokane. The Courthouse complex is zoned Community Business (CB-150), with a height limitation of 150 feet. For the subject property, West Central Development sought a rezone from O-35 to O-150, which would allow an increase in the maximum building height from 35 feet up to 150 feet.

The rezone request was recommended for approval by the City Planning Staff and supported by the West Central Neighborhood Council. Following review of the rezone application by City agencies, the Hearing Examiner approved the rezone subject to conditions.

Respondent Brad Chinn appealed the Hearing Examiner's decision to the Spokane City Council. The City Council conducted a closed-record appeal hearing and subsequently affirmed the Hearing Examiner's decision and adopted detailed written findings of fact and conclusions in support of its decision. An appeal was filed in Spokane County Superior Court by Mr. Chinn.

Because of Mr. Chinn's prior position as a Court Commissioner in Spokane County District Court, a visiting Superior Court judge was sought to hear the appeal. The case was assigned to Judge Rebecca Baker, who is a judge for Ferry, Stevens and Pend Oreille counties.<sup>1</sup>

Following oral argument, Judge Baker issued a written Decision on Land Use Petition on March 12, 2011 ("Superior Court Decision"), reversing the City Council's decision to approve the rezone.

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<sup>1</sup> Judge Baker has since retired from the bench.

## II. STATEMENT OF CASE

### A. Summary of Rezone Application

West Central Development submitted an application to rezone its property from O-35 (Office Zoning with a 35 foot maximum height) to O-150 (Office Zoning with a 150 foot maximum height) on July 13, 2009. The property is located just north of the Downtown core and adjacent to the Spokane County Courthouse Complex and consists of approximately 48,000 square feet of vacant land. Administrative Record. Sec. 1, p. 6-7.<sup>2</sup>

It should be noted at the outset the difference in the O-35 and O-150 zones. The Spokane Municipal Code (“SMC”) has an “Office” zoning classification which is intended to implement property that is designated Office on the City’s Comprehensive Plan. R, Sec. 1, pg. 38. There is only one difference between the O-35 and O-150 zone: building height. SMC 17C.120 (Table 17C-120-1). The “35” denotes a maximum building height of thirty-five feet and the “150” denotes a maximum building height of one hundred-fifty feet. SMC 17C.120.220. By way of explanation, the City has established height limits for its

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<sup>2</sup> References to the Administrative Record before the City Council will be referred to as R.

office/commercial zones and the only means to obtain an increase in building height is through a rezone application. SMC 17C.120.220. R. Sec. I, p. 38. The height categories are: 35 feet; 40 feet; 55 feet; 70 feet; and 150 feet. *Id.* Under such categories, if a property owner wishes to construct a building taller than 70 feet, the property owner must ask for 150 feet, even though the building may only be 90 feet.

For the West Central Development property, a rezone to the O-150 category was requested. The rezone application was routed to various agencies for review and comment, with none of the agencies recommending denial of the rezone. CP 165. The City's Planning Services Department submitted a Staff Report recommending approval of the application with conditions. R. Sec. 1, p. 36-41. The Planning Services Department also reviewed the application under the State Environmental Policy Act (SEPA) to determine if the proposal would create a significant adverse impact on the environment. R. Sec. 1, p. 104-122. The environmental checklist indicated that the maximum building height could be 150 feet and that views would be altered. R. Sec. 1, p. 118. The Staff determined the proposal would not create any adverse impacts on the environment and issued a Mitigated Determination of Nonsignificance. R. Sec. 1, p. 104-106. No appeal was filed.

**B. Hearing Examiner Decision**

The City's Hearing Examiner conducted an open record hearing on the application on October 27, 2009. R. Sec. 1, p. 8. The Hearing Examiner issued his decision on November 9, 2009, approving the application with conditions, including but not limited to:

- 1) A condition requiring the building to comply with the City's Tall Building standards set forth in Spokane Municipal Code SMC 17C.250;
- 2) A condition requiring building plans to go through the City's design review process for comments and recommendations.
- 3) A condition limiting the height of all buildings to no higher than the adjacent Spokane County Courthouse and jail;
- 4) A condition requiring West Central to obtain a permit to develop the property under the O-150 zone within three (3) years or the rezone approval expires or the zoning reverts to O-35.

R. Sec. 1, p. 12-13

Petitioner appealed the Hearing Examiner's decision to the City Council on November 23, 2009.

**C. City Council Decision on Appeal**

The City Council held a closed-record hearing on May 3, 2010 and issued its decision affirming the Hearing Examiner on June 7, 2010. R. Sec. II, pgs. 244-250.

The City Council addressed each of the arguments made by Chinn and found that the Hearing Examiner's decision was supported by the record, did not contain an error or misinterpretation of law of fact, and was within the Hearing Examiner's authority. The City Council adopted five pages of detailed findings of fact and conclusions of law. R. Sec. II, pgs. 244-250.

First, the City Council specifically found that the rezone is permitted under the land use codes of the City, citing Table 17C-120-1 of the Spokane Municipal Code. The SMC specifically lists "office" as a permitted use in the office zone; therefore, the City Council properly found that the proposed office building and office uses are allowed under the City's land use codes. R. Sec. II, p. 245-246.

Second, on the issue of building height, the City Council affirmed the Hearing Examiner's interpretation and finding that the Spokane Municipal Code does not prohibit tall buildings, such as the one proposed, unless the proposed structure is within 150 feet of a single-family or two-family zone. R. Sec. II, p. 246. The City Council found that the Spokane Municipal Code only restricts building height when property is located next to single family or two-family zones and rejected the argument made by Chinn that tall buildings are not permitted in "residential areas." *Id.*

Third, the City Council found that the rezone is consistent with the City's Comprehensive Plan, finding that the City's Land Use Policies do not prohibit an increase in building height from 35 feet to 150 feet. R. Sec. II, p. 246.

Fourth, the City Council made specific findings that the proposed office uses meet the Concurrency requirements of the City and that no City department denied concurrency. R. Sec II, p. 246.

Fifth, the City Council found that the record did not contain any testimony demonstrating that the subject property was unsuitable for the proposed offices uses because of physical characteristics. R. Sec II, p. 247.

Last, the City Council made specific findings and conclusions that the proposal would not have a significant adverse impact on surrounding properties<sup>3</sup>. The Council also noted that West Central Development would be required to comply with the tall building standards of the City (SMC 17C.250) and submit its building plans to the City's Design Review Committee for review and approval. R. Sec. II, p. 247.

Chinn filed his Land Use Petition appealing the decision of the City Council on June 22, 2010.

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<sup>3</sup> A Mitigated Determination of Nonsignificance was issued under the State Environmental Policy Act, meaning the rezone will not create an adverse impact on the environment and surroundings properties. The MDNS was not challenged or appealed. R. Sec I, pgs. 104-106.

**D. Superior Court Decision**

The Superior Court reversed the City Council's decision based upon a single provision contained in the Spokane Municipal Code. The Superior Court based its decision solely on an interpretation of SMC 17C.120.030, which describes the "characteristics" of the office and commercial zones of the City. The Superior Court committed reversible error because the Court elevated the vague and ambiguous "characteristics" language which suggests that offices should be "low intensity" and "small-scale" and "promote compatibility with the surrounding area," above the precise standards contained in SMC Table 17C.120-1 (Commercial Zones Primary Uses) and SMC 17C.120.220 (Height).

The Superior Court committed reversible error by failing to grant deference to the Council's decision, findings, and conclusion of law that Chapter 17C.120 allows "office" as a permitted use in the office zones and that the Municipal Code does not restrict or define "higher intensity" (or conversely, "lower intensity") offices. The trial court further erred by disregarding the City Council's decision, findings, and conclusions of law concerning the City's building height regulations and application of the same.

The trial court correctly affirmed the City Council's findings and interpretation that the Spokane Municipal Code does not prohibit structures, such as the one proposed, unless it is within 150 feet of a single-family or two-family residential zone. The Record reflects that there is no single-family or two-family residential zone within 150 feet of the subject property; therefore, the trial court correctly found that the City Council's decision was correct on that issue.

**E. Summary of Prior Rezone Decisions on the Subject Property**

In 2008, West Central Development filed a rezone application for the same property to change the zoning from *O-35* (Office Zoning with a 35 foot height limitation) to *OR-150* (Office/Retail Zoning with a 150 foot height limitation). The City Hearing Examiner denied this application and it was appealed by West Central Development to the City Council. On appeal, the City Council reversed the Hearing Examiner and approved the rezone to *OR-150*. The City Council's May 5, 2008 decision reversing the Hearing Examiner was appealed by Chinn to Spokane County Superior Court ("Chinn I"). On December 30, 2008, the Spokane County Superior Court (Judge Rebecca Baker presiding) issued a decision reversing the City Council's decision.

The Superior Court's December 30, 2008 decision was appealed by

West Central Development and the City of Spokane to this Court. In reversing the City Council's decision, the Court of Appeal distinguished between zone changes for only a height increase versus changes involving both height and retail uses. As to height rezones, this Court stated that the City Council's interpretation of the Comprehensive Plan was correct in that new office uses may exist outside of centers so long as the office use is within the boundary of an existing office designation. *Chinn v. City of Spokane*, 157 Wn.App. 294, 299-300, 236 P.3d 245 (2010). This Court made further findings that the "office retail" zone is a higher intensity use, but that an "office" zone was low intensity. *Id.*

### III. STANDARD OF REVIEW

This LUPA action is governed by the standards of review set forth in RCW 36.70C.130(1). Like the City Council and Superior Court, this Court limits its review to the record before the City Council. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assoc.*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004); RCW 36.70C.120. As the party seeking relief from the land use decision, Mr. Chinn bears the burden of meeting one of the six standards for granting relief set forth in RCW 36.70C.130(1).

The LUPA standards for granting review set forth in RCW 36.70C.130(1) includes:

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts.

RCW 36.70C.130(1)(b)(c)(d).

The court may grant relief only if the Petitioner, the party seeking relief from the land use decision, has carried the burden of establishing that one of these standards has been met. RCW 36.70C.130.

Questions of law are subject to de novo review in this Court. RCW 36.70C.130(1)(b). This court's review of any claimed error of law in the City Council's interpretation of city ordinances 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(2002); *Pinecrest Homeowners Ass'n*, 151 Wn.2d at 290; RCW 36.70C.130(1)(b). The City Council 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 Island*, 106 Wn.App. 461, 474 24 P.3d 1079 (2001); RCW 36.70C.130(1)(b).

The City Council's decision may be reversed only where the City Council's application of the law to the facts is clearly erroneous. Under the "clearly erroneous application" test, the court applies the law to the facts and will overturn the land use decision only if the court is left with a "definite and firm conviction" that the decision maker committed a mistake. *Citizens to Pres. Pioneer Park*, 106 Wn.App. at 473.

Findings on issues of fact are reviewed under the substantial evidence test. RCW 36.70C.130 (1)(c). Evidence is substantial when it is of sufficient quality of evidence in the record to persuade a fair-minded person of the truth or correctness of the decision. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.* 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

#### IV. ARGUMENT

A. **The Superior Court Was Correct in Finding that the City Council correctly interpreted SMC 17C.120.220**

The City of Spokane has adopted specific regulations which address building height in commercial zones and they are contained in SMC Section 17C.120.220, entitled "Height."

The applicable section of SMC 17C.120.220 is set forth below:

Chapter 17C.120 Commercial Zones

Section 17C.120.220 Height

A. Purpose.

The height limits are intended to control the overall scale of buildings. The height limits in the O, NR and NMU zones discourage buildings that visually dominate adjacent residential areas. The height limits in the OR, CB and GC zones allow for a greater building height at a scale that generally reflects Spokane's commercial areas. ***Light, air and the potential for privacy are intended to be preserved in single-family residential zones that are close to commercial zones.***

B. Height Standards.

The height standards for all structures are stated in Table 17C.120-2. ***Exceptions to the maximum height standard are stated below.***

1. ***Maximum Height.***

***Exceptions to the maximum structure height are designated on the official zoning map by a dash and a height listed after the zone map symbol (i.e., CB-150). Changes to the height limits require a rezone.*** Height limits are thirty-five feet, forty feet, fifty-five feet, seventy feet or one hundred fifty feet depending on location.

2. Buildings and structures over fifty feet in height must follow the design, setback and dimensional standards found in chapter 17C.250 SMC, Tall Building Standards.

3. ***Adjacent to Single-family and Two-family Residential Zones.***

***To provide a gradual transition and enhance the compatibility between the more intensive commercial zones and adjacent single-family and two-family residential zones:***

- a. ***For all development within one hundred fifty feet of any single-family or two-family residential zone the maximum building height is as follows:***

Starting at a height of thirty feet at the residential zone boundary additional building height may be added at a ratio of 1 to 2 (one foot of additional building height for every two feet of additional horizontal distance from the closest single-family or two-family residential zone). The building height transition requirement ends one hundred fifty feet from the single-family or two-family residential zone and then full building height allowed in the zone applies.

In the proceedings below, Chinn argued that the City Council's decision to allow the rezone from O-35 to O-150 was grounded on an erroneous interpretation of SMC 17C.120.220, but Chinn has abandoned that argument in this proceeding, presumably, because the Superior Court soundly rejected this argument. CP 170-171. Specifically, Chinn asserted below that "*residential areas*" located in and around the subject property were entitled to special protection, even though such properties are not located in a single-family or two-family zone. CP 170-171. The City's

building height regulations are expressly intended to protect certain residential zones and to not extend to residential “areas.”

The Superior Court found:

“Petitioner is correct that some of the uses west, south and north of the subject property are indeed residential, whether single- or multi-family. *But of course, because of the zoning of these adjacent properties [office] it is expected that those residential uses will change over time to office or commercial use.*”

And the staff report discusses the fact that, *since no residential zones exist within 1275 feet of the subject property, “there are no defined development standards that affect the height requested through a rezone application other than if adjacent [to] or within 150 feet of a Single-Family or Two-Family Residential Zone,” citing SMC 17C.120.220.*

Under the circumstances of this case, and even though there is indeed a residential “area” nearby, *I conclude that the City did not erroneously interpret SMC 17C.120.220* when it relied more heavily on the adjacent and nearby zones in addition to noting these residential uses.

CP 170-171. (Emphasis added.)

It is undisputed that the City’s building height regulations set forth in SMC 17C.120.220 do not preclude the requested rezone from O-35 to O-150.

**B. The City Council Correctly Found that SMC 17C.120.220 is the Applicable Provision Regulating Building Height Increases.**

Chinn relies upon the words “residential areas” contained in SMC 17C.120.030 (Characteristics of Commercial Zones) and argues that an increase in building height is prohibited in “residential areas.” In other words, Chinn asserts that the vague language contained in SMC 17C.120.030 supersedes the more prescriptive building height standards contained in SMC 17C.120.220, which apply only to residential zones.

It is undisputed that there are some non-conforming residences in this office zone, but even the Superior Court recognized that these residences would likely transition to uses allowed under the Office zone. CP 170. The Record demonstrates that the area is characterized by non-residential uses. As noted by both the Hearing Examiner and in the Planning Department Staff Report, the surrounding area is used for office use with more intense zoning to the east in the form of the Spokane County Courthouse and jail. R. Sec. I, p. 17, 37. The Record also reflects that the zoning directly to the east of the subject property is Central Business-150 and the surrounding area is developed with a variety of uses such as office, government buildings, restaurants, and the new Walnut Corners retail district. R. Sec. I, p. 17-24. There is substantial evidence in

the Record that the surrounding area is not a “residential area.”

Furthermore, even though some of the land use activities currently surrounding in the Office-35 zone may be residential, the properties are zoned for office use and will continue to develop or re-develop with office uses as contemplated by the Office zone and Office Comprehensive Plan land use designation. This fact was acknowledged by the Superior Court in the proceedings below. CP 170.

The difficulty with the Chinn’s argument is that an owner of a “residential property” in an office zone could negatively affect the property rights of an adjacent property owner by using his or her property in a less intensive use, such as residential use in an office zone. The zoning requirements were not designed to allow one property owner to selectively determine the land use rights of an adjacent property owner. If accepted, Petitioner’s argument would thwart the goals and policies of the City’s Comprehensive Plan and zoning designation, which both expressly state that the subject property and “surrounding area” will be developed for office use, not residential. Chinn claims that the presence of non-conforming residences precludes an increase in the building height for the proposed office use and the requested rezone because these non-conforming residences make it a “residential area,” thereby placing a

limitation on any building height increases. This argument is contrary to the existing Office zoning designation and the Office Comprehensive Plan designation. If the City had intended to protect “residential areas” it would have extended the provisions contained in SMC 17C.120.220 to “residential areas” as well as residential zones.

C. **The City Council Correctly Interpreted and Applied Spokane Municipal Code 17C.120.030.**

Chinn’s arguments rely exclusively on an interpretation of SMC 17C.120.030. This particular code section describes the “*characteristics*” of the various commercial zones; however, it does not prescribe specific development standard nor does it regulate allowable land uses or building heights. Allowable land uses are listed in SMC Table 17C.120-1 and the regulations for building height are found in SMC 17C.120.220. Section 17C.120.030 states in pertinent part:

Chapter 17C.120 Commercial Zones

Section 17C.120.030 Characteristics of Commercial Zones

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.*

**1. The Spokane Municipal Code Does not Mandate that Office Uses be “Small-Scale” or “Lower Intensity.”**

Chinn also asserts that the rezone application is not permissible based on SMC17C.120.030 (A), which states that:

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.

Petitioner argues that this request is for a “higher intensity” use.

That argument is not supported by the Record, the Staff Report, the Hearing Examiner’s findings or the Council Decision. In fact, the decision of the Court of Appeals in *Chinn I* specifically found that the

“Office” zone is low intensity and “Office Retail” is high intensity.

First, the Court of Appeals found that a retail component was the distinguishing characteristic of “higher intensity use” between Office and Office Retail. Specifically, the Court of Appeals found:

To this end, the SMC first creates the Office and Office Retail categories to distinguish office use according to intensity: Land zoned Office is “intended to be low intensity office zone,” whereas land zoned Office Retail is “intended to be a higher intensity office zone.”

*Chinn v. City of Spokane*, 157 Wn.App. 294 299-300 (2010).

Second, the Record is void of any evidence that the height of a building dictates the use or intensity of a building. Significantly, the Municipal Code does not even use the language “higher intensity” relied upon by Chinn. Intensity is controlled by the allowable land uses of the underlying zoning. Under SMC Table 17C.120-1, “office” use is allowed in O-35 and O-150. The City of Spokane does not distinguish between offices such as a law office, medical office, or real estate office.

Consequently, there is no advantage, with respect to allowable uses, of a building that is 35 feet in height or 150 feet in height. Indeed, there is no difference between the impacts of a medical office located in a 150 foot tall building versus a 3-story building. A medical office is a medical

office.

Third, Chinn fails to acknowledge that the same square footage of building could be built as a 150 foot tall building with a smaller footprint or in a 3-story building with a much larger footprint. The advantage of developing vertically is that open space can be preserved as opposed to a horizontal development where the entire property is consumed with impervious surfaces. It is undisputed that one of the goals of the Comprehensive Plan is to preserve open space.

Fourth, in the City Council Decision on Appeal, the City Council made specific findings that the Spokane Municipal Code does not define “higher intensity” nor does it restrict higher intensity offices in the Office zone. R. Sec. II, p. 246. The court must grant deference to the City’s interpretation of its own codes. See *Citizens to Preserve Pioneer Park LLC v. City of Mercer*, 106 Wn.App. at 474; RCW 36.70C.130(1)(b). The Office zone allows all offices uses, without regard to “intensity.”

Fifth, Chinn’s argument that all office uses must be “small scale” is not supported by the Record or law. The City Code does not define “small scale” nor limit the square footage of office uses. Is an office that contains 500 square feet “small scale?” If an office contains 10,000 square feet but only generates 5 vehicle trips per day, is it considered

“small-scale?” If an office is only open eight hours a day versus 24 hours a day, does that make it “small-scale” or “low intensity?” Mr. Chinn wants the height of a building to be the defining characteristic of “small scale” or “low intensity” but there is simply no support in the Record or applicable code provisions for such argument. Therefore, it must fail.

The controlling regulations which determine how intensely a site may be developed include those contained in Section 17C.120.220 of the Municipal Code (Building Height) and SMC Table 17C.120-1 which outlines allowable uses in the office zone. In addition, the City has floor/area ratios which limit the maximum floor area that can be developed based on the size of the property. SMC 17C.120.210.

Finally, Chinn’s arguments fail to recognize that with the increase in building height comes additional development standards in terms of design, setbacks and dimensional standards found in SMC 17C.120.250. R. Sec. 1, p. 12. While a rezone from O-35 to O-150 is an increase of building height, any adverse effects to the surrounding neighborhood are mitigated by the increased dimensional standards set forth in SMC 17C.120.250 (Tall Buildings), which are only applicable to buildings greater than 50 feet. It should also be noted that while the rezone may permit a building up to 150 feet, the actual height of the building to be

constructed may be significantly less.

**D. The Rezone Application Satisfied All Criteria for a Rezone Under the Spokane Municipal Code.**

To be approved by the Hearing Examiner, the rezone application must comply with five criteria set forth in Spokane Municipal Code (SMC) Section 17G.060.170 (C). Chinn asserts that 3 of the 5 criteria have not been met, including the requirement that the proposal be allowed under the provisions of the land use codes (SMC 17G.060.130( C)(1)); that the proposal be consistent with the comprehensive plan designation and goals objectives and policies for the property (SMC 17G.060.170( C )(2)); and that the proposed rezone not have a significant adverse effect on the surrounding properties (SMC 17G.060( C)(5)).

In his appeal to the City Council, Chinn raised many of the same arguments. The City Council adopted lengthy and detailed findings in its Decision on Appeal, and affirmed the Hearing Examiner's decision to approve the rezone. ("The Hearing Examiner's decision was supported by the record, was not an error or misinterpretation of law or fact, and was within the Hearing Examiner's authority.") R. Sec, II, p. 245.

**1. A Rezone to O-150 is allowed under the Spokane Municipal Code.**

The subject property is zoned Office, which is consistent with, and implements the City's Comprehensive Plan. Office uses are allowed in the Office zone: all that is at issue in this proceeding is the height limitation.

The decision of the Hearing Examiner, affirmed by the City Council, explains that office zones are commercial zones governed by Chapter 17C.120 of the SMC. The rezone application from O-35 to O-150 is for property that, as noted by this court in its prior decision, is already within an existing "Office" zone and "Office" Comprehensive Plan designation. The City Council found that under Table 17C.120-1 of the Spokane Municipal Code, "office" is specifically listed as a permitted use; therefore, the proposal is allowed under the City's land use codes. R. Sec. II, p. 246.

As noted above, office uses are allowed in the Office zone: all that is at issue is the height limitation. As discussed previously, a change in the height limit requires a rezone. The available height limits are 35 feet, 40 feet, 55 feet, 70 feet and 150 feet. SMC 17C.120.220(B). The Hearing Examiner correctly concluded, and the City Council appropriately

affirmed, that the application for a rezone from O-35 to O-150 is one of the available options allowed under the City's land use codes.

- a. *The Spokane Municipal Code Only Limits Building Height for Buildings Located Adjacent to, or within 150 feet of, a Single-Family or Two-Family Zone.*

Concerning building height, the City Council found, as did the Hearing Examiner, that the City Municipal Code does not prohibit structures, such as the one proposed, unless it is within 150 feet of a single family or two-family zone. R. Sec. II, p. 245-246.

As stated in SMC 17C.120.220, the purpose of the height/scale standards is to preserve light, air and the potential for privacy in “*single-family residential zones* that are close to commercial zones.” SMC 17C.120.220(A) (Emphasis added). Consequently, the City has enacted building height restrictions for buildings which are located adjacent to, or within 150 feet of, a single-family and two-family residential *zones* under SMC 17C.120.220(B)(3), as set forth below.

3. Adjacent to Single-family and Two-family Residential Zones.

To provide a gradual transition and enhance the compatibility between the more intensive commercial zones and adjacent single-family and two-family residential zones:

- a. ***For all development within one hundred fifty feet of any single-family or two-family residential zone the maximum building height is as follows:***

Starting at a height of thirty feet at the residential zone boundary additional building height may be added at a ratio of 1 to 2 (one foot of additional building height for every two feet of additional horizontal distance from the closest single-family or two-family residential zone). The building height transition requirement ends one hundred fifty feet from the single-family or two-family residential zone and then full building height allowed in the zone applies.

SMC 17C.120.220(B)(3) (Emphasis added.)

It is undisputed that the West Central Development property is not adjacent to single-family or two-family residential zones or even within the 150 foot requirement set forth in SMC 17C.120.220B. The nearest residential zone is located 1,275 feet away. CP 170. The property is adjacent to other office zoning and the more intensive land uses such as the Spokane County Courthouse complex and jail. R. Sec. I, p. 17-24.

The Hearing Examiner and City Council specifically found that the

Spokane Municipal Code does not prohibit structures such as the one proposed unless it is within 150 feet of a single family or two-family residential zone (“[t]he City has no regulations against the building of a structure like this in the office zone unless it is within 150 feet of a single family or two family residential zone”). R. Sec. II, p. 246. When the City is interpreting its own regulations, the court is required to give deference to the City’s interpretation. See *Citizens to Preserve Pioneer Park LLC v. City of Mercer*, 106 Wn.App. at 474; RCW 36.70C.130(1)(b).

The concerns expressed by Chinn are addressed by the SMC when office zones are adjacent to residential zones, in which case, additional conditions and limitations are imposed on the building height of the office development. However, in this application, it is undisputed that the O-150 zone is not adjacent to a residential zone nor it is even within the 150 foot distance requirement of SMC 17C.120.220 (B)(3).; therefore the Hearing Examiner and the City Council correctly found that the proposal is allowed under the land use codes.

**E. The Rezone is Consistent with the Comprehensive Plan.**

The City Council, as well as the Hearing Examiner, found that the rezone request to increase the building height from 35 feet to 150 feet is not inconsistent with the Comprehensive Plan, citing Policy LU 1.5. R.

Sec. II, p. 246.

It should be noted that in *Chinn I*, Chinn argued that Land Use Policy 1.5 was the applicable and controlling land use policy to decide if an increase in building height is permitted. In this appeal, Chinn ignores Land Use Policy 1.5 and the findings the Court of Appeals on this land use policy, and instead introduces red herring arguments related to other Comprehensive Plan policies. As explained below, Petitioner's reliance on these other sections of the Comprehensive Plan is misplaced.

Chapter 3.5 of the Comprehensive Plan provides a description of office use, which uses language such as "The Office designation is usually a freestanding small office. . ." or "Higher intensity office areas should be located around downtown Spokane in the North Bank and Medical District. . ." Comprehensive Plan, Chapter 3, 3.5, pg. 34 (CP 94); Brief of Respondent Chinn, pgs.13-14. Chinn also cites to Land Use Policy LU 3.2 of Chapter 3.4 of the Comprehensive Plan regarding neighborhood centers. Chinn's argument is misplaced since the cited language is either suggestive in nature or in reference to neighborhood centers, which is not present in this application.

Furthermore, this Court previously found that a retail component was the distinguishing characteristic of "higher intensity use" between

Office and Office Retail. Specifically, the Court of Appeals found:

To this end, the SMC first creates the Office and Office Retail categories to distinguish office use according to intensity: Land zoned Office is “intended to be low intensity office zone,” whereas land zoned Office Retail is “intended to be a higher intensity office zone.”

*Chinn v. City of Spokane*, 157 Wn.App. at 299-300 (2010).

Applying this finding and interpretation of law to the Comprehensive Plan sections cited by Chinn, the “higher intensity” zones that would be allowed or should be located around downtown Spokane is the Office Retail zone, because that is the “higher intensity” zone. Because Office is not deemed to be a “higher intensity” use, it is not geographically limited. The controlling regulation is SMC 17C.120.220 which limits the geographic location of taller buildings to areas within 150 feet of single family and residential zones. The Municipal Code does not have a standard such as the one suggested by Chinn. In other words, the O zone does not direct tall buildings to only those areas around the Downtown Plan, the Medical District or North Bank, as Chinn suggests. The City Council specifically found that offices are allowed in the Office zone and the Office zoned does not restrict or define higher intensity

offices. R. Sec. II, p. 246. Rather, the Municipal Code controls height within 150 feet of single family and two-family zones, which is the implementing provision of the Comprehensive Plan.

Assuming *arguendo*, that a conflict existing between Land Use Policy 3.5 and SMC 17C.120.220, 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, if it could be construed that Land Use Policy 3.5 may seek to limit tall buildings to certain geographic areas of the City, as argued by Chinn, it must yield to the more specific zoning regulation (SMC 17C.120.220), which does not restrict location except in those instances where a tall building is located within 150 feet of a single-family or two-family zone.

In this case, the City Council determined that West Central's rezone was consistent with and implemented the Comprehensive Plan as well as the applicable provisions of the municipal code adopted to implement the Comprehensive Plan. 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). Therefore, the City Council's decision must be affirmed.

F. **Petitioner has failed to demonstrate that the City Council's decision affirming the Hearing Examiner's decision is not supported under the substantial evidence standard of RCW 36.70C.130(1).**

While Chinn cites to portions of the record demonstrating opposition by area residents to the rezone application, Petitioner fails to meet the standard set forth in RCW 36.70C.130(1). Chinn must demonstrate that the City Council's decision affirming the Hearing Examiner's decision is not supported by evidence that is substantial when viewed in light of the whole record before the court. Evidence is substantial when it is of sufficient quality of evidence in the record to persuade a fair-minded person of the truth or correctness of the decision. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.* 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). The focus is on the quality of the evidence, not the quantity of the number of neighbors who are opposed to how property in their neighborhood is developed.

The City Council's decision clearly demonstrates how the rezone application complied with the requirements of the decision criteria set forth in SMC 17G.060.170. R. Sec. II, p. 244-250. Both the City Council

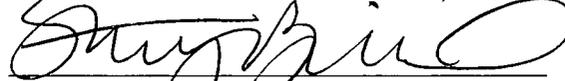
and the Hearing Examiner's decisions demonstrate the affirmative findings of fact relative to each criteria. It is important to note that the burden is only initially upon the applicant to demonstrate that the five decision criteria are met. SMC 17G.060.170. The subsequent appeal to the City Council and to this Court shifts the burden to the Petitioner not to simply show how there is support opposing the rezone but that the decision is not supported by substantial evidence when viewed in light of the whole record. Chinn has failed in his burden.

#### V. CONCLUSION

As discussed herein, the City Council's interpretation of Comprehensive Plan, Municipal Code and its decision to affirm the Hearing Examiner, were not based upon an erroneous interpretation of law or misapplication of the law to the facts; therefore the Superior Court's decision should be reversed and the City Council's decision should be affirmed.

Respectfully submitted this 22<sup>nd</sup> day of December, 2011.

PARSONS/BURNETT/BJORDAHL, LLP



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LLC

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**CERTIFICATE OF SERVICE**

STATE OF WASHINGTON

BY \_\_\_\_\_

I, the undersigned, hereby declare under penalty of perjury and the laws of the State of Washington that on the 22nd day of December, 2011, I caused a true and correct copy of the of the OPENING BRIEF OF PETITIONER 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 checked="" type="checkbox"/> US Mail & Email <input 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 checked="" type="checkbox"/> US Mail & Email <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy (Fax)

EXECUTED on the 22nd day of December, 2011 at Spokane, Washington.

By:   
STACY A. BJORDAHL