

NO. 43300-1-II

**COURT OF APPEALS, DIVISION II,
STATE OF WASHINGTON**

SSHI LLC d/b/a DR Horton,
Appellant

v.

City of Olympia, et al.,
Respondent

Olympia Safe Streets Campaign
Intervenor

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RESPONSE BRIEF OF THE CITY OF OLYMPIA

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I. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the City properly accept the recommendation of its Hearing Examiner to deny approval where substantial evidence in the record demonstrated that there was no transit service to the site and none was planned within the foreseeable future?
2. Did the City properly determine that the record was inadequate on the issue of consistency with Comprehensive Plan Policy PF 33.5, requiring consideration of dedication of a school site to mitigate school capacity impacts?
3. Did the City properly reject the Hearing Examiner's determination that the project demonstrated consistency with requirements for bicycle/pedestrian connectivity, where that determination was not supported by substantial evidence in the record?

II. RESTATEMENT OF THE CASE¹

A. Trillium Neighborhood Village Master Planned Development

DR Horton's ("DRH") "Trillium" proposal is for a large complex master planned community as large as some incorporated towns in Washington.² It would include 1500 residents in 300 single-family homes and townhouses, and 200 multi-family units.³ A "village center" would

¹ DR Horton's Statement of Facts (e.g. Op. Br. at 7-9; 13-14) includes numerous characterizations unsupported by Record cites, a practice not consistent with RAP 10.3 (a)(4), (5), RAP 10.3 (b), and RAP 10.4 (f). See Hurlbert v. Gordon, 64 Wn.App. 386, 399-400, 824 P.2d 1238, 1245 (Div. 1, 1992); In re Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998).

² See generally <http://www.ofm.wa.gov/pop/april1/default.asp>

³ AR 005935-5939; AR 006006AR 000045 (12/17/08 Trillium Prel. Site Plan). References to the certified Administrative Record utilize the City's original page numbers, preceded by "AR," with the exception of Exhibits 700-711 (Verbatim Transcripts of City proceedings below), which bear different pagination. The transcripts will be referenced as "AR Ex. ___, at ___." An index to the certified record is found at CP 258-279.

have 10,000 square feet of retail and office space. AR 005937. In addition to the commercial tract with a contiguous “village green”, there would be stormwater tracts, open space, and a sewer pump station. AR 005921. Trillium would have an internal network of “local” (small) and “neighborhood collector” (medium) streets. A substantial new “Log Cabin Road” arterial would extend east to west through the middle of the site.⁴

The Trillium site has no regular scheduled bus service on any adjacent streets and none is planned for the foreseeable future. The closest bus service is IT’s Route 94, on Boulevard Road, over a ½ mile away.⁵

B. City of Olympia’s Master Plan Review Process

The parcel that is now the Trillium site was designated “Neighborhood Village” (“NV”) by the City’s Code and its Comprehensive Plan in 1994.⁶ Master Plan (“MP”) approval pursuant to OMC Ch. 18.57 (“Master Planned Development”) is a prerequisite for any development within an NV zone.⁷ An MP applicant bears the burden of demonstrating compliance with all Code standards and design criteria for

⁴ AR 000045; AR 005939; AR 006006.

⁵ AR 005942; AR 003712. In 1994, when the City designated the Trillium property NV, it was served by adjacent IT bus service. AR 005847 (6/21/11 Staff Report); CP 695 (July 12, 1994 Intercity Transit route map showing regular service by Bus Route 24 on Morse-Merryman Road, between Boulevard Road and Hoffman Road). This service was eliminated over a decade ago, due to state-wide reductions in funding. AR 005847; AR 004518 (IT [Final] Strategic Plan 2011-2016).

⁶ AR 005846; CP 697 (1997 Olympia Comprehensive Plan Future Land Use Map).

⁷ OMC 18.05.050A; AR 005846. Cited Code and Comprehensive Plan provisions are attached to this brief.

“villages” and “centers”. OMC Ch. 18.05 and OMC Ch. 18.05A. OMC 18.02.120C. MP applications must also comply with Washington’s subdivision laws⁸ and the State Environmental Policy Act (SEPA).⁹

The review process for a NV/MP application is more complex than for a simple subdivision because they are inherently larger and more complicated. A NV/MP has higher density and more intense uses than would otherwise be permitted under conventional zoning regulations.¹⁰ The Code recognizes that the greater densities in a NV/MP require a greater commitment to urban amenities and infrastructure, including, *inter alia*, public transit, open space, and bicycle and pedestrian connections, both internal and external. See OMC 18.05.020 (“Purposes”). The City’s Comprehensive Plan NV policies likewise emphasize the creation of livable communities that minimize their carbon footprint by reducing dependence on auto use.¹¹

The Land Use Code also recognizes that the infrastructure required for a NV/MP may not always be possible. It therefore expressly offers an alternative of a rezone for NV-zoned properties to a “straight” residential

⁸ RCW 58.17.110; OMC 18.57.120.

⁹ RCW Ch. 43.21C; OMC 18.57.080, OMC 18.57.100B.

¹⁰ OMC 18.57.020; DRH Appellant’s Opening Brief (“Op. Br.”) at 5.

¹¹ Comprehensive Plan, Ch. 1 Land Use and Urban Design, Intro. at 2; Neighborhood Goals and Policies (“Essential Neighborhood Characteristics”) at 18; LU 3.3; LU10; T1; and T1.25.

district if a site is not NV “viable” (i.e., due to, *inter alia*, “site conditions” or “infrastructure”).¹²

Under the best circumstances, review of NV/MP applications is time-consuming in light of their interconnected parts, akin to planning a “new town” with increased densities and a variety of uses.¹³ The process can take longer when there are delays in providing information necessary for application review.

Initial intake and technical review commences with City Planning Staff review under the Land Use Code and SEPA. OMC 18.57.080. The City’s Design Review Board reviews and makes a recommendation to the City Council on design (largely architectural and aesthetic) aspects of the proposal.¹⁴

The fulcrum of the City’s review is the hearing conducted by the City’s long-time independent Hearing Examiner. The applicant, staff, and the public may participate in the hearing, present evidence, conduct cross-examination, and make arguments.¹⁵ Based on the hearing record, the

¹² OMC 18.05.050A (2).

¹³ For example, the Bentridge NV/MP – adjacent to and the same size as Trillium -- was submitted to the City in September, 2005 and the City’s approval Ordinance was adopted by Council in April, 2010, nearly five years later. AR 005193-005200.

¹⁴ OMC 18.57.080; OMC Ch. 18.05A (design guidelines). Trillium’s brief makes much of the positive Design Review its proposal received. Op. Br. at 7. However, that determination is not relevant to the land use issues its application presented.

¹⁵ OMC 18.57.080C. The Hearing Examiner also reviews the corresponding subdivision as well as any appeals filed under SEPA. OMC 17.16.080; OMC 14.04.160.

Examiner prepares a recommendation to the City Council on the MP application. *Id.* It is only then that the City Council, sitting in a quasi-judicial capacity, receives the MP application, hears argument from interested parties, which must be based on the record, and takes action on the Hearing Examiner's recommendation decision. OMC 18.57.080D. The Council may not approve the MP if (1) it would conflict with the Comprehensive Plan; or (2) insufficient evidence was presented as to the impact on the surrounding area. OMC 18.57.080D(3). It may deny the MP; remand the matter back to the DRB or the Hearing Examiner for an additional hearing; continue to a future date to allow for additional staff analysis; modify the DRB and/or the Examiner's recommendations and adopt its own findings and conclusions; or schedule its own open-record hearing. *Id.*

Per Code, adoption of an approved MP is treated, like a site-specific rezone, as an amendment to the zoning code and official zoning map controlling future development on the site. OMC 18.57.040C.¹⁶

Before the Hearing Examiner's recommendation ever reaches the City Council for quasi-judicial review, there can be intermediate appeals by the applicant or the public to the Hearing Examiner on questions such

¹⁶ See, e.g., OMC 18.05.160 ("Bentridge Village Master Plan"); OMC 18.05.170 ("Village at Mill Pond Master Plan"), examples of NV/MPs adopted by the City.

as SEPA compliance. These can be time-consuming, adding to the overall project review period.

C. Review Of Trillium Master Plan Application

DRH submitted an initial Trillium application to the City on November 30, 2005.¹⁷ Virtually from its inception it was a matter of strong public interest and extensive public participation in the legally mandated review processes. For example, unrecognized in DRH's briefing, the City received public comments throughout the MP process from the Olympia Safe Streets Campaign ("OSSC")¹⁸ as well as from many other citizens, pointing out what they saw as information gaps and deficiencies in the MP.¹⁹

DRH's approach to the mandated review process was not uniformly constructive. It appeared to consider approval an entitlement rather than a possibility dependent on a public process and a demonstration, to the independent Hearing Examiner and City Council, of Code compliance and consistency with the Comprehensive Plan.

¹⁷ CP 725.

¹⁸ OSSC participated throughout the MP process. It was also, at critical junctures, represented by counsel. See OSSC Br. at 4-10. DRH's description of the MP process only once acknowledges OSSC's participation, as though OSSC only became involved at the City Council level.

¹⁹ For example, approximately 250 pages of such public comments, most of them substantive, were attached to the June 14, 2010 Staff Report to the Hearing Examiner. AR 001740-001987; excerpted at CP 912-933.

The initial Trillium application submitted at the end of 2005 required many substantial revisions before it could be forwarded to the Design Review Board (“DRB”) and Hearing Examiner.²⁰ The City’s letters to DRH during this period consistently refer to significant shortcomings in the application. *Id.*

In April, 2008, DRH submitted a substantially revised Trillium MP application combined with a new preliminary plat application to the City. AR 000032-000034.²¹ Although DRH could have waited to see the outcome of the MP before proceeding with the plat application, it asked for concurrent review of the two applications, adding complexity to the application review and hearing process. *Id.*; AR 005934. The City’s combined review of the Trillium proposal also necessarily incorporated environmental review under SEPA.

The same Senior Planner was assigned to the Trillium project from 2005 through late 2008, when she retired.²² Before she left, on July 30,

²⁰ CP 556-557; CP 725-726; 732; 734-35; 737-748; 759-762; 766-779. DRH, with meager Record “support”, claims City “delays”, including prior to 2008. *Op. Br.* at 7-8, 11, 13. However, this claim is legally and factually misplaced. “Delay” is not a ground for reversal under LUPA. And, in any event, the LUPA Petition now before this Court concerns matters forward from April, 2008, when DRH submitted its subdivision and revised MP applications. AR 000032-000034. Although doubly irrelevant, pre-2008 Trillium records demonstrate DRH itself was primarily responsible for any delays.

²¹ This followed the City’s removal, in March, 2008, of some parcels, including the Trillium site, from the Chambers Basin Development Moratorium area. CP 557; CP 702-714.

²² DRH provides no record cites for its assertions of frequent, deliberate changes in staffing assignments. *Op.Br.* at 7-8.

2008, she summarized the City's numerous earlier requests for information and corrections, with an 8-page (single-spaced) letter to DRH. CP 787-794. A new Senior Planner was in place and assigned to Trillium prior to the City's receipt of DRH's responses, submitted half a year later, on December 17, 2008. CP 796-810.²³

Project review following the April 2008 resubmission was hampered because the MP still reflected significant, unmitigated impacts on surrounding roads and traffic and, despite City requests, DRH had yet to provide an adequate transportation impact analysis. CP 789-791.

As its review proceeded, Staff informed DRH on September 9, 2009 that it was considering issuing a SEPA Determination of Significance ("DS"). CP 815-818. This would require preparation of an Environmental Impact Statement ("EIS") at least regarding transportation impacts. *Id.* DRH's response was to ask the City to delay the SEPA threshold determination pending further meetings. *Id.* Meanwhile, DRH still had not provided the requested transportation impact analysis. Ex. 703 at 446-448 (City Transp. Engineer David Smith hearing testimony).

On April 1, 2010, the City issued a SEPA Mitigated Determination

²³ Because the new Senior Planner was responsible for other proposals as well as Trillium, the City proposed assigning a different planner to Trillium. CP 812-813. However, DRH objected to the staffing change and it did not take place. *Id.*

of Nonsignificance (“MDNS”). Per the state SEPA rules,²⁴ the MDNS listed mitigation measures, including certain traffic improvements, necessary to avoid an EIS. AR 000035-000039. Based on these MDNS conditions, the June 14, 2010 Planning Staff Report to the Hearing Examiner recommended approval of the Trillium MP and concurrent subdivision application. AR 000001-000031. However, DRH appealed the SEPA MDNS Conditions to the Hearing Examiner thereby adding time and complication to the Examiner proceeding. AR 001396-001422.

The Trillium MP and subdivision application public hearings as well as DRH’s Trillium SEPA appeal were consolidated into a single hearing before the Hearing Examiner that extended over four days: June 14th, 28th, 29th and July 22nd, 2010. AR 005845. Members of the public, including OSSC, testified that the Trillium proposal did not meet the requirements of the City Code and was inconsistent with the City Comprehensive Plan. The public testimony focused primarily on outsized blocks, lack of required bicycle/pedestrian links, inadequate provision of local schools, and the absence of required transit.²⁵

Based on transit issues raised in the June 14, 2010 public hearing testimony, and uncertainty on the part of Staff and DRH regarding

²⁴ WAC 197-11-350.

²⁵ See, e.g., AR Ex. 701, at 68-69, 99-103, 110-115, 130-134.

whether the site was served by transit,²⁶ the Hearing Examiner, with the parties' consent, asked Intercity Transit's ("IT") Planning Manager for information for the record regarding existing and anticipated bus routes that would serve the Trillium site.²⁷ IT confirmed in a response dated July 1, 2010, that there was no existing transit service to the site, and that the closest bus service was over a half a mile away. The IT Planning Manager also stated that IT:

would not anticipate any additional fixed-route service in that area until such time that the extension of Log Cabin Road, for example, between Boulevard Road and Wiggins Road SE becomes a reality.²⁸

Subsequently, on October 28, 2010, the Hearing Examiner issued two separate decisions. One upheld the SEPA MDNS Conditions DRH had challenged.²⁹ The second October 28, 2010 decision was a recommendation to City Council, per OMC 18.57.080C, for denial of the NV/MP application based on failure to comply with the Code requirements for public transit, as well as its inconsistency with

²⁶ See, e.g., AR Ex. 701 at 33-35, 130, 133.

²⁷ AR 003712; AR 003641.

²⁸ AR 005942 (Finding 51); AR 003712. See AR 000045(Trillium Site Plan); CP 693 (Map of area showing Trillium site and surrounding road network).

²⁹ AR 005845; AR 005921; AR 005991. DRH's LUPA Petition originally included some SEPA claims, but DRH later waived them acknowledging that they were not ripe. CP 582-583 (February 10, 2012 LUPA hearing on merits, Report of Proceedings ("RP") at 32-33). Based on DRH's acknowledgement, the Superior Court dismissed the SEPA issues. February 24, 2012 RP at 22 (Oral Ruling by Judge Sutton). They are not at issue before this Court.

Comprehensive Plan policies respecting transit, school capacity, block size and street spacing, and bicycle and pedestrian connectivity.³⁰ AR 005921-005964. In keeping with the massive record and multiplicity of issues involved in an entirely new “village”, the Examiner’s decision was forty-four pages, with sixty-nine Findings and seventy Conclusions.

With respect to transit, the Examiner, based on substantial evidence before him, found that transit service would “reach Trillium only at some indefinite and undetermined point in the future,” citing IT’s response, DRH’s own statements, and the City’s Comprehensive and Capital Facilities Plans which showed the Log Cabin Road extension necessary for IT transit service as completely dependent on uncertain future growth in the area.³¹ The Hearing Examiner acknowledged that the Code requirements and Plan policies could be satisfied if regular bus service to Trillium were certain at some stage in the “build out of the development.” He concluded, however, that the transit requirement was not met, because the evidence demonstrated that such service depended on

³⁰ DRH mischaracterizes the Hearing Examiner’s conclusions, claiming without citation that the Examiner “recognize[d] that his recommendation would put DR Horton in an impossible position,” (Op. Br. at 10) and that the Examiner imposed a condition on DRH to “obtain a commitment from IT” to provide fixed-route bus service to the Trillium site. (Op. Br. at 8-9).

³¹ AR 005949-005951(Conclusions 20-29). The Examiner noted DRH’s own acknowledgement in its MDNS appeal that, “the final segment of Log Cabin road to the east” would only be “built sometime in the indefinite future.” Hearing Examiner at AR 005951 (Conclusion 28), citing AR 001413, line 17.

“unpredictable contingencies” -- a succession of unknowns. AR 005951-5952 (Conclusion 28).

In light of his denial recommendation, the Examiner indicated he would not issue a decision on the concurrent preliminary plat application, unless DRH requested that he do so. AR 005935. DRH did not.

Pursuant to Code, the City Council would have commenced reviewing the Examiner’s October 28, 2010 Recommendation within thirty days. OMC 18.57.080D(1). However, on November 15, 2010, DRH as well as the Planning Department filed motions for reconsideration with the Examiner.³² The motions relied on new testimony not already in the record.³³ The Examiner did not re-open the hearing, but nonetheless considered the new submissions. OSSC objected³⁴ and also protested the tight time allowed for submitting responses. AR 005981-005985. DRH insisted the Examiner reconsider based on the new testimonial submissions, without reconvening the public hearing. AR 005364-005367.

On December 6, 2010, the Hearing Examiner issued a twenty-eight page “Reconsideration and Clarification Decision” on transit, school capacity, block sizes, stub roads and bicycle/pedestrian connectivity AR

³² AR 005981(Ord. No. 6762); AR 003903-003926; AR 003927-003948.

³³ Id. For example, DRH’s counsel submitted a 15-page motion to which she attached new written testimony from various consultants. AR 003903-003926.

³⁴ AR 003964-003988; AR 003991-004012.

005893-005920. He again recommended denial of the Trillium MP and affirmed his earlier determinations concerning transit, bicycle/pedestrian connectivity and school capacity. *Id.* Based on the new submissions from DRH and Staff, the Examiner included additional conclusions respecting the project's lack of current or foreseeable bus service – “an essential element of transit service”.³⁵

The Examiner's original recommendation as amended by his reconsideration decision was transmitted to the City Council. OSSC raised as a threshold question before the Council whether the Examiner had authority to receive new evidence on a motion for reconsideration without re-opening the hearing.³⁶ Pursuant to OMC 18.57.080D, the Council established a schedule for briefing and oral argument on this threshold issue. After reviewing the parties' briefing and hearing oral argument, the Council determined on February 7, 2011, that the Examiner could not on reconsideration accept substantial new information into the record without reopening the hearing. AR 005567-005571(Conclusion 4). To cure this defect, the Council remanded the matter back to the Hearing Examiner for hearing. *Id.* Due to the parties' and the Examiner's scheduling requirements, the remand hearing was not held until March 28 and 29,

³⁵ AR 005906 (Conclusion 25); AR 005902-005907(Conclusions 12-29).

³⁶ See AR 005247-005252; AR 005352-5362 (OSSC's 12/28/10 and 1/24/11 submissions to City Council).

2011.³⁷

On April 26, 2011, the Hearing Examiner issued his recommendation decision after remand. AR 005848-00587. Based on new information, including new proposed DRH amendments to the application, the Examiner determined that the MP was no longer inconsistent with the Code's requirements for bicycle and pedestrian connectivity.³⁸ The changes to the application proposed by DRH at the remand hearing were new cross-block connections and other paths that were added in response to OSSC arguments.³⁹ Based on new School District testimony to the effect that Trillium students would not require additional "portable" building school facilities, the Examiner also rescinded his previous findings and conclusions concerning school capacity that had been another basis for denial. AR 005876-005877 (Conclusions 51-55).

However, the Examiner for the third time recommended denial due to noncompliance with transit requirements.⁴⁰ In response to DRH's new claim of a constitutional taking, the Examiner concluded that, because

³⁷ DRH's insistence over OSSC's legal objections that the Examiner proceed on reconsideration to accept new testimony without re-opening the record was misguided. Had the City Council compounded the error by overlooking OSSC's objections, the delay consequences would have been worse once OSSC brought a LUPA Petition.

³⁸ AR 005864-005866 (Findings 53-64); 005883-005884 (Conclusions 86-90) 005885-005586 (Decision E and F).

³⁹ DRH offered no explanation for why it was making these changes so late in the process when OSSC had alleged for over four years that revisions were necessary to comply with the Code standards.

⁴⁰ AR 005866-005876 (Conclusions 1-50); 005885 (Decision A).

DRH had not pursued options that could achieve compliance with the transit requirements, “the evidence falls well short” of establishing that DRH would lose all economic use of the property. AR 005874 (Conclusion 39). The options DRH had not pursued included “securing transit service through other means, such as arrangements with IT or providing its own links to existing routes.” Id.⁴¹

The Examiner also concluded, in response to an issue raised at the remand hearing, that the MP was potentially inconsistent with Comprehensive Plan policy PF 33.5, which requires dedication of a school site where a development will generate “the need” for additional capacity. Id. at #005877-005878 (Conclusions 56-61).

The Hearing Examiner’s initial October 28, 2010 recommendation, the December 6, 2010 recommendation on reconsideration, and the April 26, 2011 recommended decision following remand came before the City Council on June 21, 2011. Interested parties, including DRH and OSSC actively participated. AR 005982 – 005983. The City’s Planning Manager, Todd Stamm, who had prepared the Staff Report providing Council with relevant background on the Trillium MP, made a presentation. AR

⁴¹ The Examiner noted that denial based on lack of transit “could” conceivably deny reasonable economic use, but not on the Trillium facts. AR 005874 (Conclusion 39, 40).

005844-005847.⁴² The Council, sitting in a quasi-judicial capacity, and having reviewed the parties' written submissions, heard several hours of oral presentations based on the Record and the Hearing Examiner recommendations. Many presenters – again including several members of OSSC – emphasized that the Record reflected the MP's failure to provide Code-required public transit and “pedestrian orientation”:

In short, the plan does not ensure viable transit, bicycle, and pedestrian transportation. Rather than improving alternative transportation, the plan enhances dependence on motor vehicles due to lack of transit service, inadequate capacity of local schools, inadequate pedestrian, bicycle connectivity, especially toward the Chehalis Western Trail.”⁴³

The Council gave DRH an opportunity to respond to all comments. It then deliberated at length before finally voting four-to-two to adopt the Hearing Examiner's recommended denial of the Trillium MP based on noncompliance and inconsistency with the relevant public transit provisions in the Code and Comprehensive Plan. AR Ex. 711, at 130-156. Council members noted that the high density neighborhood envisioned for an NV/MP was premised on availability of public transportation.⁴⁴ They

⁴² AR Ex. 711 at 14-17. DRH complains that Staff did too little before the Council. Op. Br. at 11, n 27. OSSC objected below that Staff were doing too much and were irretrievably biased in favor of the application. AR 005360-005361. See also AR 005225 (12/30/10 City Attorney memo re “Participation and Status of Staff”).

⁴³ AR Ex. 711 (Kaminsky test.) at 63-64; AR Ex. 711, at 58-64; 92-93.

⁴⁴ See, e.g., AR Ex. 711 at 137 (Councilmember Roe). DRH distorts Councilmember Roe's comments (Op. Br. at 15), omitting the gist of her concerns: that, regardless of

also noted their disappointment that, after so much time, the applicant appeared to disregard the governing Code and Comprehensive Plan requirements.⁴⁵ The Council declined to adopt Hearing Examiner Conclusion 40,⁴⁶ and instead adopted Council Conclusion 5, noting that DRH would not be denied reasonable economic use of its property, in light of the explicit Code NV rezone provision in OMC 18.05.050A(2). AR 005984.

The Council also adopted all of the Hearing Examiner's Findings and nearly all of his Conclusions regarding bicycle and pedestrian connections. But, after independent review, it disagreed with the ultimate conclusion that the applicant's burden on these requirements had been met. Instead, Council held that the record was inadequate to make a determination on the proposal's consistency with NV/MP Code requirements and Comprehensive Plan provisions for such connections.⁴⁷ The Council also concluded that the record was inadequate to determine whether the proposed project was consistent with the Comprehensive Plan

whether Trillium would meet NV minimum density requirements, high density housing is not appropriate where it is not served by public transportation.

⁴⁵ Id. at 135 (CM Langer: "[T]here's sort of a bow in the direction of the Comprehensive Plan but then you just go ahead and do whatever you think you can get away with that's not consistent with the ...Plan."); at 155 ("it's not ... a vote against Urban Villages in this particular location. It's a vote against an Urban Village that doesn't meet the criteria for Urban Villages and Comprehensive Plan -- and the requirements the City has for -- developments including Urban Villages.")

⁴⁶ AR 005874.

⁴⁷ AR 005983 (Finding 22).

Policy requiring provision of school sites.⁴⁸

Because the Council denied the Trillium MP, adopting the Hearing Examiner's recommendation on the overarching transit issue, it did not remand back to the Hearing Examiner on the pedestrian/bicycle connection and school site issues. However, the majority of the Council clearly indicated that, if the Trillium MP denial on transit grounds were reversed and remanded on appeal to Court, the two remaining issues required presentation of further evidence to the Examiner if an approval were to be possible. AR Ex. 711 at 140-142 and 148-150.⁴⁹

III. ARGUMENT

A. Review of the City's Decision is Deferential to the City

Under the Land Use Petition Act ("LUPA"), this Court stands in the same position as the Superior Court. Wenatchee Sportsmen Association v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). As a LUPA petitioner, DRH has the burden of demonstrating error under one of the six LUPA standards for relief listed in RCW 36.70C.130 (1). Under LUPA a Court reviews questions of law *de novo*, and, per RCW 36.70C.130(1)(b) and principles of statutory construction, gives

⁴⁸ AR 005983); AR Ex. 711 at 140-142 and 156.

⁴⁹ DRH criticizes the Council for not exploring these two issues further. Op. Br. at 15. However, the Council's approach allowed a LUPA Petition to be filed without the delay that further City proceedings would have required. This made sense because the denial rendered the remaining issues moot.

“considerable deference” to the City’s expertise in interpreting the laws it administers, in this case the Olympia Code and Comprehensive Plan.⁵⁰ Phoenix Development, Inc. v. City of Woodinville, 171 Wn.2d 820, 828-829, 256 P.3d 1150 (2011).

In Phoenix, the Washington Supreme Court strongly reaffirmed that substantial deference must be accorded a City’s interpretation and application of its land use plans, policies, and regulations. 171 Wn.2d at 820, 830. Phoenix concerned a developer’s LUPA challenge to the Woodinville City Council’s denial of site-specific rezone requests in a quasi-judicial review process very similar to Olympia’s Master Plan review process. Id. at 826-827, 836.⁵¹ Unlike the Hearing Examiner denial recommendation here, the Examiner in Phoenix had concurred with Woodinville planning staff and recommended approval, but was reversed by the City Council. Id. at 827. The Supreme Court nonetheless held that a highly deferential standard should have been applied to the Council’s denial based on its interpretation of its Code and Comprehensive Plan:

We defer to the City's determination of what constitutes “demonstrated need” under WMC 21.44.070(1) and hold that the City properly interpreted its own ordinance to require a showing

⁵⁰ DRH incompletely describes this standard of review for alleged erroneous interpretations of law. Op. Br. at 16.

⁵¹ Akin to the site-specific rezone in Phoenix, per OMC 18.57.040C, approved Master Plans are adopted as site specific amendments to the zoning code and zoning maps.

that a rezone is needed to achieve larger policy objectives.⁵²

...

We defer to the City's construction of what is consistent with its comprehensive plan and hold that the City's conclusion is not an erroneous interpretation of the law.⁵³

As the Court noted, these principles of deference apply to a local government's site-specific land use decisions particularly where Growth Management Act (GMA) planning considerations play a role in the ultimate decision, "because the GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs." *Id.*, at 830.⁵⁴

Under RCW 36.70C.130 (1)(c), another LUPA review standard that DRH cites,⁵⁵ a decision supported by substantial evidence in the record must be upheld. Phoenix, 171 Wn.2d at 829, 831-832. This does not require a preponderance of the evidence, but only a "sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true" when viewed in light of the whole record before the Court. *Id.* Accord, Wenatchee Sportsmen, 141 Wn.2d at 176. Review for substantial evidence is also deferential and requires the Court to view the evidence and to draw inferences from the evidence in the light most

⁵² Phoenix at 831.

⁵³ Phoenix at 838.

⁵⁴ DRH, with little explanation, dismisses Phoenix as irrelevant. AR Ex. 711 at 100 ("totally different scenario"); CP 1539 ("totally different considerations"); Op. Br. at 20, n.47 ("totally different criteria").

⁵⁵ Op. Br. at 17, 31, 50.

favorable to the decision by the highest forum exercising fact-finding authority, here the City Council. Phoenix, at 828-829. This “necessarily entails acceptance of the fact finder’s views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.”⁵⁶ The Court does not weigh the evidence or substitute its judgment for the Council’s. Phoenix, 171 Wn.2d at 831-832.

On issues involving the application of law to facts (RCW 36.70C.130 (1)(d)), judicial review is again deferential. The City must be affirmed unless, giving deference to the Council’s factual determinations, the Court “is left with the definite and firm conviction that a mistake has been committed.”⁵⁷

B. Staff Positions Taken During The NV/MP Review Process Are Not Accorded Deference Under LUPA

In reviewing a land use decision under LUPA, the Court reviews the “final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination.” RCW 36.70C.020(2); Phoenix, at 837-838 (“Although the City staff concluded that the proposals complied with the comprehensive plan, it is the City’s final decision that controls our review.”) Thus, LUPA’s deferential review

⁵⁶ City of University Place v. McGuire, 144 Wn.2d 640, 652, 30 P.3d 453 (2001).

⁵⁷ Phoenix, supra, 171 Wn.2d at 829; Accord Cingular Wireless v. Thurston County, 131 Wn.App. 756, 768, 129 P.3d 300 (Div. 2 2006); Citizens to Preserve Pioneer Park, L.L.C. v. The City of Mercer Island, 106 Wn.App. 461, 473, 24 P.3d 1079 (Div. 1 2001).

here is applied to the Council's decision, the final one for the City.

In attacking the Council denial, DRH repeatedly cites to planning staff's support before the Hearing Examiner for DRH's interpretation of the transit requirement and to representation of the staff position that was made by the deputy city attorney.⁵⁸ However, it is not unusual for staff recommendations to be rejected by Hearing Examiners, or for Hearing Examiner recommendations to be rejected by Council. See Phoenix, *supra*, 171 Wn.2d at 826-827. Nor is it unusual for one government attorney to advocate for staff's initial position while another government attorney later advises the Council in its quasi-judicial decision making and defends the final decision adopted by the Council.⁵⁹ In Trillium, planning staff was represented before the Hearing Examiner by the deputy city attorney and, when he went on parental leave, by substitute counsel. The City Council, in turn, was advised by separate outside counsel and the City Attorney, who had not represented planning staff during the earlier proceedings.⁶⁰

C. The Trillium MP Was Properly Denied For Failure to Meet Zoning Code Requirements and Inconsistency With Comprehensive Plan Public Transit Provisions

1. The City Council Properly Interpreted and Applied the

⁵⁸ Op. Br. at 1, 10, 12, 23, 27, 28, 30, 33, 37 and 39. DRH also complains about staff and staff positions upheld by the Examiner with which DRH disagreed. See, e.g., Op Br. at 7, 8 fn 13, 11.

⁵⁹ Cf. Matter of Johnston, 99 Wn.2d 466, 663 P.2d 457 (1983) (professional disciplinary proceeding); Amoss v. University of Washington, 40 Wn.App. 666, 700 P.2d 350 (Div. 1 1985) (academic tenure appeal).

⁶⁰ AR 003927-3933; AR Ex. 709 at 300; AR 005743-5748; AR Ex. 711 at 9, 141-157.

Zoning Code Requirement That a Neighborhood Village Master Plan Development Must Be Served By Public Transit

The Olympia Code explicitly requires “a sheltered transit stop” “approved by Intercity Transit” for a Neighborhood Village Center. OMC 18.05.050C(1); OMC 18.05.050C(4). The Code also requires that neighborhood village centers be located along collector streets “to make them readily accessible for mass transit.” OMC 18.05.050C(6)(b). In construing these municipal code provisions, familiar rules of statutory construction apply. City of Wenatchee v. Owens, 145 Wn.App. 196, 202, 185 P.3d 1218, 1220 (Div.3 2008). There is a presumption against absurd results. State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185 (1983). The primary goal is to determine and give effect to the legislative body’s intent and purpose. Woods v. Kittitas County, 162 Wn.2d 597, 607, 174 P.3d 25 (2007); see City of Wenatchee v. Owens, supra, at 205 (each statutory provision should be read in relation to others, and the statute should be construed as a whole). Further, as noted, under LUPA the Court gives substantial deference to the City Council in its interpretation of its GMA policies and regulations. Phoenix, 171 Wn.2d at 830.

Legislative intent for the transit requirement is indicated, first and foremost, by the Code itself in its specification of “purposes” for the NV zoning district adopted by the Council:

* * *

2. To enable a land use pattern which will reduce dependence on auto use, especially drive-alone vehicle use during morning and evening commute hours.
3. To enable the design of new development in a manner which will ensure the safe and efficient movement of goods and people.
4. To require direct, convenient pedestrian, bicycle, and vehicular access between residences in the development and the village center, in order to facilitate pedestrian and bicycle travel and reduce the number and length of automobile trips.
5. To require sufficient housing density to enable cost-effective extension of utilities, services, and streets; frequent transit service; and to help sustain neighborhood businesses.
6. To enable many of the community's residents to live within one-fourth (1/4) mile of a grocery store and transit stop.⁶¹

Legislative intent in adopting OMC 18.05.050C's transit provisions is also found in relevant Comprehensive Plan policies that these Code provisions implement. See RCW 36.70A.040, RCW 36.70A.130. The preface to the Olympia Comprehensive Plan Neighborhood Goals and Policies states:⁶²

All new housing developments, including multi-family projects, will be arranged in a pattern of connecting streets and blocks to allow people to get around easily by foot, bicycle, bus, or car.

...

Several relatively large tracts near the perimeter of the City are designated for development as "Neighborhood Villages" and "Urban Villages." ... The configuration and mix of land uses and the design of the street and trail system in these areas will create an environment that encourages walking, biking, and use of mass transit, while providing direct, pleasant routes for motorists. These villages will foster efficient land use through compact, higher

⁶¹ OMC 18.05.020 (emphases added).

⁶² Relevant portions of the Comprehensive Plan are attached to this brief.

density development and by placing residential uses in close proximity to bus stops and basic retail and support services.⁶³

The Comprehensive Plan's "Essential Neighborhood Characteristics," for Neighborhood Villages include:

- narrow, tree lined streets arranged in a modified grid pattern ... to make walking, bicycling and travel by transit easy and interesting;
- a coordinated system of open space, parks, and trails, with a neighborhood park within walking distance or a short transit ride of all residences;
- neighborhood centers within walking distance or a short transit ride of most residences;
- sufficient housing densities to enable frequent transit service and sustain neighborhood businesses. (Emphasis added.)

Id. The Plan further provides that each Neighborhood Village should be characterized by "housing, shopping, jobs, and transit in close proximity to one another." Id. (Emphasis added).

Specific Comprehensive Plan policies and goals also emphasize the importance of ensuring that public transit will serve NV/MPs: LU 3.3 (to "enable less reliance on automobiles" and "make mass transit more viable"); LU10 ("to establish neighborhood villages with ... a pedestrian orientation"); T1 ("reduce dependence on auto use"); T1.21 ("consult with Intercity Transit to make sure street standards, land uses and building placement support existing or planned [transit] services and facilities

⁶³ Comprehensive Plan, Ch. 1, Land Use and Urban Development, at 2, 18 (emphases added). Significantly, the Plan uses "bus stop" interchangeably with "transit stop." Webster's 3rd International Dictionary defines "bus stop" as "a point on a bus route where buses stop," eliminating DRH's notion of a bus stop without bus service.

along identified routes”); and T1.25 (“Provide an appropriate level of reliable, effective public transportation options commensurate with the region’s evolving needs”).

Comprehensive Plan Transportation Policy T3.32 also directs that transit be part of planning for NV type development:

“New residential subdivisions, planned residential developments, and urban villages shall provide for efficient circulation patterns for public transportation. Intercity Transit should be consulted to assure that new development appropriately accommodates transit use.” Such policies are explained in the Introduction to Comprehensive Plan Chapter 6 (p. 1):

In order to become a sustainable city, the goals and policies in this plan describe a new direction for Olympia. The new direction offers incentives and disincentives that will result in less auto dependence, provide better transportation services, and encourage the use of alternatives to driving alone to work.

The Hearing Examiner and the Council, applying established rules of construction, both reasonably concluded that the Code requires actual bus service to serve the proposed Trillium Neighborhood Village. Their reasoning was straightforward:⁶⁴

Without service a transit stop would serve only as a sheltered seating area for pedestrians in the village green. If that were its purpose, the ordinance would have required that pedestrian amenity, not a transit stop. Its requirement of a transit stop means a

⁶⁴ AR 005903. The Examiner’s reasoning was also exhaustive. The Examiner’s findings and conclusions regarding transit issue are found in the record as follows: *Remand Decision* - AR 005857 (Findings 7-11) and AR 005866-005876(Conclusions 3–50); *Reconsideration Decision* – AR 005897 (Findings 3-8) and AR 005902-005908 (Conclusions 12-29); and *Original Decision* – AR 005942-005943 (Findings 48-54) and AR 005949-005952 (Conclusions 20-29).

stop that will in fact allow catching the bus.⁶⁵

In addition to noting the futility of requiring a “transit stop” with no transit, the Examiner cited the City’s use of terms such as “mass transit,” “identified routes” and “frequent transit” in the Code regulations and Comprehensive Plan policies and reasonably determined that the NV transit requirement necessarily includes regular bus service.⁶⁶

DRH’s counter-argument on transit is unabashed in its blindered approach: a transit stop satisfies Code, even where there is no – and may never be – regular transit service. Op. Br. at 24-28.⁶⁷

DRH’s assertion⁶⁸ that the City’s intent was only to “encourage” or “enable” future bus service to these dense villages by requiring improvements that could “accommodate” it (if the demand ever presents itself), does not square with the plain language in the Code and Comprehensive Plan requiring NV residential uses to be within ¼ mile of a “transit stop,” and within a “short transit ride” from neighborhood

⁶⁵ AR 005950. Comments by citizens at the June 21, 2011 City Council Hearing echoed this analysis. See, e.g., Ex. 711, 6/21/11 City Council Proceeding Tr. at 61 (“Why would City Code require a bus stop without bus service?”), at 59 (“A bench in a shelter that won’t be served is an absurd consequence.”).

⁶⁶ See AR 005904 (Conclusion 17); AR 005906 (Conclusion 25).

⁶⁷ DRH itself notes the City’s commitment to work with IT to provide bike racks or lockers at “appropriate locations such as transit stops.” Op. Br. at 32 n. 66. A commitment to provide facilities at transit stops for parking bicycles so that bicyclists can board buses would be futile in the absence of bus service.

⁶⁸ Op. Br. at 25-26.

centers and parks.⁶⁹ Each of these requirements implies regular transit service will be in place within a reasonable time to serve the development. In contrast, DRH's interpretation would mean that an NV/MP must be approved, even where there is substantial evidence that transit service will never be provided. Even if this were minimally plausible, the Council's interpretation is entitled to substantial deference, per Phoenix.

DRH objects to deference to the City in interpreting the Code requirement for a "sheltered transit stop...approved by Intercity Transit" because it is unambiguous.⁷⁰ This argument is conflicted: per DRH the OMC 18.05.050C(1) and (4) provisions are unambiguous – but only if one ignores the terms "transit" and "stop" so that neither actual "transit" service, nor even a "stop" are required. The Examiner and Council determined that DRH's "unambiguous" reading was "an absurd result":

This is an absurd result which reduces City ordinances to requiring the futile, counter to accepted canons of construction. The term does not require that a stop have immediate transit service, but does require something more than a situation where service would never be provided.

AR 005903 (Conclusion 16). A far less strained reading of the plain Code language is that each of its words is there for a reason, and that it

⁶⁹ OMC 18.05.020 (6); Comprehensive Plan, "Essential Neighborhood Characteristics" for Neighborhood Villages, Land Use and Urban Design at 18.

⁷⁰ Op. Br. at 18-19, 24 (citing West Hill LLC v. Olympia, 115 Wn.App. 444, 449, 63 P.3d 160 (Div. 2 2003).

unambiguously contemplates that there must be regular transit service, such as that offered by IT, that actually stops at the shelter.⁷¹ However, if that is not enough and the Code language is deemed ambiguous, then the City's interpretation is entitled to deference.

DRH also argues that the City's interpretation should be accorded no deference because it is not a "pre-existing policy," citing Sleasman v. Lacey, 159 Wn.2d 639, 151 P.3d 990 (2007).⁷² Op. Br. at 19-20. As support, DRH claims that the City has never before made transit service a requirement for NV/MP approval. Op Br. at 34. A more apt question is whether the Council has ever approved a Neighborhood Village application that did not demonstrate available or planned transit service. For example, as the Hearing Examiner noted, the Bentrige Neighborhood Village MP application, which DRH cites as comparable, plainly shows that it will be served by IT's existing Bus Route 94, which runs regularly on Boulevard Road.⁷³

DRH also claims that the City approved the "Village at Mill Pond" NV/MP without a "bus service commitment from Intercity Transit", citing

⁷¹ The dictionary definition for "bus stop" as "a point on a bus route where buses stop," supports this reading. Webster's Third International Dictionary. In Sleasman v. City of Lacey, 159 Wn.2d 639, 643, 151 P.3d 990 (2007), the Supreme Court held that the plain meaning of code language is appropriately discerned through such dictionary definitions.

⁷² Sleasman concerned Code compliance and did not involve a concomitant requirement for consistency with the Comprehensive Plan as is required for an MP.

⁷³ AR 005875; AR 003712.

to an amendment to the original MP approval. Op. Br. at 35-36. The amendment does not mention transit because there was no need to do so. The record for the original Mill Pond MP approval includes a March 18, 2005 Memorandum from IT to the City Planning Department, describing IT plans to extend fixed-route bus service to and through the development now known as the Village at Mill Pond. CP 699-700.⁷⁴ In contrast, DRH could not produce such a memo here, nor did it step up to alternative means for scheduled bus service.

DRH's alternative argument to its "transit stop does not mean transit" is equally strained. DRH submits that, if NV approval does require transit service, rather than just a "sheltered" "stop," NV approval can be obtained by reference to vanpool, Dial-A-Lift or other activities. Op. Br. at 30. However, Dial-A-Lift is exclusively for riders with disabilities that prevent them from using regular bus service, transporting these specially certified riders from their residences (not a transit stop). AR 003925; AR 004535. The vanpool program only leases to groups under narrowly

⁷⁴ As it did in the superior court, DRH "supports" its argument by attaching to its Opening Brief, for "judicial notice," Ordinance No. 6773, and the Hearing Examiner's 2/15/08 and 6/10/11 Findings and Conclusions, explaining that the "Village at Mill Pond" project was formerly known as the "Briarton Village Master Plan." However, DRH omits from "judicial notice" the IT memorandum, attached to the City's brief below (CP 699-700), that shows what actually occurred.

prescribed conditions.⁷⁵ DRH now mentions⁷⁶ the possibility of other (“public and private”) forms of transit that could use a transit stop (i.e. “Microsoft Connector” or “private transit providers”), but DRH never pursued such them when it could have. See AR 005874 (Conclusion 39).

Clearly, neither a transit stop with no service, nor a Dial-A-Ride service limited to person certified as disabled, nor a Vanpool limited to a few pre-registered and trained commuters, provide general public transit service contemplated by the Code and Comprehensive Plan.

Phoenix turned in part on a Woodinville Code requirement for “demonstrated need,” and upheld the Woodinville City’s Council’s interpretation rather than that of the Woodinville staff and Hearing Examiner. Here, the Olympia Hearing Examiner and the Council came to the same interpretation of a much more specific requirement under OMC 18.05.050: a new Village sheltered transit stop must have regular transit service and cannot be a functionless artifact. Especially in light of the deference accorded the Council’s interpretation -- but even in its absence - -DRH has not shown that the City erred in its interpretation.

2. Neighborhood Village/Master Plan Approval Requires Comprehensive Plan Consistency

⁷⁵ AR 003925; AR 004535. Each vanpool requires a coordinator and a bookkeeper and a minimum of five commuters, at least three of them drivers specially trained by IT. Id. Vanpool commuters also must live at least 10 miles from where they work. AR 004533.

⁷⁶ Op. Br. at 27.

If a zoning code explicitly requires that a proposed land use comply with a comprehensive plan, then the proposed use must satisfy both the zoning code and the comprehensive plan. Woods v. Kittitas, 162 Wn.2d 597, 614, 174 P.3d 25 (2007); Cingular Wireless LLC v. Thurston County, 131 Wn.App. 756, 770, 129 P.3d 300 (Div. 2 2006). Here, the Olympia Code explicitly requires that the City Council determine whether a proposed Master Plan conflicts with the Comprehensive Plan. OMC 18.57.080D(3).

DRH argues that the City's Comprehensive Plan consistency analysis should have ended at the time the property was zoned NV. Op. Br. at 22. However, under the Olympia Code, in light of the substantially increased densities and commercial development permitted through the NV/MP process, the NV zoning designation is conditional, contingent on adoption of a Master Plan. Further, the Code treats adoption of a Master Plan like a site-specific rezone, requiring an amendment to the zoning code and the official zoning map controlling future development on the site. OMC 18.57.040C. MP approval requires a determination of consistency with the Comprehensive Plan under OMC 18.57.080D.⁷⁷ If an NV/MP approval is granted, the MP process is completed with the

⁷⁷ As noted, local governments have broad discretion in reviewing site specific rezone proposals involving GMA considerations. Phoenix, 171 Wn.2d at 830.

appropriate Code and map amendments. The Code explicitly acknowledges that a NV/MP might not be “viable” due to for example “site condition” or “infrastructure” issues. It therefore provides that an NV property can be rezoned pursuant to OMC 18.05.050A (2).

DRH cites Citizens of Mount Vernon v. City of Mount Vernon, 133 Wn.2d 861, 947 P.2d 1208 (1997) for the proposition that any transit requirements in the Comprehensive Plan are overridden by the Code.⁷⁸ However, Mount Vernon concerned a circumstance, now unusual in light of the GMA, in which there was a direct conflict between the Code and the Comprehensive Plan. No direct conflict has been identified here. As explained by Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Associates, 151 Wn.2d 279, 291-292, 87 P.3d 1176, 1182 (2004) in distinguishing Mount Vernon, where zoning regulations do not explicitly contradict the relevant comprehensive plan policies, a city in deciding whether to approve a site-specific rezone proposal may take into account inconsistency with plan policies.

DRH also complains that that the Comprehensive Plan contains no standards for transit service in the NV zone, and that the Trillium MP is consistent with them, just the same. Op. Br. at 37-38. However, DRH’s

⁷⁸ Op. Br. at 37.

conclusory “consistency analysis” falls short of its burden of demonstrating from the record consistency with Comprehensive Plan policies calling for public transit to serve large mixed-use developments. Nor has DRH demonstrated that the City’s decision on this point is not supported by substantial evidence and is legally erroneous.

3. In Denying the Project, Council Correctly Applied The Law to Substantial Evidence In The Record That Demonstrated The Extension of Regular Public Transit to the Trillium Site Would Not Occur in the Foreseeable Future

As noted above, IT’s explicit response to the Examiner was that Trillium would not have bus service within the foreseeable future.⁷⁹ Based on this response and other facts in the Record, the Examiner’s recommendation findings describe Trillium’s transit situation:

- the nearest transit stops on existing bus routes are .50 and .38 miles away from the closest boundary of the Trillium site, leaving the great majority of Trillium residences substantially more than 1/4 mile from any existing transit stop;⁸⁰
- no additional fixed-route service in the Trillium area is anticipated until Log Cabin Road is extended east to Wiggins Road;
- the current 30-foot wide public right-of-way between the Trillium site and Wiggins Road is insufficient for the extension of Log Cabin Road;
- because the extension of Log Cabin Road to Wiggins will be "development driven", it will likely not be built until needed to accommodate the impacts of future development of properties

⁷⁹ AR 005942 (Finding 51); AR 003712.

⁸⁰ Per OMC 18.05.020A(6) one NV purpose is to enable “many of the community’s residents to live within one-fourth mile of a grocery store and transit stop.” The Examiner concluded that none of Trillium’s residents would. AR 005950 (Conclusion 21).

located along its future route between Trillium and Wiggins Road.⁸¹

Applying the law to these facts, the Examiner concluded -- and the Council agreed -- that, because “the evidence shows that transit service is likely to reach Trillium only at some indefinite and undetermined point in the future,” the proposal was not in compliance with OMC 18.05.050C(1) (requiring a “sheltered transit stop” to serve the development), and C(6) (requiring village centers to be located on streets “readily accessible for mass transit”), and thus could not be approved consistent with the purposes of Code standards or the Comprehensive Plan.⁸² As for DRH’s assertion that the transit requirement is limited to “enabling” future transit service, there is no evidence that the Trillium project would “enable” transit service. Per the Examiner’s findings, transit service to the Trillium site is a long way off, if it ever occurs. AR 005951-005952.

The shortcoming identified by the Examiner was not, as DRH argues, that DRH or IT failed to guarantee fixed route bus service to Trillium indefinitely.⁸³ It was that DRH failed to demonstrate any reasonable prospect of transit service for the foreseeable future:

⁸¹ AR 005903 (Reconsideration Decision, summarizing Findings 48 through 54 and Conclusions 21 through 24 in the October 28, 2010 decision (AR 005942-005943; 005950). These findings were based on the written response from IT’s Planning Manager (AR 003712); and further supported on remand through introduction into evidence of IT’s Strategic Plan (AR 004518-004519).

⁸² AR 005902-005903.

⁸³ Op. Br. At 39-40.

[M]y decision is based on the specific circumstances presented by this case, not the absence of any guarantee. And ... because of the uncertainty of when this road segment is going to be built, that transit service never could be provided here. I am not requiring a guarantee of transit service.

AR Ex. 709 at 304. While no guarantee was required, by the same token, neither the Hearing Examiner nor the Council could ignore the fact that, per undisputed evidence in the Record:

Transit service to Trillium thus depends on unpredictable contingencies which will postpone its arrival until some unknown and quite likely distant time in the future.

AR 005867. Was the Council then to override the Hearing Examiner's well- documented recommendation and approve a Village proposal, with its intensified densities, for which transit service was not a realistic expectation? As the Examiner concluded, and the Council ultimately agreed:

The recommendation of denial simply recognizes that there is a point where actual service is so contingent and likely delayed so far into the future that a Neighborhood Village would not meet applicable standards.

AR 005906-005907 ("actual service is at best a hope for the indefinite future"). The Examiner responded to DRH's question, repeated to the Court here,⁸⁴ asking "at what point" in project development bus service would be required:

Since a development of this nature helps provide the density to make transit routes viable, the provisions above would be met if

⁸⁴ Op. Br. at 39-40.

the evidence showed that transit service would be provided at an appropriate stage in the build-out of the development.⁸⁵

The problem was that the uncontroverted evidence in the record showed that transit service to the Trillium site is not existing or planned within the foreseeable future, regardless, and the obstacles to the establishment of transit service would not be remedied simply by building Trillium Village.⁸⁶ Nor did DRH offer any other solution.

The City Council carefully reviewed the Examiner's findings and conclusions on the availability of transit – ninety-four total – and heard extensively from DRH as well as other parties. Reflecting its care in review, the Council then adopted, pursuant to OMC 18.57.080D, most but not all of them.⁸⁷ There is more than substantial evidence to support the findings adopted by Council and ample legal basis in the law, including the Code and Comprehensive Plan, for its conclusions. See Phoenix, 171 Wn.2d at 836. There is no basis for reversal under LUPA.

4. The Requirement For Transit Is Not Vague

DRH suggests that even if transit service is “hypothetically” required, the term is too vague to be applied. Op. Br. at 38-41. In addressing “vagueness”, this Court has admonished that:

⁸⁵ AR 005907.

⁸⁶ AR 005906-005907.

⁸⁷ AR 005983-005984.

B[ecause “[s]ome measure of vagueness is inherent in the use of language,” we do not require “impossible standards of specificity or absolute agreement.” Mere uncertainty does not establish unconstitutional vagueness. Given this, a statute meets a vagueness challenge “[i]f persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some possible areas of disagreement.” (Citations omitted).⁸⁸

This Court went on to explain that “undefined terms in a statute do not automatically render it unconstitutionally vague.” *Id.* The Washington Supreme Court has similarly held that terms for which there is “a basis in common practice and understanding”, are not impermissibly “vague.” Town of Clyde Hill v. Roisen, 111 Wn.2d 912, 919, 767 P.2d 1375 (1989) (common sense definition of “fence”). In this context, DRH’s challenge to the common sense proposition that a transit stop connotes actual bus service is unwarranted.⁸⁹

DRH’s reliance on Anderson v. Issaquah, 70 Wn.App. 64, 851 P.2d 744 (Div. 1 1993) and Burien Bark v. Supply v. King County, 106 Wn.2d 868, 871, 725 P.2d 994, 996 (1986) is also misplaced. *Op. Br.* at 37-38. Anderson involved aesthetic guidelines for projects, not zoning and GMA-based standards. Burien Bark addressed, in a use permit application

⁸⁸ Pacific Topsoils, Inc. v. Washington State Dept. of Ecology, 157 Wn.App. 629, 646-47, 238 P.3d 1201 (Div. 2 2010), as amended on denial of reconsideration (Nov. 9, 2010), review denied, 171 Wn.2d 1009, 249 P.3d 1028 (2011).

⁸⁹ See argument, *supra* at 28-29, re ambiguity.

context, a provision allowing “manufacturing uses and processing to a limited degree”, with no guidance on “limited.”

The context here, a determination of consistency with the Comprehensive Plan for a discretionary Council amendment to the City’s zoning regulations and maps, is different as are the criteria themselves. See Pinecrest Homeowners, 151 Wn.2d at 292-293 (upholding Spokane’s application of comprehensive plan policies in lieu of more specific zoning code provisions to site specific rezone proposal; distinguishing Anderson).⁹⁰

DRH argues that the transit requirement is overly vague because it does not address what would happen if the City made a finding that bus service was currently foreseeable and then a change occurred after approval. However, as with any other finding regarding infrastructure availability the City’s decision is necessarily limited to present and reasonably foreseeable conditions – what is existing or already planned. Schools close and are re-opened, elsewhere. Traffic conditions can change dramatically, for example, as businesses or employers thrive, fail, or relocate. The inability to guarantee traffic conditions or school availability

⁹⁰ DRH cites Norco Construction Inc. v. King County 97 Wn.2d 680, 649 P.2d 103 (1982), a pre-GMA subdivision case that rejected King County’s application of not-yet-adopted criteria in denying a preliminary plat. DRH inappropriately conflates its assertions respecting “vague” standards with the criteria not yet adopted relied on by King County in Norco. Op. Br. at 39.

“in perpetuity” does not preclude a City requirement for availability at least in the reasonably foreseeable future.

GMA planning document goals and policies are not drafted as precise engineering standards but still can and must be met. Cingular Wireless, *supra*, 131 Wn.App. at 778-779. To the extent DRH argues otherwise, it is mistaken.⁹¹

The Olympia GMA Comprehensive Plan’s land use and transportation goals and policies plainly convey, using specific terms such as “transit stop,” “short transit ride,” “reduce dependence on auto use,” and “identified routes,” the requirement that Neighborhood Villages be served by regular transit service. In Phoenix, the Washington Supreme Court upheld far less specific wording in rejecting the argument that a Woodinville Comprehensive Plan standard requiring “northwest woodland character” was too vague. Phoenix, *supra*, 171 Wn.2d at 838.

5. DRH Confuses NV/MP Standards With Concurrency Regulations

Citing Whatcom County Fire District 21 v. Whatcom County, 171 Wn.2d 421, 256 P.3d 295 (2011), DRH argues that the NV/MP transit requirement should have been adopted by the City as a “concurrency”

⁹¹ Op. Br. at 37.

regulation.⁹² DRH accurately summarizes the “concept” of concurrency, as addressed in Whatcom County, but provides no authority for its assertion that the City was required to adopt a separate “concurrency regulation” for the transit requirement. *Id.* The NV/MP transit requirement here is not a traffic concurrency level of service standard. It is a discrete zoning consideration to mitigate increased densities and ensure a livable community with reduced carbon footprint and lessened dependence on autos.

In any event, Whatcom County, cited by DRH, points out that, with the exception of roadway level of service standards, “whether to adopt concurrency requirements is generally left to the discretion of planning authority [sic].” *Id.* at 428.⁹³ DRH has not met its burden of showing the City erred.

6. The City’s Denial Of Discretionary NV/MP Is Neither an Unlawful Exaction Nor An Unconstitutional Deprivation of Economic Use

DRH claims in broadbrush terms that the application denial unconstitutionally deprives it of economic use of the site. *Op. Br.* at 41-

⁹² *Op. Br.* at 29, 37.

⁹³ Whatcom County concerned approval of development projects despite the Fire District’s refusal to issue “concurrency” letters stating that adequate capacity existed or would exist to serve them. *Id.*, at 424-425. The Court reversed the County’s approvals because a municipal regulation explicitly delegated to the Fire District the determination of whether the requisite adequate capacity existed. *Id.* at 429. Here, the City has not delegated its zoning-based decision to IT, but it properly considered IT’s negative response concerning prospects for transit service to Trillium.

43.⁹⁴ However, complaining about denial of a NV/MP application for failure to satisfy a transit requirement does not demonstrate the destruction of a fundamental attribute of ownership necessary to finding a constitutional violation. See Presbytery of Seattle v. King County, 114 Wn.2d 320, 329-330, 787 P.2d 907 (1990).

The Code explicitly provides for the circumstances, MP denial, about which DRH complains. It allows owners of property for which an NV/MP turns out to not be “viable” due to “site conditions” or “infrastructure” to request a rezone of their property for more traditional residential development. DRH’s counsel explicitly acknowledged this before the City Council: “If transit service cannot be provided, and that is what the Council determines is the standard, then an infrastructure component cannot be provided to this property and a [rezone] then would be appropriate.” AR Ex. 711 at 23-24.⁹⁵ The 80-acre Trillium site therefore remains a very valuable asset with economically viable uses. That a new application is required to develop the property as a regular

⁹⁴ In doing so, DRH alludes to but does not develop several constitutional issues which were laid to rest by the Examiner. AR 005871-005874 (Conclusions 26 - 41).

⁹⁵ In adopting its Conclusion 5, the Council cited this DRH statement acknowledging that an NV/MP denial would not preclude reasonable economic use of its property in light of OMC 18.05.050A (2), allowing for a rezone where the site is not “viable for the designated uses” due to, inter alia, “site conditions” and “infrastructure.” AR 005984 (Ordinance 6762, Conclusion 5). DRH counsel told Council: “Under the Code, that automatically punts this property into a rezone process to something that will ultimately look like a more traditional subdivision under the R6 or R8 standard” and noted that the result would not have the density proposed in the Trillium Village MP. AR Ex. 711 at 23-24.

subdivision instead of a Neighborhood Village does not give rise to any constitutional issues. It is not a taking of all economic use when a land use application for one, particularly intense use is denied and a would-be developer has to submit another for a less intense use.

It is also not a taking when denial results from an applicant's choice not to pursue measures that could have achieved compliance with the City's transit requirement. As the Examiner observed in a conclusion adopted by Council, "the evidence falls well short of establishing that the basis of the recommended denial would deprive the Applicant of all reasonable economic use of this property," because it does "not show that the Applicant could not secure transit service through other means, such as arrangements with Intercity Transit or providing its own links to existing routes." AR 005874 (Conclusion 39).

Further, DRH presents no cognizable argument that the transit requirement does not "safeguard the public interest in health, safety, and the environment." Presbytery, 114 Wn.2d at 329. On the contrary, it ensures that the dispensation to develop at the higher densities inherent in NV/MP approval will be accompanied by a meaningful reduction in automobile use, protecting public health and the environment. To the extent that the DRH arguments are cognizable, they also must be reviewed through the prism of the Code purposes statements and GMA

Comprehensive Plan policies, which are directed at orderly planning, and ensuring that urban densities are supported by necessary and appropriate infrastructure.

DRH also contends that the City's denial violated DRH's substantive due process rights. Op. Br. at 44-45. As DRH acknowledges, the Courts apply a three-prong test when considering such claims:

To determine whether a regulation violates due process, we employ a three prong due process test. We must determine (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether the regulation is unduly oppressive on the landowner. (cites omitted)

Peste v. Mason County, 133 Wn.App. 456, 474, 136 P.3d 140, 149 (Div. 2, 2006). A party raising a substantive due process challenge bears the burden of proving unconstitutionality under this three prong test. Girton v. City of Seattle, 97 Wn.App. 360, 363, 983 P.2d 1135 (Div. 1, 1999). DRH does not meet this burden.

DRH offers no cognizable argument that reducing a new town's reliance on auto trips is not a "legitimate public purpose". Nor can it make a colorable argument that provision of regular transit service is not well-accepted as a means to reasonably achieve this purpose.

The record also does not support DRH's conclusory claim that the transit requirement is "unduly oppressive by making it impossible for DR

Horton to develop.” Op. Br. at 45. Demonstrating undue oppression requires much more than just pointing to an application denial. Girton, supra at 363, 365 (denial of variance from environmental regulations not undue oppression); Peste, supra at 456, 474-475 (denial of site specific rezone not unduly oppressive). Here, the transit was not required before development could commence. As the Examiner noted: “the provisions ... would be met if the evidence showed that transit service would be provided at an appropriate stage in the build-out of the development.” AR 005907. And if DRH could not show that service would occur sometime during development of its very large project, it had the options of pursuing alternate means for meeting the transit requirement or seeking a rezone.

DRH incorrectly characterizes the transit requirement as impermissible because it would address a “pre-existing” problem rather than one arising from the proposed NV/MP. Op. Br. at 41, 44. The Trillium site is undeveloped. Nothing about the impacts of Trillium’s proposed 500 new residential units plus commercial development is “pre-existing.”⁹⁶ The transit requirement is to serve Trillium residents and workers who would not otherwise be present.

D. Trillium’s Consistency With Comprehensive Plan Policy PF

⁹⁶ Benchmark v. City of Battleground, 146 Wn.2d 685, 695, 49 P.3d 860 (2002), cited by DRH, is not on point. Op. Br. at 41. Benchmark concerned a subdivision approval requirement for improvement of a right-of-way not impacted by the subdivision.

**33.5 (School Site Dedication) Was Properly Before The Council
And Council Reservation Of the Issue Was Appropriate**

DRH asserts that the Council erred as a matter of law in determining that it was required to consider the question of Trillium's consistency with Comprehensive Plan Public Facilities ("PF") Policy 33.5, which provides that "new residential developments should take into the account the impact they may have on school capacity [and] [i]f a development is large enough to generate the need, one or more school sites should be dedicated."⁹⁷

As explained, in reviewing a Neighborhood Village Master Plan application, the Council must determine pursuant to OMC 18.57.080D(3) whether there is a "conflict with the City's adopted plans, policies and ordinances." Trillium's consistency with PF 33.5 was therefore properly before the Council. DRH also argues that the Council erred in determining that the record was inadequate to reach a conclusion respecting Trillium's consistency with PF 33.5. Op. Br. at 45. However, the Council did not make this determination in a vacuum. The Examiner had identified the record deficiency in his Remand Decision recommendation to the Council and suggested that additional argument be taken, or that the MP be denied

⁹⁷ Op. Br. at 45.

based on DRH's failure to demonstrate the required consistency.⁹⁸ Argument by the parties before the Council and colloquy among Councilmembers highlighted significant unresolved questions in the Record respecting the school site issue.⁹⁹ Moreover, DRH itself argued to the Council, as it now argues in this Court, that the factual record on this issue was incomplete. AR 005829; Op. Br. at 47. The "solution" DRH urged the Council to adopt -- ignoring the issue rather than calling out the record's deficiency -- was not consistent with the Council's duty to make a Comprehensive Plan consistency determination. DRH has not shown that the Council's finding on this was clearly erroneous, especially in light of DRH's own concession below that the Record was deficient.

DRH now suggests that the school issue is properly resolved, pursuant to OMC 17.16.090, as part of preliminary plat review. Op. Br. at 46. As noted above, the Examiner, with DRH's concurrence, did not issue a preliminary plat decision, pending resolution of the MP. AR 005935 (Finding 5). Nonetheless, the requirement for Comprehensive Plan consistency, including with regard to school sites, remained an issue for

⁹⁸ AR 005878 (Conclusion 60- 61). The Examiner noted that School District-wide capacity is distinct from the District's ability to accommodate Trillium children in neighborhood schools. The latter, he concluded, had direct bearing on the issue of Trillium's consistency with PF 33.5. Id., Conclusion 60.

⁹⁹ See, e.g., AR Ex. 711, at 64-68 (Jaqua comments); at 107-120 (Council discussion at June 21, 2011 hearing), at 134, (Mayor Pro Tem Buxbaum: "...Other substantial considerations that we may need to address that have been cited by the Hearing Examiner but are possibly still open for data and information. And I speak specifically to schools....").

the Council. The Council properly declined to adopt the Examiner's recommendation of denial based on inconsistency with PF 33.5 and, per OMC 18.57.080D(3), appropriately reserved the issue, in accordance with DRH's own concession below that the record was incomplete.

E. The Council Correctly Determined That The Record Was Inadequate To Find Consistency With Connection Standards

DRH argues that the Council's finding of record inadequacy regarding bicycle and pedestrian connection issues is not supported by substantial evidence. Op. Br. at 47-50.¹⁰⁰ This is the issue on which Intervenor OSSC participated extensively over a period of several years.¹⁰¹ DRH had the burden of demonstrating that its project would meet the City's bicycle and pedestrian path network requirements. OSSC's brief lays out why those requirements are important and how DRH failed to meet them. Those explanations will not be repeated here except to note that pedestrian and bicycle connections are a fundamental premise of planning for an MP. OSSC Br. at 22-25.

The Hearing Examiner's final decision recommended approval of the DRH connection plan, but with reservations, stating that the NV/MP could have been "designed to provide a network of more trails better located to connect the various areas of residential development and

¹⁰⁰ The City joins in and incorporates OSSC's objections to DRH's Assignment of Error 7 and to DRH's failure to present any argument on it. See OSSC Br. at 21, n. 7.

¹⁰¹ See OSSC Br. at 4-10 (including record cites).

residential and commercial areas.”¹⁰² The Council reviewed this recommendation and the record, including specific examples cited by OSSC of how Trillium still failed to comply with Code connectivity requirements.¹⁰³ It was therefore well within Council’s discretion – as the ultimate fact finder¹⁰⁴ – to determine that the record was inadequate to affirmatively determine consistency with the connectivity requirements and to therefore decline to adopt the Hearing Examiner Conclusion that Trillium would provide the required connections.¹⁰⁵ As OSSC asserts (Int. Br. at 11-17), and DRH acknowledges (Op. Br. at 15, n.46) the upshot of the Council’s decision on the connections issue could have been an additional ground for outright denial.¹⁰⁶ However, the Council instead chose, as the Code allows, to leave open the possibility of supplementing the record on the connections issue. OMC 18.57.080D (3)(e).

Under LUPA, if there is substantial evidence supporting a Council decision, including a decision that the Record is deficient, that decision must be upheld rather than reweighed. Phoenix, supra, 171 Wn.2d at 832. Per Code, the Council was entitled to note the deficiency and reserve the question, while denying the application based on the distinct unmet transit

¹⁰² AR 005883-005884 (Conclusions 88 and 89).

¹⁰³ See, e.g., AR 004438-004459; 004468; AR 005792-005817; AR Ex. 711 at 72-86.

¹⁰⁴ Wenatchee Sportsmen Authority, supra, 141 Wn.2d at 176.

¹⁰⁵ AR 005983 (Finding 22) and AR 005984 (Conclusion 4).

¹⁰⁶ AR 005915-005916 (Conclusion 69); AR 005919-005920 (Decision Para. I); AR 005959 (Conclusion 62); AR 005962-005963 (Conclusion 75).

requirement. Had the Council sent DRH back to the Hearing Examiner (to supplement the “connections” record) rather than finalizing the transit-based denial, DRH would surely have complained about the delay.

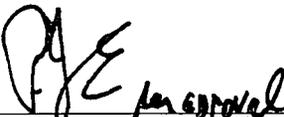
F. The City Should Be Awarded Its Attorneys’ Fees.

The City should be awarded reasonable attorneys’ fees, expenses, and costs as a prevailing party. RCW 4.84.370 (1); RCW 4.84.370(2).¹⁰⁷

IV. CONCLUSION

The City respectfully requests that this Court affirm the dismissal of the DRH LUPA Petition, uphold the City’s denial of the Trillium MP, and award the City its attorneys’ fees, expenses, and costs.

Respectfully submitted this 4th day of October, 2012.

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¹⁰⁷ Jones v. Town of Hunts Point, 166 Wn.App. 452, 463, 272 P.3d 853, 858 (Div. 1 2011 review denied, 174 Wash. 2d 1016, 281 P.3d 687 (2012)); Habitat Watch v. Skagit County, 155 Wn.2d 397, 412-414, 120 P.3d 56 (2005).

NO. 43300-1-II

**COURT OF APPEALS, DIVISION II,
STATE OF WASHINGTON**

SSHI LLC d/b/a DR Horton,
Appellant

v.

City of Olympia, et al.,
Respondents

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COURT OF APPEALS
DIVISION II

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DECLARATION OF SERVICE

I, Deniece Bleha, declare that I am over the age of eighteen, not a party to this lawsuit and am competent to testify as to all matters herein.

On October 4, 2012 I caused to be delivered, a true and correct copy of the Response Brief of the City of Olympia in the manner described below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of October, 2012 at Seattle, Washington.



Deniece Bleha, Legal Assistant