

No. 43300-1-II

Thurston County Superior Court #11-2-01733-5
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SSHI LLC, a Delaware limited liability corporation, dba DR
Horton,

Petitioner/Appellant,

vs.

THE CITY OF OLYMPIA,
a Washington municipal corporation,

Respondent,

OLYMPIA SAFE STREETS CAMPAIGN, a Washington
Nonprofit Corporation,

Intervenor.

APPELLANT'S REPLY BRIEF

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FILED
COURT OF APPEALS
DIVISION II
2012 NOV -5 PM 3:38
STATE OF WASHINGTON
BY 
DEPUTY

ORIGINAL

TABLE OF CONTENTS

ARGUMENT	1
A. The Olympia Municipal Code Requirement for a ‘Sheltered Transit Stop’ in the Village Center of a Master Plan is Unambiguous.....	1
i. The requirement for a sheltered transit stop has inherent utility and is a logical step in the land development process.....	2
ii. A transit service commitment exists for Trillium, even if the City could make such a demand.....	3
B. The Master Plan, Required to Develop Property that the City Placed in the Neighborhood Village Zone, is Not a Rezone	5
C. The Olympia Municipal Code Does Not Require DR Horton to Demonstrate Master Plan Consistency with the City’s Comprehensive Plan as if it Were a Rezone.	7
i. The City’s attempt to impute the rezone criterion of consistency with a Comprehensive Plan into master plan review is unlawful.	7
ii. The City improperly attempts to use its Comprehensive Plan to impose specific requirements onto the master plan.	8
iii. The Comprehensive Plan does not impose transit service requirements on a master plan.	10
D. The Legislative Statements of Purpose for the NV Zone do Not Provide Authority to Impose an Unwritten Requirement for a Commitment of Transit Service.....	11
E. <i>Phoenix</i> Does Not Change the Rules of Statutory Construction or Stand for Authority to Impose New Requirements Not Expressly Adopted in City Code.....	13
F. The City Does Not Provide a Clear or Rational Explanation of What Would Satisfy its Transit Service Requirement In Order to Approve the Trillium Master Plan.....	15
i. The City is inconsistent as to the type of transit service it demands and whether that service must use the sheltered transit stop.....	16
ii. The City does not have any agency policy as shown in prior master plan decisions that might support the City’s position even if the OMC requirements were ambiguous.....	18

- a. The Bentrige Master Plan was not required to demonstrate any commitment of fixed-route bus service to its sheltered bus stop and was approved based on similar existing fixed-route bus service as that available to the Trillium property 19
 - b. The Village at Mill Pond approval included no commitment for transit service or any consequences in the event fixed-route transit service is never actually provided..... 20
- G. By Refusing to Analyze Issues Related to School Site Dedication and Pedestrian/Bicycle Connectivity, the City Council Belied a Ready Recognition that its Land Use Decision Would Likely Be Reversed if Judicially Reviewed. 22
- H. The City Misused Policy PF 33.5 to Reserve Review After Remand of Whether to Require a School Site Dedication as part of the Trillium Master Plan. 23
- I. There is No Support for the City’s Decision that the Record Was Insufficient to Determine Whether the Trillium Master Plan Provided Adequate Pedestrian and Bicycle Connectivity. 24
- J. There is No Basis to Award Attorneys’ Fees..... 25

TABLE OF AUTHORITIES

CASE LAW

<i>Burien Bark v. King County</i> , 106 Wn.2d 868, 725 P.2d 994 (1986)	17
<i>Cathcart-Maltby-Clearview Community Council v. Snohomish County</i> , 96 Wn.2d 201, 634 P.2d 853 (1981)	5
<i>Citizens for Mt. Vernon v. City of Mt. Vernon</i> , 133 Wn.2d 861, 947 P.2d 1208 (1997)	8,10, 23
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).	1, 16, 18
<i>Feil v. EWGMHB</i> , 153 Wn. App. 394, 220 P.3d 1248 (2009)	8
<i>Gig Harbor v. North Pacific Design</i> , 149 Wn. App. 159, 201 P.3d 1096 (2009)	1, 6
<i>Judd v. American Tel. and Tel. Co.</i> , 152 Wn.2d 195, 95 P.3d 337 (2004)	12
<i>Lauer v. Pierce County</i> , 173 Wash.2d 242, 267 P.3d 988 (2011).....	15
<i>McTavish v. City of Bellevue</i> , 89 Wn. App. 561, 949 P.2d 837 (1998)	1
<i>Maranatha Mining v. Pierce County</i> , 59 Wash. App. 795, 801 P.2d 985 (1990).....	22
<i>Parkridge v. City of Seattle</i> , 89 Wash.2d 454, 573 P.2d 359 (1978).....	5
<i>Phoenix v. City of Woodinville</i> , 171 Wn.2d 820, 256 P.3d 1150 (2011).....	7, 13, 14, 15
<i>Pinecrest Homeowners Association v. Glen A. Cloninger and Associates</i> , 151. Wdn.2d 279, 87 P.3d 1176 (2004)	7, 8
<i>Postema v. Postema Enterprises, Inc.</i> , 118 Wn. App. 185, 72 P.3d 1122 (2003)	12
<i>Raynes v. City of Leavenworth</i> , 118 Wn.2d 237, 821 P.2d 1204 (1992).....	5

<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005)	1
<i>Timberlake Christian Fellowship v. King County</i> , 114 Wn. App. 174, 61 P.3d 332 (2002)	8, 23
<i>Whatcom County Fire District 21 v. Whatcom County</i> , 171 Wn.2d 421, 256 P.3d 295 (2011)	2

CITY REGULATIONS

chapter 18.05 OMC	9, 13
chapter 18.05A OMC	9, 13
chapter 18.57 OMC	9
OMC 18.02.100	9
OMC 18.02.160	5
OMC 18.05.020	11, 12, 13
OMC 18.05.050	1, 6, 19
OMC 18.05.160	19
OMC 18.57.040	6, 7
OMC 18.57.080	9, 10
OMC 18.59.050	5, 6

OTHER AUTHORITIES

Policy PF 33.5	23
Policy T3.32	10

ARGUMENT

A. The Olympia Municipal Code Requirement for a ‘Sheltered Transit Stop’ in the Village Center of a Master Plan is Unambiguous.

There is no ambiguity in the master plan requirements at issue in the instant case. Those requirements are clearly stated in the Olympia Municipal Code (“the OMC”): the required village center “shall contain ... a sheltered transit stop” that “shall be located and designed in accordance with specifications provided by the City and approved by Intercity Transit.”¹ There is also no dispute that DR Horton’s proposed master plan meets the plain language of these requirements.

This Court clearly directs that, “[i]f the language is unambiguous, we rely solely on the statutory language.”² When an ordinance is unambiguous, “construction is unnecessary because the plain meaning controls.”³

The fact that the OMC does not define these basic terms does not make its requirements ambiguous.⁴ A requirement to build a physical sheltered transit stop as part of a mixed-use development is not unusual and does not imply that the applicant must separately ensure transit service. To the contrary, the OMC does not require a master plan applicant to ensure transit

¹ OMC 18.05.050 (C)(1) and (4).

² *Gig Harbor*, 149 Wn. App. 159, citing *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005).

³ *Gig Harbor*, at 159, citing *McTavish v. City of Bellevue*, 89 Wn. App. 561, 565, 949 P.2d 837 (1998).

⁴ *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 814, 828 P.2d 549 (1992).

service of any type, let alone a fixed-bus route. Hence, logically, the OMC does not have any standards or guidance for considerations such as type and level of transit service, when that service must start or duration of service.⁵

i. The requirement for a sheltered transit stop has inherent utility and is a logical step in the land development process.

The City fails to recognize that the sheltered transit stop has utility irrespective of a fixed-route bus. The OMC requires the sheltered stop to be centrally located so as to be available to all residents and users of the commercial area, for purposes of school busses, Dial-a-Lift and vanpool users, or private transit services. The City fails to recognize that Dial-a-Lift and vanpool users residing in multifamily units or using commercial businesses will find no better central location than the sheltered transit stop for accessing those transit services.

Transit is driven by the end user's demand. At the time of master plan review, no one can know who the end users of the homes are; defining which types of transit will be needed is simply impossible at this stage. Transit providers, whether public or private, respond to demand, which does not exist until a new development is built and occupied. The sheltered transit stop needs to be available for a variety of transit uses for decades to come, as those services come and go according to demand.

⁵ Compare to *Whatcom County Fire District 21 v. Whatcom County*, 171 Wn.2d 421, 428-429, 256 P.3d 295 (2011).

The developer, the City and independent transit providers each have differing roles in this respect. The developer's role is to design a community that meets the City's adopted standards and requirements, specifically addressing road capacity, road design and transit amenities. The developer builds the required infrastructure proportionate to the impacts and needs the new development generates, i.e. roads wide enough for busses of all sizes, sidewalks, sheltered transit stop(s) and so forth. It would then be the City's responsibility to negotiate with Intercity Transit any fixed-route bus services through an interlocal agreement and the City's seat on the Intercity Transit board. Even if the City is unable to coordinate services with Intercity Transit, the sheltered transit stop will have other independent utility over the years.

ii. A transit service commitment exists for Trillium, even if the City could make such a demand.

Intercity Transit has committed specific transit services for the Trillium village and explained both when and how a fixed-route bus service would be provided in the future through the Trillium and Bentrige sites.⁶ No adopted standards support the City's subjective conclusion that this is insufficient.

Development in the area is proceeding from west to east: the approved Bentrige Master Plan, immediately west of Trillium, will extend Log Cabin

⁶ Ex. 97, AR pages 003712; Ex. 150, AR pages 003925-3926. Color copies were provided to Superior Court. CP 285-445 However, DR Horton hereby corrects its Opening Brief as not having provided color copies pursuant to RAP 10.4 (a)(1).

Road across the site from Boulevard Road to the common Bentrige-Trillium boundary. DR Horton would then extend Log Cabin Road across its site to Trillium's east boundary. From there, only one intervening property separates Log Cabin Road from connecting with the next north-south arterial, Wiggins Road. Once that link is complete, Log Cabin Road would connect completely through the neighborhood as a major collector, accomplishing a significant transportation objective for the area.⁷ Intercity Transit plans to provide fixed-route bus service on Log-Cabin Road once the full connection to Wiggins is complete.⁸ Nothing precludes Intercity Transit from adding a fixed-route bus on Log Cabin Road before then if there is demand; the Trillium roads as designed would allow for that service irrespective of a final link to Wiggins Road. Even without Log Cabin Road, the City itself anticipated that Intercity Transit may re-start its previous Morse-Merriman bus route along the north boundary of Trillium and Bentrige when those projects are built and occupied.⁹

⁷ *Comprehensive Plan*, Transportation Element, pages 39-40.

⁸ Ex. 97.

⁹ In 1994, Intercity Transit had a bus route (Route 24) along Morse-Merriman. CP 550-1517, Appendix C-2. Intercity Transit has since discontinued that bus route. However, as even the City recognized, Intercity Transit is expected to reinstate that route with increased demand from residents of Trillium and Bentrige. Ex. 708, pages 124-125.

B. The Master Plan, Required to Develop Property that the City Placed in the Neighborhood Village Zone, is Not a Rezone.

The City improperly argues the master plan is a rezone so as to take advantage of a higher level of discretion more favorable to the City's subjective approach. For example, there is no presumption in favor of a rezone because the City already assigned zoning to the property that it deemed appropriate. Further, a rezone proponent must demonstrate that conditions have changed since the original zoning and that the rezone would bear a substantial relationship to the public health, safety, morals, or welfare.¹⁰ In sum, a city has relatively broad discretion in deciding whether to approve a rezone.

Quite simply, this case does not present a change to the property's zoning classification: the property is zoned Neighborhood Village (NV) throughout the land development process.¹¹ In contrast, a rezone changes a property's zoning from one classification to another.¹²

A master plan approval does not constitute a rezone. Instead, the master plan is a land development approval required to make any use of property the

¹⁰ *Parkridge v. City of Seattle*, 89 Wash.2d 454, 462, 573 P.2d 359 (1978); OMC 18.59.050.

¹¹ The Neighborhood Village zone is one of many zones established under the Olympia Municipal Code. OMC 18.02.160 (A) (Establishment of Zoning Districts; said zoning districts are set forth in Article II of Title 18 OMC, namely chapters 18.04 through 18.08).

¹² *Cathcart-Malby-Clearview Community Council v. Snohomish County*, 96 Wn.2d 201, 212, 634 P.2d 853 (1981); *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 248, 821 P.2d 1204 (1992).

City already zoned NV.¹³ The master plan ensures that development of property zoned NV meets those criteria applicable only in the NV zone. The master plan criteria and processing requirements are completely distinct from those involved in a rezone.¹⁴ In stark contrast to there being no presumption of validity for a rezone, the City must ultimately approve a master plan for the property it already zoned NV. Only if that property is not viable for development under the NV zone due to site conditions, infrastructure or street capacity would the OMC allow a rezone to a more traditional residential zone.¹⁵

This Court has previously recognized that an umbrella land development approval, such as a master plan, is not a rezone.¹⁶ In *Gig Harbor*, this Court rejected Gig Harbor's argument that a planned residential development ("PRD") was equivalent to a rezone. The PRD "did not change the purpose or the effect of the zone's permitted use, let alone constitute an 'obvious change' that would warrant a rezone."¹⁷ The Gig Harbor City Code expressly allowed the density increase applied for in the PRD without changing the zone.¹⁸ As in *Gig Harbor*, the proposed density and development under the

¹³ OMC 18.05.050 (A)(1); OMC 18.57.040 (A).

¹⁴ Compare chapters 18.05 and 18.05A OMC; OMC 18.57.040; OMC 18.59.050.

¹⁵ OMC 18.05.050 (A)(2).

¹⁶ *Gig Harbor v. North Pacific Design*, 149 Wn. App. 159, 201 P.3d 1096 (2009).

¹⁷ *Gig Harbor*, at 170.

¹⁸ *Gig Harbor*, at 171.

Trillium Master Plan falls within the limits established for the underlying NV zone and meets the specific NV zone master plan criteria.

The fact that the OMC requires the City to amend its zoning map to reflect approval of the master plan does not turn the master plan into a rezone.¹⁹ The note on the City's zoning map simply gives notice to potential future property owners and the public in general of the master plan approval since the master plan is not otherwise recorded against the property's title. This note on the zoning map does not change the property's NV zoning.

C. The Olympia Municipal Code Does Not Require DR Horton to Demonstrate Master Plan Consistency with the City's Comprehensive Plan as if it Were a Rezone.

- i. The City's attempt to impute the rezone criterion of consistency with a Comprehensive Plan into master plan review is unlawful.*

The City's erroneous assertion that a master plan is equivalent to a rezone underpins its justification for denying the Trillium Master Plan. The City would selectively apply only one of the traditional rezone criteria to the master plan, that of consistency with the Comprehensive Plan.²⁰ The City never asserts that any other rezone criteria apply to a master plan nor did the City actually apply any other rezone review criteria in the underlying record. The City's reliance on caselaw such as *Pinecrest* and *Phoenix* based on this

¹⁹ OMC 18.57.040 (C)

²⁰ *Olympia Response Brief*, see eg pages 33; 39.

approach must be rejected.²¹ Instead, the master plan is already generally consistent with the Comprehensive Plan by virtue of it being required to develop under the zoning that the City itself assigned to the property.

ii. The City improperly attempts to use its Comprehensive Plan to impose specific requirements on the master plan.

The Comprehensive Plan is a ‘guide’ or ‘blueprint’ for adopting development regulations, not for evaluating specific land development proposals.²² The purpose of the Comprehensive Plan is to guide the drafting of development regulations, i.e. the master plan requirements in the OMC, which are then applied to specific development applications.²³

The City improperly attempts to use isolated Comprehensive Plan Policies as if those contained development-specific standards that create a requirement of transit service not actually imposed in the City’s development regulations, i.e. the OMC. Mayor Mah explained that not only does the imposition of a transit service requirement create an “impossible standard to meet”, but the City is improperly using the Comprehensive Plan to support its

²¹ *Pinecrest Homeowners Association v. Glen A. Cloninger and Associates*, 151. Wdn.2d 279, 87 P.3d 1176 (2004); *Phoenix v. City of Woodinville*, 171 Wn.2d 820.

²² *Citizens for Mt. Vernon v. City of Mt. Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997).

²³ *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 182-183, 61 P.3d 332 (2002); *Feil v. EWGMHB*, 153 Wn. App. 394, 409, 220 P.3d 1248 (2009).

decision.²⁴ Councilmember Rogers even recognized this before apologizing to DR Horton for its years of work only to have the City deny its project:

And all I can encourage us to do is to make sure that when we do a Comprehensive Plan and also when we follow up in our Codes development that we make sure we're getting feedback from you, from people like Horton, and that our Codes are workable, that they're usable, that they fit, and where we're not building contradictions between our zoning and our Codes and our Comp Plan.²⁵

There is no requirement in the OMC that DR Horton affirmatively demonstrate consistency with the Comprehensive Plan.²⁶ The regulations in chapters 18.05 and 18.05A OMC already implement the Comprehensive Plan.²⁷ Instead, the Hearing Examiner was empowered to issue a recommendation based only on whether the Master Plan complied with chapter 18.05 OMC.²⁸ The Examiner was not empowered in any way to compare the master plan for consistency to the Comprehensive Plan. As well, Design Review Board issues a recommendation over whether the master plan meets the chapter 18.05A OMC design guidelines.²⁹

The City Council then considers whether either recommendation is in conflict with the Comprehensive Plan and whether the master plan has

²⁴ Exhibit 711, page 132, lines 3-14; page 133, lines 19-20.

²⁵ Exhibit 711, page 136, line 25; page 137, lines 1-9.

²⁶ See generally chapters 18.05, 18.05A and 18.57 OMC.

²⁷ OMC 18.02.100.

²⁸ OMC 18.57.080 (C).

²⁹ OMC 18.57.080 (B).

sufficient evidence presented as to any impacts on the surrounding area.³⁰ If the recommendations do not conflict with the Comprehensive Plan and all impacts are addressed, the Council shall approve the master plan.³¹

iii. The Comprehensive Plan does not impose transit service requirements on a master plan.

Irrespective of the foregoing, the Comprehensive Plan simply does not require that a master plan demonstrate transit service to, through or around the site upon some point in time of development. To the extent the Comprehensive Plan comes into play in this case, general conformity is all that is required, not strict consistency with particular policies and the Trillium Master Plan is readily consistent with the Comprehensive Plan.³²

The Comprehensive Plan policies the City cites to do not require a master plan to ensure transit service.³³ Instead, those policies only contain general language related to efficient design and the City's desire to have less dependence on single-occupancy vehicles. The Trillium Master Plan is readily consistent with these policies, as DR Horton briefly summarized in its Opening Brief.³⁴

³⁰ OMC 18.57.080 (D).

³¹ OMC 18.57.080 (D)(4).

³² *Citizens for Mt. Vernon*, 133 Wn.2d 861, 873.

³³ This is the case even though the City now wishes to rely on at least one Comprehensive Plan Policy, T3.32, which was not the basis for its land use decision.

³⁴ *Opening Brief*, page 38.

The City lost sight of the Comprehensive Plan vision that contemplates projects such as Trillium will provide the density and infrastructure to make future transit services viable. By providing the required road design and layout, road widths and physical amenities, DR Horton has met the master plan requirements that ensure Trillium will support and allow for the full range of transit service options.³⁵ Intercity Transit reviews this physical infrastructure so that it meets Intercity Transit's needs.³⁶ Then Intercity Transit independently determines how it will serve Trillium based on its resources and the community demand. It is the City's denial of the Trillium Master Plan denial that conflicts with the City's Comprehensive Plan vision: there would be no neighborhood village project to finance building the Log Cabin Road extension and bring the residential density and commercial services to support a fixed-route bus.

D. The Legislative Statements of Purpose for the NV Zone do Not Provide Authority to Impose an Unwritten Requirement for a Commitment of Transit Service.

The City improperly relies on the purpose statements set forth in the OMC for the Urban Village (UV) and Neighborhood Village (NV) zones for its creation of a new fixed-route bus service requirement.³⁷ There is no basis

³⁵ See e.g. Ex. 150, AR 003922.

³⁶ Ex. 150, AR 003923-3926.

³⁷ OMC 18.05.020 (A); *Olympia Response Brief*, pages 23-24.

for the City to rely on general purpose statements to question the unambiguous master plan requirements.

Legislative findings and purpose statements do not set forth operative rules of action.³⁸ In some cases, they may help to determine legislative intent where an ordinance is ambiguous and needs construction. However, they do not set forth project requirements and cannot be used to contradict the plain language of requirements set forth in a statute or ordinance.³⁹

The City has never previously imposed the legislative purposes set forth in OMC 18.05.020(A) as if they were specific master plan criteria and does not even do so consistently in this case. For example, the City cites as authority the purpose of development in the NV and UV zones to enable residents “to live within one-fourth (1/4) mile of a grocery store and transit stop.”⁴⁰ The City has never required or even addressed whether any master plan, whether Trillium, Bentrige or the Village at Mill Pond, should identify existing or planned grocery stores. This would have been improper as the OMC does not set forth any standards or meaningful guidance regarding grocery stores. The same holds true for the City’s attempt to selectively use only portion of this purpose to support its new demand that DR Horton assure transit service for Trillium.

³⁸ *Judd v. American Tel. and Tel. Co.*, 152 Wn.2d 195, 203, 95 P.3d 337 (2004).

³⁹ *Postema v. Postema Enterprises, Inc.*, 118 Wn. App. 185, 198-199, 72 P.3d 1122 (2003).

⁴⁰ OMC 18.05.020 (A)(6).

These purpose statements simply do not have the specificity or clear mandates necessary to impose them as additional master plan requirements. The extent to which any single master plan furthers a particular purpose of the NV zone will vary depending on the property's location, what each given master plan can provide and the City's willingness to cooperate with independent agencies such as Intercity Transit and school districts to serve the development when built.

Instead, the Trillium Master Plan furthers the purposes listed in OMC 18.05.020(A) by meeting the master plan standards and requirements set forth in chapter 18.05 and 18.05A OMC. The Trillium Master Plan layout, road widths and requirements, and physical amenities all further the NV zone purposes. For example, high density and a community center area with commercial and recreation opportunities implement all five goals the City discusses in its briefing.

E. *Phoenix* Does Not Change the Rules of Statutory Construction or Stand for Authority to Impose New Requirements Not Expressly Adopted in City Code.

Not surprisingly, the City leans heavily on the recent *Phoenix* decision since it contains language favoring city discretion under the substantial

evidence standard when evaluating rezones.⁴¹ As noted above, *Phoenix* does not apply to the instant case as no rezone is involved.

Nothing in *Phoenix* changed the long standing judicial rules of construction pertaining to statutes and ordinances. *Phoenix* also does not stand for giving more deference to a city's interpretation than is allowed under current rules. The City's heavy reliance on *Phoenix* to argue this Court should give substantial deference to the City Council is simply not supported by *Phoenix* itself.⁴²

First, in reviewing whether substantial evidence supported the City's decision, the *Phoenix* Court discussed deference in construing an ordinance.⁴³ However, such deference is simply not relevant or warranted when an ordinance is unambiguous, as is the case here.

The *Phoenix* Court also applied the 'error of law' standard in looking at the rezone criterion of consistency with the Woodinville Comprehensive Plan.⁴⁴ In doing so, the *Phoenix* Court quoted the express language of the relevant city enactments in reaching its decision. In *Phoenix* those enactments were Comprehensive Plan Policies, because the rezone criterion

⁴¹ *Phoenix v. City of Woodinville*, 171 Wn.2d 820, 256 P.3d 1150 (2011).

⁴² *Olympia Response Brief*, page 23.

⁴³ *Phoenix*. 171 Wn.2d at 830.

⁴⁴ *Phoenix*. 171 Wn.2d at 828-829.

at issue required analysis of whether the proposed rezone was consistent with the Comprehensive Plan.

Following this very analysis in *Phoenix*, this Court must look at the plain language of the master plan criteria, i.e. those enactments that DR Horton was required to meet, in evaluating whether the City made an error of law. As shown above and in DR Horton’s Opening Brief, the City cannot escape that it made an error of law in failing to impose the written unambiguous master plan criteria, and only that, to the Trillium Master Plan.

Since *Phoenix*, the Washington State Supreme Court has reconfirmed that the rules of construction pertaining to ordinances and statutes have not changed.⁴⁵ In *Lauer v. Pierce County*, the Court looked to “just the plain language” of the applicable state statutes and local regulations.⁴⁶ DR Horton asks this Court to do the same in the instant case.

F. The City Does Not Provide a Clear or Rational Explanation of What Would Satisfy its Transit Service Requirement In Order to Approve the Trillium Master Plan.

Since the City cannot point to any adopted standard or requirement, the City asks the Court to infer a transit service requirement from legislative purposes, the Comprehensive Plan and what the City asserts the OMC meant to require. The City cannot settle on its authority for a transit service

⁴⁵ *Lauer v. Pierce County*, 173 Wash.2d 242, 267 P.3d 988 (2011).

⁴⁶ *Lauer*, 173 Wn.2d at 261.

requirement or even give a consistent explanation of what such a requirement involves. This Court should reject such arguments as legally unsupported, illogical and unlawfully vague.⁴⁷ Even after pages of briefing attempting to articulate what the City's real demand might be, one is still left asking critical questions such as what service is the City requiring, when that must start, must transit serve the development generally or specifically the sheltered transit stop, how much of a commitment is required, how long must the commitment last, and how does an applicant demonstrate that commitment?

DR Horton recognizes that the City's Planning Department and City Attorney objections to the imposition of a transit service requirement are not determinative. However, those objections are instructive as they demonstrate sincere surprise at such a novel requirement. The Planning Department and City Attorney quickly and firmly advised that such a requirement would be unenforceable, both legally and as a practical matter. That surprise and their concerns are indicative of the lack of precedent, legal authority or meaningful standards.⁴⁸

- i. The City is inconsistent as to the type of transit service it demands and whether that service must use the sheltered transit stop.*

⁴⁷ DR Horton addressed the excessively vague nature of the City's demand and the impossibility of compliance in its Opening Brief on pages 38-41.

⁴⁸ *Cowiche Canyon Conservancy*, 118 Wn.2d 801, 814.

The City asserts the OMC “contemplates that there must be regular transit service, such as that offered by IT, that actually stops at the shelter.”⁴⁹ Yet in direct contradiction, the City appears to accept that private transit services which would serve only certain individuals in the community would be acceptable had DR Horton been able to obtain advance commitment.⁵⁰ Even so, the City rejects Intercity Transit’s commitment of Dial-a-Lift and Vanpool as not serving enough people or not conclusively using the sheltered transit stop. The City points to no guidance in the OMC to make these types of distinctions or for an applicant such as DR Horton to know what the City is truly requiring.

The City’s demand for a commitment of transit service is unlawfully vague because one must guess at its meaning and persons of common intelligence differ as to its application.⁵¹ Mayor Mah clearly explained that “I believe that the Hearing Examiner sets an impossible standard for the applicant to meet as it is currently expressed, and the creation and imposition of this highly subjective standard is improper....”⁵² Even Councilmember Rogers, who voted to deny the master plan, admitted that the City was creating an impossible standard: “it’s not that Intercity Transit has set up an

⁴⁹ *Olympia Response Brief*, page 29.

⁵⁰ *Olympia Response Brief*, page 31.

⁵¹ *Burien Bark v. King County*, 106 Wn.2d 868, 871, 725 P.2d 994 (1986).

⁵² Exhibit 711, page 133, lines 19-20.

⁵³ Exhibit 711, page 136, lines 6-9.
⁵⁴ *Cowiche Canyon*, 118 Wn.2d 801, 815.

Because the City asserts the requirement is ambiguous and its interpretation should be given weight, the City must show that it has adopted and applied such interpretation as a matter of agency policy.⁵⁴ In *Cowiche Canyon*, the Court rejected the State's interpretation of a statute because the State had no history of agency interpretation to support its position. Similarly, this City has shown no historical application of an agency policy to support its position that DR Horton must demonstrate a commitment of fixed-route bus to use the sheltered transit stop before it will approve the Trillium Master Plan. The City asserts that the transit services existing when it approved the Benridge and Village at Mill Pond Master Plans were sufficient even though (a) neither master plan demonstrated any use of the internal sheltered transit stop, and (b) neither master plan reflected a commitment for transit service from Intercity Transit or any other entity. Instead, even if the master plan requirement could be viewed as ambiguous, the City is

ii. The City does not have any agency policy as shown in prior master plan decisions that might support the City's position even if the OMC requirements were ambiguous.

actually meet, the City's transit service requirement is illegal. Without adopting meaningful standards that an applicant can have,⁵⁵ impossible standard or that our Hearings Examiner has. It's that our Codes

improperly bootstrapping its legal argument into the place of a uniformly applied agency policy, which does not exist.⁵⁵

- a. The Bentrige Master Plan was not required to demonstrate any commitment of fixed-route bus service to its sheltered bus stop and was approved based on similar existing fixed-route bus service as that available to the Trillium property.

The City's approval of the Bentrige Master Plan starkly reveals the City's lack of legal basis to deny the Trillium Master Plan. The City asserts it approved the Bentrige Master Plan because there is an existing fixed-route bus, Route 94 on Boulevard Road, the road that runs along the west boundary of the Bentrige property.⁵⁶ The City never required the Bentrige developer to show that Intercity Transit or any other entity would use the 'sheltered transit stop' to be built under OMC 18.05.050 (C). Yet now, the City argues that the only way DR Horton could satisfy the very same requirement is if DR Horton obtains a commitment from Intercity Transit that a fixed-route bus will use the Trillium 'sheltered transit stop'. The City gives no explanation for this blatantly inconsistent treatment. Nor does the City explain how it approved Bentrige in light of its argument that the 'sheltered transit stop' requirement has no meaning without a commitment that a fixed-route bus service, or any other transit service, will use at some point in time.

⁵⁵ *Id.*

⁵⁶ *Olympia Response Brief*, page 29; Ex. 28, AR page 003270-3271, Findings 35 and 38 (approved in OMC 18.05.160 and Ex. 200 (Ordinance 6700)).

Further, the City never required Bentrige to show that Intercity Transit would provide the Route 94 service after Bentrige is built and occupied. The Bentrige Master Plan is designed to provide the same extension of Log Cabin Road as Trillium; both have identical considerations for Intercity Transit service related to extension of Log Cabin Road. The City felt that Route 94, running along just one side of the Bentrige property, put Bentrige “in full compliance with the ordinance and Comprehensive Plan.”⁵⁷ Ironically, Route 94 also runs south of the Trillium site, roughly the same distance from many Trillium residents as Bentrige residents.⁵⁸

Finally, many of the Bentrige residents will be more than ¼ mile away from Route 94 on Boulevard.⁵⁹ Even so, the City did not use the NV zone purpose statements, such as enabling residents to live within ¼ mile of a transit stop and grocery store, as master plan requirements in reviewing the Bentrige Master Plan. The City never evaluated the distance of future Bentrige residents to either the existing Route 94 or a grocery store.

- b. The Village at Mill Pond approval included no commitment for transit service or any consequences in the event fixed-route transit service is never actually provided.

⁵⁷ Ex. 502, AR 005875 (Hearing Examiner Trillium Remand Decision, Conclusion 47).

⁵⁸ Ex. 97, AR 003715.

⁵⁹ Ex. 97, AR 003715 (map depicting distances and general bus stops in vicinity of Bentrige and Trillium sites. Bentrige is bounded to the east by the Trillium property and to the west by Boulevard Road. Ex. 502, *Original Recommendation*, page 18, finding 30, AR 005938. Unfortunately, the record does not contain a ready map to which DR Horton can reference showing both projects.

Likewise, in the Village at Mill Pond, the City did not require the developer to show that Intercity Transit would use the master plan's sheltered transit stops. The City points to a letter from Intercity Transit describing the types of bus stops Intercity Transit would like built so that it could serve the area and a "small section" of the Village at Mill Pond (f.k.a. Briarton) site.⁶⁰ However, Intercity Transit never committed to actually serving the larger area, let alone Mill Pond. To the contrary, the Intercity Transit letter shows that Mill Pond was not even in Intercity Transit's service area at the time of master plan approval. Trillium has at least the equivalent commitment of transit service and likelihood of actual fixed-route bus as Mill Pond.

Significantly, the City did not find the Intercity Transit letter to be meaningful in making its findings and conclusions for the Mill Pond Master Plan, and did not impose any consequences if Intercity Transit did not provide fixed-route bus service. The Mill Pond development will be built irrespective if Intercity Transit changes its routes or simply never provides service, as it is legally entitled to do. Actual transit service was simply never addressed in any finding, conclusion or condition of approval for the Village at Mill Pond Master Plan.

⁶⁰ CP 699-700; *Olympia Response Brief*, page 29.

G. By Refusing to Analyze Issues Related to School Site Dedication and Pedestrian/Bicycle Connectivity, the City Council Belied a Ready Recognition that its Land Use Decision Would Likely Be Reversed if Judicially Reviewed.

The City Council chose to refrain from analyzing two particular issues, school site dedication and pedestrian and bicycle connectivity, based on their express recognition that judicial review may well result in a reversal of the Council's Trillium Master Plan denial on the issue of transit service. The Council recognized several times that a court may well overturn their denial based on transit service, and, as a result, the Council wanted to be sure they could deliberate these two issues in the future upon remand.⁶¹

The Council's statements in this respect belied that their denial of the Trillium Master Plan was motivated by improper considerations, whether that was community displeasure with DR Horton wishing to develop the Trillium property or the Council's displeasure with Intercity Transit's level of fixed-route bus service.⁶² In doing so, the Council significantly hampered this Court's review without providing any legitimate basis for doing so based on the expectation that this Court may reverse their land use decision.

⁶¹ Ex. 711, pages 140-142, 144-145, generally.

⁶² *Maranatha Mining v. Pierce County*, 59 Wash. App. 795, 801 P.2d 985 (1990).

H. The City Misused Policy PF 33.5 to Reserve Review After Remand of Whether to Require a School Site Dedication as part of the Trillium Master Plan.

As noted above, Comprehensive Plans and specific policies therein are not properly used as a basis to deny a project specific land use applications.⁶³ As would be expected from language that is intended to guide the adoption of development regulations, not evaluation of land use applications, Policy PF 33.5 does not contain any standards for determining the impact of new developments on school capacity or evaluating when a development is “large enough” to warrant discussion of a school site. Instead, Policy PF 33.5 is implemented through the OMC regulations for preliminary plats and evaluation of school concurrency. The school district has capacity for Trillium students and DR Horton will be required to pay impact fees.

Citizens and its progeny, including *Timberlake*, expressly instruct that the City cannot use Policy PF 33.5 as if it were a development regulation. The City’s attempt to impose Policy PF 33.5 as if it were a regulation that a master plan must meet is an error of law and improper application of law to the facts.

⁶³ *Timberlake*, 114 Wn. App. 174, 183.

I. There is No Support for the City’s Decision that the Record Was Insufficient to Determine Whether the Trillium Master Plan Provided Adequate Pedestrian and Bicycle Connectivity.

The City has never identified a reason for concluding there was insufficient evidence regarding pedestrian and bicycle connectivity. The Hearing Examiner extensively reviewed this issue and found that the Trillium Master Plan provided sufficient connectivity.⁶⁴ Despite that review, the Council never indicated what information it felt was lacking.⁶⁵ The City’s failure to explain the basis for its decision gives DR Horton absolutely no guidance on what evidence to submit. The City has not shown that any evidence, or lack thereof, supports its Land Use Decision in this respect.

Despite its lengthy briefing on this single issue, Olympia Safe Streets Campaign (“OSSC”) also never points to any particular aspect of the issue that OSSC feels is lacking evidence in the record. Instead, OSSC devotes its briefing to a substantive discussion of connectivity. OSSC improperly characterizes the Land Use Decision as reaching a substantive conclusion on this issue.⁶⁶ The Land Use Decision clearly reflects that the City Council expressly did not make a substantive decision on this issue.⁶⁷ As a result, there is no basis for this Court to engage in substantive review of the issue.

⁶⁴ Ex. 502, *Remand Recommendation*, pages 38-39, Decisions E and F.

⁶⁵ Ex. 711, pages 140-141.

⁶⁶ *Intervenor Response Brief*, pages 1, 38.

⁶⁷ Ex. 506. Ordinance 6762.

Instead, it is proper for this Court to find the Council's request for more evidence lacks any basis in the record or law and should direct the City Council to make a substantive decision.

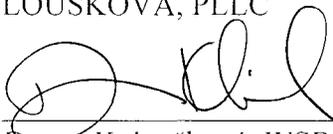
OSSC mischaracterizes the Examiner's recommendation by relying exclusively on Examiner analysis in early recommendations that the Examiner supplanted in his final Remand Recommendation.⁶⁸ In fact, the Hearing Examiner recommended approval of the Trillium Master Plan with respect to pedestrian and bicycle connectivity.

J. There is No Basis to Award Attorneys' Fees.

As DR Horton has demonstrated that the Land Use Decision should be reversed, the City is not entitled to attorney's fees and costs. Further, OSSC is not entitled to fees under any circumstance as it has never been a prevailing party and has only ever held 'intervenor' status.

DATED this 5th day of November, 2012.

JOHNS MONROE MITSUNAGA
KOLOUŠKOVÁ, PLLC

By 
Duana Koloušková, WSBA #27532
Attorneys for Petitioner/Appellant
SSHI LLC, a Delaware limited
liability corporation, dba DR Horton

⁶⁸ *Intervenor Response Brief*, pages 36-37.

Olympia Municipal Code Excerpt

18.59.050 Decision criteria for rezone requests

The Department shall forward rezone requests to the Planning Commission for review and recommendation and to the City Council for consideration for review and action. The following criteria will be used to evaluate the rezone request.

- A. The rezone is consistent with an approved amendment to the future land use map.
- B. The rezone is consistent with the Comprehensive Plan; and
- C. The rezone will maintain the public health, safety, or welfare; and
- D. The rezone is warranted in order to achieve consistency with the Comprehensive Plan, or because of a need for additional property in the proposed land use district classification, or because the proposed zoning classification is appropriate for reasonable development of the subject property; and
- E. The rezone will not be materially detrimental to uses or property in the immediate vicinity of the subject property.

Rezone requests not accepted for review may be resubmitted by the proponent, subject to the timelines contained in this chapter.

(Ord. 5792 §1, 1998).

Comprehensive Plan Excerpt

Additionally, two major corridors were assumed: Yelm Highway widening to four lanes with turn lanes at major intersections, and a new four-lane road from Tumwater to Lacey south of the Yelm Highway. Without these improvements, a far greater amount of traffic can be expected in the southeast Olympia subarea. Development of the new connector road (south of the Yelm Highway) will depend on how rapidly development takes place at Tumwater's City Center/State Office area and in the area south and east of Lacey. Until this road is built, congestion on the Yelm Highway may drop below LOS D in the short term. In the long term, upon completion of the connector road, LOS will improve on the Yelm Highway. These projects are referenced in each jurisdiction's comprehensive plan transportation element.

If the new connector road is built as a 4/5 lane facility, the Yelm Highway may maintain LOS D as a 4/5 lane facility. If the new road is not built, then the Yelm Highway must be widened to 6/7 lanes to maintain LOS D. Strong, long-lasting land use controls will be needed along the new connector road to preclude development inconsistent with growth management goals and policies. These may include limiting access and strong zoning controls.

Lakewood Drive

The Lakewood Drive street connection between the Cove and Holiday Hills Subdivisions should not be made at this time based on action taken by the City Council in August, 1997, but preserved as an option to be opened in the future. The existing bicycle/pedestrian connection will be maintained between these two Subdivisions until a full street connection is made. If the street connection is made sometime in the future, at a minimum the following traffic calming devices will be installed:

1. A chichane at the point of connection;
2. A choker and raised crosswalk at the Holiday Hills recreation area;
3. An asphalt sidewalk along the south side of Lakewood Drive between the point of connection and Lakehurst Drive;
4. A stop sign on Lakehills Drive at Lakewood Drive; and
5. Crosswalks at Lakewood Drive and Lakehurst Drive.

Signage will be installed at the point of connection of Lakewood Drive between the Cove and Holiday Hills Subdivisions, and at the east end of Lakewood Drive to indicate that this street may be connected sometime in the future. (Ordinance #5757, 12/16/97.)

Log Cabin Road to Herman Road Connection

This new connection provides an important new travel route for east/west movements within this sub-area. This street will also be development-driven (as development occurs, the street will be built to accommodate the impacts of future development.) If capacity deficiencies occur on other existing streets, this street could be necessary earlier than anticipated).

This new street should be constructed to major collector standard. The street will be designed in a curved alignment configuration in order to encourage cautious driving. All non-motorized improvements should be included (bike lanes, sidewalks and transit shelters) to encourage the use of alternative modes of transportation. (Ordinance #5861, 12/15/98)

The eastern end of this corridor (lying west of Wiggins Road) proposes to cross a wetland which has a private drive crossing for an existing residence. A 1996 report indicated that this is a Class II wetland system. This report also indicated that the impacts of this future

wetland crossing would be minimal and could be mitigated in the immediate vicinity. There also appears to be no compelling reason to use a bridge type structure to cross this wetland as the other mitigation measures found in the Critical Areas Ordinance should provide adequate environmental protection. Road improvements will need to incorporate the appropriate recommendations for mitigating future stormwater and flooding problems identified in the Chambers/ Ward/ Hewit Comprehensive Drainage Basin Plan (1995).

A 1996 projection of future peak hour trips, based upon the adopted land use plan and the distribution of population and employment used by the Regional Transportation Plan, indicates that the addition of this new street will increase peak hour traffic by approximately 41 percent on the existing section of Log Cabin Road (west of Boulevard Road) over what would be expected without the new street connection. But this still will be within the capacity of the existing lanes on Log Cabin Road. (Ordinance #5661, 12/26/96.)

Fones Road

Fones Road from Boulevard Road to the City of Lacey will continue to be the most northerly east- west major collector within this subarea. Other routes, north and south of Fones Road, have been proposed to help distribute the traffic. In 1996 the City analyzed the proposed extension of 22nd Avenue to Wiggins Road and a neighborhood collector connection for Dayton to Fones Road near Pacific Avenue. Both alternatives are limited by the presence of wetlands, whereas Fones Road is not.

The 22nd Ave extension was removed as a proposed major collector west of Allen Road. A Class II wetland within a kettle (enclosed basin) lies between Boulevard and Allen Roads. A wetland report and an evaluation of several different alignments indicated that there were no feasible or cost effective routes west of Allen Road which did not adversely affect the wetlands and greatly increase the possibility of

flooding upon adjacent properties. The extension of Wiggins Road will terminate at Allen Street with a "T" type intersection.

North of Fones Road, much of Dayton Road lies in an unincorporated county island. There was a proposal to connect this residential area to the commercial and industrial land which lies along the north-south portion of Fones Road. A Class II wetland (which is the headwaters of Woodard Creek) lies between the residential and industrial areas. Several different alignments were evaluated of which the least costly would be to utilize the Burlington Northern Rail Road corridor. This alignment would have widened the existing rail road fill over the wetland and would also have accommodated the Class I Woodland Urban trail. The rail road alignment could also have been used east of Fones Road to eventually connect with Sleater Kinney Road in Lacey.

However, any east-west connection would have adversely affected the character of this isolated neighborhood and would have increased peak hour traffic volumes. Even though designated as a neighborhood collector, this connection would have many characteristics of a major collector, particularly if extended east of Fones Road. Under either classification, such a connection could have potentially become a bypass for Fones Road traffic.

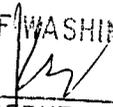
Access to this neighborhood can be provided which avoids impacting any wetlands with a neighborhood collector connecting Dayton to Fones Road using the approximate alignment of Van Epps Street.

The elimination of these two transportation links will place more demand upon the existing network of collectors within this subarea. Based upon 1996 Olympia transportation modeling, it is likely that this will increase peak hour volumes at the Fones/Elizabeth intersection by approximately 8% (9% increase on north leg, 11% on west leg, and 5% on south leg of Hoffman Road). At the Fones/Boulevard intersection it would result in a net decrease of

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  _____
DEPUTY

No. 43300-1-II

Thurston County Superior Court #11-2-01733-5
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SSHI LLC, dba DR Horton, a Delaware limited liability
corporation,

Petitioner/Appellant,

vs.

THE CITY OF OLYMPIA,
a Washington municipal corporation,

Respondent.

AFFIDAVIT OF SERVICE

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ORIGINAL

STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

The undersigned, being first duly sworn on oath, deposes and says:

I am a citizen of the United States of America; over the age of 18 years, am a legal assistant with the firm of Johns Monroe Mitsunaga Koloušková PLLC, not a party to the above-entitled action and competent to be a witness therein.

On this date, I caused to be served via legal messenger delivery, true and correct copies of: APPELLANT'S REPLY BRIEF; and this AFFIDAVIT OF SERVICE, upon all counsel and parties of record at their addresses listed below.

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Jane Kiker, WSBA #
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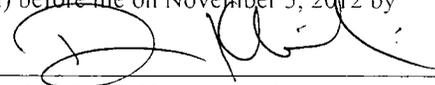
Dated this 5th day of November, 2012.



EVANNA L. CHARLOT

STATE OF WASHINGTON) ss.
COUNTY OF KING)

SIGNED AND SWORN to (or affirmed) before me on November 5, 2012 by
Evanna L. Charlot.



Duana T. Koloušková
Notary Public Residing at Seattle, WA.
My Appointment Expires: 1-19-2013

422-8 Affidavit of Service 11-05-12.doc

